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Bid Protests: The Costs are Real, But the Benefits Outweigh Them

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I. Introduction

This Article discusses the benefits and costs of bid protests, which are legal challenges brought by bidders against the way the Government has conducted its procurements.¹ In the U.S. federal procurement system, bid protests have existed since the 1920s.² Despite its longevity, however, critics have come to characterize the bid protest process as costly and overly complex.³ This Article explains why, in the author's view, the benefits of the bid protest system substantially outweigh the burdens it imposes on the procurement system.

II. The Administrative and Judicial Venues for Filing Bid Protests in the U.S. Federal System

In 1924, a few companies began writing to the then relatively new General Accounting Office (GAO)⁴ to complain that agencies had improperly awarded contracts to their competitors.⁵

¹ See FAR 33.101.

² Daniel I. Gordon, *In the Beginning: The Earliest Bid Protests Filed with the US General Accounting Office*, 13 PUB. PROCUREMENT L. REV., NA147, at NA147 (2004) [hereinafter *In the Beginning*].

³ See William E. Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*, 9 ADMIN. L. REV. AM. U. 461, 461, 491 (1995).

⁴ Today's Government Accountability Office was founded in 1921 as the General Accounting Office. See Budget and Accounting Act, 1921, Pub. L. No. 67-13, § 301, 42 Stat. 20, 23. Effective July 7, 2004, the General Accounting Office's legal name became the Government Accountability Office. See GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, § 8(a), 118 Stat. 811, 814. The name change did not alter the acronym "GAO."

⁵ See *In the Beginning*, *supra* note 2, at NA154-62.

There was hesitation within the GAO about the appropriateness of considering complaints by private firms about the federal procurement process.⁶ Ultimately, the GAO decided to consider the complaints as part of its responsibility to ensure that funds appropriated by Congress are lawfully spent, which is also known as the Office's account settlement function.⁷

Then in 1925, a company wrote to the GAO alleging that Panama Canal officials had issued a solicitation with specifications for a truck that were "wired" to a particular brand name and that thereby unfairly precluded the complaining firm from fair consideration for the contract.⁸ The GAO requested the agency's views on the matter, and, when the Canal authorities admitted that they had used the specifications of one company's truck in the solicitation,⁹ the GAO issued the first published bid protest decision, ruling that the challenged solicitation was unlawful.¹⁰

In the course of the ensuing decades, handling bid protests became a routine function of the GAO's Office of General

⁶ See *id.* at NA147; Daniel I. Gordon, *Annals of Accountability: The First Published Bid Protest Decision*, 39 PROCUREMENT LAW., Winter 2004, at 11.

⁷ *In the Beginning*, *supra* note 2, at NA148.

⁸ *Id.* at 157-58.

⁹ *Id.* at 160-62.

¹⁰ Letter to the Gov., *the Panama Canal*, 5 Comp. Gen. 712, 713 (1926).

Counsel.¹¹ Some protests involved potential offerors' pre-award challenges to solicitation terms,¹² while others represented post-award challenges in which firms that had competed for a contract contested the award to another offeror.¹³

For many years, courts did not consider bid protests, so that the GAO (and the contracting agencies themselves) represented the only place to file a protest.¹⁴ Then, for three decades U.S. district courts had bid protest jurisdiction, beginning with the U.S. Court of Appeals for the District of Columbia Circuit's decision in *Scanwell Laboratories, Inc. v. Shaffer*¹⁵ and ending with the statutory mandate of the Administrative Dispute Resolution Act of 1996 that this jurisdiction "sunset" in 2001.¹⁶

¹¹ See Kovacic, *supra* note 3, at 470.

¹² See, e.g., Letter to Sec'y of War, 16 Comp. Gen. 149, 150 (1936).

¹³ See, e.g., Letter to Sec'y of Interior, 17 Comp. Gen. 770 (1938).

¹⁴ See Robert S. Metzger & Daniel A. Lyons, *A Critical Reassessment of the GAO Bid-Protest Mechanism*, 2007 WIS. L. REV. 1225, 1229 (2007).

¹⁵ 424 F.2d 859, 876 (D.C. Cir. 1970) (holding that bid protests could be heard in U.S. district courts).

¹⁶ Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12(d), 110 Stat. 3870, 3874-75 (codified as 5 U.S.C. §§ 571-584 (2000)) (providing for district court jurisdiction over bid protests to "sunset" on January 1, 2001).

Meanwhile, from the enactment of the Competition in Contracting Act of 1984 (CICA)¹⁷ until its jurisdiction ended pursuant to section 5101 of the Clinger Cohen Act of 1996,¹⁸ there was another administrative forum with jurisdiction over bid protests that pertained to information technology: the General Services Administration's Board of Contract Appeals.¹⁹ Finally, a statutory change in 1996 resulted in the Court of Federal Claims,²⁰ which had only pre-award protest jurisdiction for many years, gaining post-award jurisdiction as well.²¹

Consequently, for more than a decade now, the only places outside the contracting agency where disappointed bidders have been able to file protests have been the GAO and the Court of Federal Claims. From time to time there are differences between the GAO and the Court of Federal Claims, with respect to both

¹⁷ Competition in Contracting Act (CICA), Pub. L. No. 98-369, 98 Stat. 1175, 1182 (1984) (codified as amended at 10 U.S.C. § 2304 (2006 & Supp. IV 2010) and 41 U.S.C. §§ 3301-3311 (Supp. IV 2010)).

¹⁸ Clinger Cohen Act of 1996, Pub. L. No. 104-106, § 5101, 110 Stat. 186, 680.

¹⁹ The Competition in Contracting Act (CICA) both created an explicit statutory basis for the GAO's bid protest jurisdiction and gave the General Services Administration's Board of Contract Appeals its limited bid protest authority. *Id.* § 2741.

²⁰ The Court of Federal Claims was previously called the United States Claims Court, prior to Congress's enactment of the Federal Courts Administration Act of 1992. Pub. L. No. 102-572, § 902, 106 Stat. 4506, 4516.

²¹ Administrative Dispute Resolution Act § 12.

process and outcome.²² The author views occasional differences between the two fora as inevitable. That is particularly the case where, as here, one forum is administrative and the other is judicial. In any event, having two fora hear bid protests may be healthy for the procurement system. While the discussion below regarding the costs and benefits of protests to the procurement system is focused on the GAO, the analysis should apply, at least in broad terms, to the Court of Federal Claims as well.

III. Spread of the Protest Process Outside the U.S.

Before turning to that analysis, it is worth looking outside the United States, because the protest process has received substantial attention around the world in recent years.²³ More than ever, a protest system has come to be seen as a required part of a good public procurement regime.²⁴ As

²² JOHN CIBINIC, JR. ET AL., *FORMATION OF GOVERNMENT CONTRACTS* 1673, 1674 (2011).

²³ See Erik A. Troff, *The United States Agency-Level Bid Protest Mechanism: A Model for Bid Challenge Procedures in Developing Nations*, 57 A.F. L. REV. 113, 115-16 (2005) (describing bid protest mechanisms required by major public procurement development efforts); see, e.g., David P. Goodwin et al., *International Procurement*, 44 INT'L LAW. 261, 262-64 (2010) (discussing local protest procedures in Canada).

²⁴ See Troff, *supra* note 23, at 115-16, 116 n.6 (noting the international emphasis placed on bid protest mechanisms). It should be noted that the term "protest" (or "bid protest") is rarely used outside the United States; instead, what we would call protests are called "challenges," "domestic review

evidence of this trend, the U.S. includes a bid protest provision in the free trade agreements it negotiates.²⁵ For example, the North American Free Trade Agreement (NAFTA) requires each partner to have a protest forum.²⁶ The World Trade Organization's (WTO) Agreement on Government Procurement (GPA) likewise includes a provision requiring that WTO members that accede to the GPA have a forum to hear protests (called a domestic review procedure).²⁷ Finally, there is a protest provision in Chapter VIII of the model procurement law of the United Nations Commission on International Trade Law (UNCITRAL).²⁸

procedures," "remedies," or simply "complaints." *Id.* at 115 n.5.

²⁵ Timothy M. Cox, *Should the United States Incorporate the Procurement Integrity Act Into Its Free Trade Agreements?: A Look At the Australian-United States Free Trade Agreement*, 17 Sw. J. INT'L LAW 101, 113 (2010) (noting that all free trade agreements with the United States require some type of bid protest mechanism); see generally *Free Trade Agreements*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements> (last visited Feb. 15, 2013) (listing all United States Free Trade Agreements in force).

²⁶ North American Free Trade Agreement art. 1017, Dec. 17, 1992, 107 Stat. 2066, 32 I.L.M. 296 (1993) (entered into force Jan. 1, 1994).

²⁷ See Agreement on Government Procurement, Committee on Government Procurement, Adoption Of The Results Of The Negotiations Under Article XXIV:7 Of The Agreement On Government Procurement, Apr. 2, 2012, WT/GPA/113, available at <http://www.ustr.gov/sites/default/files/GPA%20113%20Decision%20on%20the%20outcomes%20of%20the%20negotiations%20under%20Article%20XXIV%207.pdf>.

²⁸ See UNCITRAL MODEL LAW ON PUB. PROCUREMENT Ch. VIII (United Nations Comm'n on Int'l Trade Law 2011), available at

Perhaps most interesting is the attention bid protests have received during the past twenty years in the European Union (EU). Not mentioned in the EU's Public Procurement Directives, protests were first addressed by the European Commission in what is known as the Remedies Directive.²⁹ Initially issued in 1989,³⁰ the Remedies Directive was revised in 2007.³¹ The Remedies Directive has had an enormous impact, requiring all member states to have a forum that considers protests.³² Furthermore, the Court of Justice of the European Union has also issued decisions that have reshaped the protest process in the EU.³³ Of particular importance was the *Alcatel* decision³⁴ that led to the requirement (codified in Article 2a of the 2007 revision to the Remedies Directive) that there be a "standstill" period (typically ten days) between the announcement of a potential

http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/ML_Public_Procurement_A_66_17_E.pdf.

²⁹ See Council Directive 89/665/EEC, 1989 O.J. (L 395) 2 (EC).

³⁰ *Id.*

³¹ See Directive 2007/66/EC, of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC With Regard to Improving the Effectiveness of Review Procedures Concerning the Award of Public Contracts 2007 O.J. (L 335) 31.

³² See *id.* at 35.

³³ See, e.g., Case C-81/98, *Alcatel Austria AG v. Bundesministerium für Wissenschaft und Verkehr*, 1999 E.C.R. I-7671 (1998).

³⁴ *Id.*

awardee and contract signing to allow a window for filing protests.³⁵

Bid protest procedures have therefore received important consideration from the international community. States-side, however, the U.S. federal protest system has sometimes come under criticism.³⁶ The following section addresses some of the misconceptions upon which much of this criticism is based.

IV. Correcting Misperceptions about Bid Protest Statistics

In the author's experience, there exist a number of misperceptions concerning bid protest statistics that deserve attention, because these misperceptions can taint judgments about the benefits and costs of protests. In particular, even people quite familiar with the federal acquisition system often believe that protests are more common than they really are, and they believe, inaccurately, that protesters use the protest process as a business tactic to obtain contracts from the Government.³⁷

³⁵ Directive 2007/66/EC, of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC With Regard to Improving the Effectiveness of Review Procedures Concerning the Award of Public Contracts 2007 O.J. (L 335) 37; Sue Arrowsmith, *The Past and Future Evolution of EC Procurement Law: From Framework to Common Code?*, 35 PUB. CONT. L.J. 337, 378 (2006).

³⁶ See Kovacic, *supra* note 3, at 462.

³⁷ See, e.g., MOSHE SCHWARTZ & KATE M. MANUEL, CONG. RESEARCH SERV., R40227, GAO BID PROTESTS: TRENDS, ANALYSIS, AND OPTIONS FOR CONGRESS 1 (2009) ("Bid protests filed with the [GAO] have recently

A. Protests Are Rare Events

The frequency of protests requires context in order for any judgment on the issue to be sensible. In the author's experience, when a Contracting Officer is asked whether, in the procurements she or he has worked on over the prior few years, protests were frequent, an affirmative answer is often provided; but if one asks how many procurements the Contracting Officer has worked on during that period, that number often dwarfs the number of protests. Put another way, while the numerator (the absolute number of protests) is important, the denominator (the total number of procurements) is critical to determining whether it is reasonable to say that protests frequently occur. In assessing the frequency of bid protests in the federal procurement system, there are difficulties with both the denominator (the number of federal procurements that occur each year) and the numerator (the number of protests filed each year).

received increased congressional scrutiny due to recent protests of high-profile awards and reports that the number of protests is increasing."); Nick Wakeman, *Bid Protest Dilemma Continues*, WASH. TECH. (Nov. 16, 2012), <http://washingtontechnology.com/blogs/editors-notebook/2012/11/bid-protest-dilemma.aspx> ("My feelings are mixed because I believe there are too many bid protests. I've heard plenty of comments from industry people who say bid protests are a common tactic by losing incumbents to extend their work on a contract because the transition to the winner is delayed while the protest winds its way through the process.").

Regarding the denominator, perhaps surprisingly, there are no good statistics on the number of federal procurements.³⁸ Any such count would need to include, not only the number of contracts awarded each year, but also any protestable task and delivery orders awarded.³⁹ The latter category includes all orders placed under the General Services Administration (GSA) Federal Supply Schedule (FSS) and orders issued under multiple-award indefinite-delivery, indefinite-quantity (ID/IQ) contracts, where the orders have a value above \$10 million.⁴⁰

³⁸ One such study, on federal procurement statistics, was conducted by the RAND Corporation. See THOMAS LIGHT ET AL., RAND PROJECT AIR FORCE, ANALYSIS OF GOVERNMENT OF ACCOUNTABILITY BID PROTESTS IN AIR FORCE SOURCE SELECTIONS OVER THE PAST TWO DECADES 12 (2012), available at http://www.rand.org/content/dam/rand/pubs/technical_reports/2012/RAND_TR883.pdf. As explained in greater detail later in this Article, the author believes that the RAND Corporation study's estimate of annual procurements made by the Air Force may represent a significant underestimation. See *infra* note 41 and accompanying text.

³⁹ See generally *supra* note 22, at 1678 (discussing protestable task and delivery orders).

⁴⁰ The Fiscal Year (FY) 2008 National Defense Authorization Act (NDAA) amended the Federal Acquisition Streamlining Act (FASA) to grant GAO jurisdiction, for three years, to hear protests concerning task or delivery orders valued at more than \$10 million. See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 843, 122 Stat. 3, 237-39 (codified as amended at 41 U.S.C. § 4106(f) (Supp. IV 2010)); Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243, 3252-53, 3264. The FY 2011 NDAA included a provision that extended, to September 30, 2016, the GAO's jurisdiction to hear protests concerning the issuance of a task or delivery order under Title 10 of U.S. Code (which essentially covers defense agencies). See Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 825, 124 Stat. 4137, 4270 (codified at 10 U.S.C. § 2304c (e)).

A recent RAND Corporation study of Air Force procurements that were protested to the GAO indicated that approximately 20,000 contracts with at least one transaction over \$25,000 were awarded by the Air Force in 2008, representing approximately \$63 billion.⁴¹ Since overall procurement spending in 2008 was over \$500 billion⁴² (eight times the amount spent by the Air Force alone), that would suggest that the overall number of contracts awarded was approximately 160,000. The author suspects that the number is low and that a better estimate, including FSS orders and ID/IQ orders above \$10 million, would probably substantially exceed 250,000.⁴³ For the purpose of this Article's analysis, however, it will be assumed that the total number of federal contracts and protestable orders awarded in a year is 200,000.

With respect to the numerator (the number of protests filed), there has been confusion due to a methodological anomaly

(Supp. V 2011)). The FY 2012 NDAA did the same thing for agencies covered by Title 41 of the U.S. Code (which essentially covers civilian agencies). National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 813, 125 Stat. 1298, 1491 (2011) (codified at 41 U.S.C. 4106(f) (Supp. V. 2011)).

⁴¹ LIGHT ET AL., *supra* note 38, at 12. It is not clear if RAND's analysis took into account task and delivery orders, but the reference to "contracts" suggests that it did not. See *id.*

⁴² *Prime Award Spending Data: FY 2008*, USASPENDING.GOV (Nov. 23, 2012), http://usaspending.gov/?q=explore&fromfiscal=yes&typeofview=detailedsummary&fiscal_year=2008.

⁴³ This estimate is based on the author's experience, including familiarity with the use of the Federal Supply Schedule (FSS) and indefinite-delivery, indefinite-quantity (ID/IQ) contracts.

at the GAO that is worth explaining. Since the days when protest filings were tracked on 3" x 5" cards, the GAO has counted cases in a manner that can cause people to believe that protest numbers are higher than they actually are.⁴⁴ When a company files a protest challenging the terms of a solicitation, the GAO assigns it a docket number, referred to as a "B number," because it begins with a "B" (for example, B-123456).⁴⁵ If the protester later learns new information that constitutes a new ground of protest and files a supplemental protest of that same solicitation's terms, the GAO will docket that as B-123456.2.⁴⁶ If another potential offeror also protests the solicitation's terms, the GAO will docket that other offeror's initial protest as B-123456.3 and its supplemental protest (if filed) as B-123456.4.⁴⁷ However those pre-award protests are resolved, once the agency awards a contract, a losing competitor may file a protest, which the GAO will docket as B-123456.5; if there is a supplemental protest once the protester sees the agency report,

⁴⁴ See U.S. GOV'T ACCOUNTABILITY OFFICE, B-401197, REPORT TO CONGRESS ON BID PROTESTS INVOLVING DEFENSE PROCUREMENTS 5-6 n.8 (2009) [hereinafter BID PROTESTS INVOLVING DEFENSE PROCUREMENTS] (describing the discrepancy between the number of protests that the GAO reports as filed, and the number of procurements that are actually protested).

⁴⁵ *Id.* The way "B numbers" are assigned and counted, and the resulting overstating of protest numbers, appears to be unique to the GAO and thus would not affect statistics at the Court of Federal Claims. See *id.*

⁴⁶ See *id.*

⁴⁷ See *id.*

it will be docketed as B-123456.6.⁴⁸ And finally, if another losing competitor files a protest and then supplements it, those protests will be docketed as B-123456.7 and B-123456.8, respectively.⁴⁹ Overall, the GAO's statistics will indicate eight protests, even though only one procurement has been protested.⁵⁰ In the author's experience, eight protests of one procurement would be unusual, whereas two or three protests of one procurement would be more routine.

This practice suggests that when the GAO reports the number of protests filed in a year, the reported number substantially overstates the number of procurements actually protested. For Fiscal Year (FY) 2008, for example, while the GAO reported 1,652 cases were filed,⁵¹ elsewhere the GAO reported that 1,027 procurements were protested in that period.⁵² In other words,

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-251R, GAO'S BID PROTEST ANNUAL REPORT TO THE CONGRESS FOR FISCAL YEAR 2008 2 n.1 (2008) [hereinafter GAO FY 2008 BID PROTEST REPORT].

⁵¹ *Id.* at 2. The number of cases filed as reported in the GAO's annual reports also includes requests for reconsideration of a prior GAO decision as well as requests for reimbursement of costs. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-162SP, GAO'S BID PROTEST ANNUAL REPORT TO THE CONGRESS FOR FISCAL YEAR 2012 1 (2012) [hereinafter GAO FY 2012 BID PROTEST REPORT].

⁵² See BID PROTESTS INVOLVING DEFENSE PROCUREMENTS, *supra* note 44, at 7. This figure is derived from adding 416 non-Department of Defense (DoD) protests and 611 DoD protests. Additionally, the report explains, "[F]or purposes of counting the number of protests filed, we eliminated from our count multiple iterations of the same 'B' number. As a consequence, the number of protests in

the GAO indicated that, on average, there were approximately 1.6 docket numbers assigned ("cases filed") per protested procurement.⁵³ Assuming that this ratio is stable over time, it would mean that the 2,353 cases filed in FY 2011⁵⁴ represented approximately 1,470 protested procurements. While the number of federal procurements was probably not the same in FY 2008 and FY 2011, if we nevertheless assume, for the sake of simplicity and because this is only a rough estimate, that there were 200,000 procurements in each of those two years, that would suggest that 0.51% of procurements were protested in FY 2008 and 0.74% were protested in FY 2011.⁵⁵ In other words, between approximately 99.3% and 99.5% of procurements were not protested.⁵⁶

This calculation is supported by the recent RAND Corporation study mentioned above.⁵⁷ In that study, researchers at the RAND Corporation found that, in the Air Force, "[t]he number of [GAO] protests as a percentage of total contract awards has fallen fairly steadily from about 1.7[%] in FY 1995

this report reflects the number of procurements challenged in a given fiscal year." *Id.* at 5-6 n.8.

⁵³ See *id.* at 7; GAO FY 2008 BID PROTEST REPORT, *supra* note 50, at 2.

⁵⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-199SP, GAO'S BID PROTEST ANNUAL REPORT TO THE CONGRESS FOR FISCAL YEAR 2011 4 (2011) [hereinafter GAO FY 2011 BID PROTEST REPORT].

⁵⁵ See *id.*; GAO FY 2008 BID PROTEST REPORT, *supra* note 50, at 2.

⁵⁶ See GAO FY 2008 BID PROTEST REPORT, *supra* note 50, at 2; GAO FY 2011 BID PROTEST REPORT, *supra* note 54, at 4.

⁵⁷ LIGHT ET AL., *supra* note 38, at 1.

to 0.5[%] in FY 2008.”⁵⁸ That is to say, as of 2008, 99.5% of Air Force procurements went forward without being protested to the GAO.⁵⁹ Even if the GAO protests for some other agencies’ procurements were twice as common as for the Air Force (and there is no reason to assume that that is the case), it would still be true that 99% of these other agencies’ procurements went forward without being protested to the GAO.

While the RAND Corporation study refers to GAO protests, including the Court of Federal Claims would not alter the picture, since the court receives fewer than one-tenth the number of protests each year that the GAO receives.⁶⁰ And while protesters can file protests within the Air Force, and notwithstanding that statistics on the number of those “agency-level protests” are not available,⁶¹ there is no reason to believe that they would increase the total percentage of protested Air Force procurements much above 0.5%.⁶²

⁵⁸ *Id.*

⁵⁹ *See id.*

⁶⁰ *See* Michael J. Schaengold et al., *Choice of Forum for Federal Government Contract Bid Protests*, 18 FED. CIR. B.J. 243, 255-59 (2009) (noting the number of protests filed at GAO and the Court of Federal Claims in each year from 2001 to 2007). For example, in FY 2008 1,652 bid protests were filed at the GAO. *Id.* at 255. In the same year, only 85 had been filed with the Court of Federal Claims (CoFC). *Id.* at 259.

⁶¹ *See id.* at 254-55; Troff, *supra* note 23, at 146 n.170.

⁶² *See* LIGHT ET AL., *supra* note 38, at 1.

It is, of course, true that very high-dollar procurements are much more likely to be protested: the higher the dollar value, the greater the likelihood of a protest.⁶³ For a company that loses the competition for a \$100 million contract, with all the bid and proposal costs that competing entails, the additional cost of filing a protest may seem minimal, so that filing a protest can be very tempting. That does not change the overall picture, however, that bid protests are rare.

What about the mantra we often hear about increases in protest numbers? It is true that the GAO has reported a substantial increase in the number of cases filed over the past few years,⁶⁴ but even if the numbers doubled, from .5% of procurements to 1%, it would still mean that something like 99% of procurements are not protested. In terms of absolute numbers, the GAO has reported that the number of cases rose from 1,327 in FY 2006 to 2,353 in FY 2011, an increase of more than 70%.⁶⁵ Adjusted to eliminate the overcounting explained above,⁶⁶

⁶³ See Memorandum from Daniel I. Gordon, Adm'r for Fed. Procurement Policy, Office of Fed. Procurement Policy, to Chief Acquisition Officers, Senior Procurement Execs., & Chief Info. Officers 7 (Feb. 2, 2011) [hereinafter *Myth-Busting*].

⁶⁴ See, e.g., GAO FY 2011 BID PROTEST REPORT, *supra* note 54, at 4.

⁶⁵ Compare GAO FY 2008 BID PROTEST REPORT, *supra* note 50, at 2 (noting that 1,327 bid protests were filed in FY 2006), with GAO FY 2011 BID PROTEST REPORT, *supra* note 54, at 4 (noting that 2,353 bid protests were filed in FY 2011). It may be worth keeping in mind that the number of cases filed at the GAO was higher in the 1990s. For example, the GAO reported 2,529 cases in FY 1995 and

that would represent an increase from approximately 830 to approximately 1,470 protested procurements (representing the same percentage increase).⁶⁷ During that same period, however, federal procurement spending has increased from \$432 billion in FY 2006 to \$537 billion in FY 2011.⁶⁸ Put another way, in FY 2006, there were approximately 1.92 protests for each billion in federal procurement spending, while in FY 2011, there were 2.74 protests per billion.⁶⁹ Those figures are similar to the ones that the GAO provided in a congressional report in 2009, when it stated that the number of protested procurements per billion dollars in Department of Defense contract spending ranged from

2,286 in FY 1996. U.S. GOV'T ACCOUNTABILITY OFFICE, B-158766, GAO'S BID PROTEST ANNUAL REPORT TO THE CONGRESS FOR FISCAL YEAR 1995 1 (1996); see also BID PROTESTS INVOLVING DEFENSE PROCUREMENTS, *supra* note 44, at 7.

⁶⁶ See BID PROTESTS INVOLVING DEFENSE PROCUREMENTS, *supra* note 44, at 5-6 n.8.

⁶⁷ These figures are derived by dividing the figures reported by the GAO, see *supra* note 65, by 1.6. The figures therefore take into account the 1.6 docket numbers assigned per protested procurement. See BID PROTESTS INVOLVING DEFENSE PROCUREMENTS, *supra* note 44, at 7.

⁶⁸ Compare *Prime Award Spending Data: FY 2006*, USASPENDING.GOV (Nov. 23, 2012), http://usaspending.gov/?q=explore&fromfiscal=yes&typeofview=detailsummary&fiscal_year=2006, with *Prime Award Spending Data: FY 2011*, USASPENDING.GOV (Nov. 23, 2012), http://usaspending.gov/?q=explore&fromfiscal=yes&typeofview=detailsummary&fiscal_year=2011.

⁶⁹ These figures are derived by dividing the number of total protests, see *supra* note 67 and accompanying text, by the total number of dollars spent on federal procurements for each respective year, see *supra* note 68.

1.4 to 1.9 during the period FY 2004 to FY 2008.⁷⁰ While the FY 2011 figure reflects an increase, the number of protests for each billion in federal procurement spending is still extremely low: fewer than three protests for each billion dollars that the Government spends on contracts.

B. It is Rare for a Protester to Win a Protest, and Even Rarer for a Winning Protester to go on to Obtain the Contract at Issue in the Protest

Here again, the GAO's methodology risks misleading observers. The GAO reports a "sustain" rate (that is, the rate at which the GAO rules in favor of the protester and sustains the protest) that has ranged, between 2007 and 2011, from 16% to 27%.⁷¹ That sounds like protesters do fairly well, but the full picture is not so favorable to protesters. First, the sustain rate has been dropping nearly consistently, falling from 27% in FY 2007 to 16% in FY 2011.⁷² Second, the sustain rate is calculated only among the cases for which the GAO issues a

⁷⁰ BID PROTESTS INVOLVING DEFENSE PROCUREMENTS, *supra* note 44, at 9.

⁷¹ RALPH O. WHITE, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-520SP, GAO BID PROTEST OVERVIEW 2 (2011) [hereinafter GAO BID PROTEST OVERVIEW].

⁷² *Id.* While the GAO's report on FY 2012 protests indicates a higher sustain rate of 18.6%, it also acknowledges that many of the sustained protests (18 of the 106 reported sustains) related to one small-business issue, which led to protests by one small business raising that one issue accounting for 15 of the sustained protests (including 8 of them in one 2.5 page decision). See GAO FY 2012 BID PROTEST REPORT, *supra* note 51, at 1, 5; Aldevra, B-406774 *et al.*, 2012 CPD ¶ 240 (Comp. Gen. Aug. 21, 2012). If those carbon-copy cases are treated as one, the sustain rate for FY 2012 falls back to approximately 16%, even without regard to the double-counting of B numbers.

decision on the merits, as the GAO's annual reports demonstrate.⁷³ That means that, in FY 2010, for example, the GAO did not sustain 19% of 2,299 cases; rather, it sustained 19% of 441 decisions on the merits (the 441 figure being based on the GAO's protest overview report of 2011).⁷⁴ Third, that percentage is distorted by the methodology of counting multiple B numbers separately because, in the author's experience, protests that are sustained typically have more B numbers than protests that are denied.⁷⁵ For example, in FY 2010, the GAO reported 441 decisions on the merits, of which 82 were reported as sustained protests.⁷⁶ But a count of actual decisions (counting each decision as one, even if it resolves two or more B numbers) reveals that there were actually 282 decisions on the merits, rather than 441, and that of these only 45 decisions sustained the 82 protests that the GAO reported as having been sustained.⁷⁷

⁷³ See, e.g., GAO FY 2011 BID PROTEST REPORT, *supra* note 54, at 4.

⁷⁴ See GAO BID PROTEST OVERVIEW, *supra* note 72, at 2.

⁷⁵ See BID PROTESTS INVOLVING DEFENSE PROCUREMENTS, *supra* note 44, at 5 n.8.

⁷⁶ GAO BID PROTEST OVERVIEW, *supra* note 71, at 2.

⁷⁷ A note on the methodology used: A Westlaw search for GAO decisions issued with the terms "Matter of" and "protest" between October 1, 2009, and September 30, 2010, produced 310 results. Sixteen of those were decisions on requests for reconsideration or on cost claims, leaving 294 protest decisions. Twelve of those were published dismissals of protests, leaving 282 decisions sustaining or denying protests. Finally, only 45 of these decisions resulted in the sustaining of the underlying protest or protests at issue, which accounted

That represents a 16% sustain rate, rather than the 19% rate that the GAO reported.⁷⁸

Thus far, this analysis means that, among the hundreds of thousands of federal procurements that occurred in FY 2010, there were only 45 procurements for which the GAO sustained bid protests.⁷⁹ The next stage, though, offers even worse news for protesters, and it is surprising how little is reported about

for the overall 82 sustained protests reported by the GAO in its bid protest overview report of 2011. *See id.*

⁷⁸ *See id.*

⁷⁹ The 45 figure slightly overstates the number of procurements that were actually successfully protested. In one instance, the GAO issued two decisions on the same day sustaining two different companies' protests of the same contract. *See* McCarthy/Hunt, JV, B-402229.2, 2010 CPD ¶ 68 (Comp. Gen. Feb. 16, 2010); B.L. Harbert-Brasfield & Gorrie, JV, B-402229, 2010 CPD ¶ 69 (Comp. Gen. Feb. 16, 2010). In another procurement, the GAO sustained a protest in March 2010, and then after the agency took corrective action, the GAO sustained another protest of the same procurement. *See* Shaw-Parsons Infrastructure Recovery Consultants, LLC, B-401679 *et al.*, 2010 CPD ¶ 77 (Comp. Gen. Mar. 10, 2010) (initial decision issued in March 2010); Shaw-Parsons Infrastructure Recovery Consultants, LLC, B-401679.9 *et al.*, 2010 CPD ¶ 211 (Comp. Gen. Sept. 8, 2010) (decision issued in September 2010 following agency corrective action). In a third procurement, one firm successfully protested award to another firm, but then the earlier awardee successfully protested award to the firm that was the prior protester, leading to two sustained protests in the same procurement. *See* Sci. Applications Int'l Corp., B-401773, 2009 CPD ¶ 229 (Comp. Gen. Nov. 10, 2009) (agency implemented recommendation and then made award to protester, but that award was successfully protested by earlier awardee in Rapiscan Sys., Inc., B-401773.2 *et al.*, 2010 CPD ¶ 60 (Comp. Gen. Mar. 15, 2010)). Consequently, then, the true number of successfully protested procurements could more accurately be said to be 42. The author, however, uses 45 in this Article, in order to track the 45 decisions issued by the GAO.

it. What happened in those 45 procurements, after the GAO sustained the protests? Did the protester that was successful in the GAO litigation succeed in obtaining the contract? The answer: rarely. The FY 2010 numbers have been selected here for further study, because enough time should have passed for final actions in the underlying procurements to be available. That said, discovering the final action on a contract can be challenging, because information on what ultimately happened after each one of the sustained protests is not readily available. Enough is known, however, to give a fairly clear picture of protesters winning at the GAO but nonetheless not receiving the contested contracts.⁸⁰ In four of the 45 decisions, the GAO did not recommend any corrective action in the protested procurement, either because the contract had already been performed or for other reasons.⁸¹ In an additional three decisions, the GAO did recommend corrective action in the procurement, but the agency declined to follow the GAO's

⁸⁰ The GAO does not track information on which company ultimately receives a contract after the GAO has sustained a protest. The author, working with student research assistants at The George Washington University Law School, has endeavored to obtain information for the post-protest outcome of each of the procurements in which the GAO sustained protests in FY 2010, and the results to date are set out in the text here. The effort to track down every case continues through Freedom of Information Act requests to the respective agencies.

⁸¹ See *infra* Appendix A (decisions A1-A4).

recommendation.⁸² In 23 additional decisions, the GAO recommended corrective action and the agency followed the GAO's recommendation, but the agency then confirmed award to the same company as before or took some other action that did not award to the protester, such as awarding to a third company or cancelling the requirement entirely.⁸³ In only eight cases identified to date did the protester apparently obtain the contested contract,⁸⁴ and in one additional case, the agency did commit to resoliciting using the size standard sought by the protester.⁸⁵ While the ultimate outcome has yet to be determined in the procurements covered by the remaining six decisions,⁸⁶ this much is clear: winning a protest is far from ensuring that a protester will win the contract that it seeks.

⁸² See *infra* Appendix A (decisions A5-A7); see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-211SP, GAO'S BID PROTEST ANNUAL REPORT TO THE CONGRESS FOR FISCAL YEAR 2010 1 (2010). GAO's Bid Protest Annual Report to the Congress for Fiscal Year 2012 identified 18 protests where the agency declined to follow GAO's recommendation. GAO FY 2012 BID PROTEST REPORT, *supra* note 51, at 1.

⁸³ See *infra* Appendix B (decisions B1-B23).

⁸⁴ See *infra* Appendix C (decisions C1-C8).

⁸⁵ In the additional case noted, listed in the appendix under C9, the protester had challenged the agency's refusal to amend the solicitation to use a small business size standard called for by the Small Business Administration's Office of Hearings and Appeals; in sustaining the protest, the GAO recommended that the agency amend the solicitation to conform to that size standard. Eagle Home Med. Corp., B-402387, 2010 CPD ¶ 82 (Comp. Gen. Mar. 29, 2010).

⁸⁶ See *infra* Appendix D (decisions D1-D6).

Experienced practitioners may point out that the GAO reports a high "effectiveness rate," which would suggest that the picture is far better than this for protesters.⁸⁷ That "effectiveness rate," which was reported as 42% for FYs 2010, 2011, and 2012,⁸⁸ combines the sustained protests described above as well as cases where agencies took voluntary "corrective action," without action by the GAO, so that the GAO closed its files without issuing a decision.⁸⁹ There is no publicly available information on that large universe of protests where the GAO was told that the protester "obtain[ed] some form of relief," as the GAO writes in a footnote to FY 2012 annual report.⁹⁰ In particular, there is no way to know whether the protesters ultimately obtained the contracts at issue, and discovering the outcome in each of the affected procurements would challenge even the most diligent researchers because, as far as the author knows, the GAO does not publicly disclose any information about the cases that it closes due to agencies' voluntary corrective action.⁹¹ There is, however, no obvious

⁸⁷ See generally GAO FY 2012 BID PROTEST REPORT, *supra* note 51, at 5 (noting the "effectiveness rate" for FY 2012).

⁸⁸ *Id.*

⁸⁹ *Id.* at 5 n.4.

⁹⁰ *Id.*

⁹¹ For example, in the GAO's most recent Performance Accountability report, the GAO notes that it did not issue formal decisions because the agencies took voluntary corrective action. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-2SP, PERFORMANCE AND

reason that an agency would be more likely to award a contract to a protester whose case ends without a GAO decision than after the GAO rules in a protester's favor.

V. Costs of the Bid Protest Process

Protests impose litigation costs on the parties, including attorney costs, although the author is unaware of data regarding those costs. Moreover, even when a bid protest is denied, it usually holds up the protested acquisition. Specifically, when a protester files in time to trigger the automatic stay under CICA, the agency must hold off on awarding the contract at issue (for pre-award protests) or direct the awardee to stop work (for post-award protests).⁹² The automatic stay for protests filed with the GAO can last up to 100 days,⁹³ which is generally longer than the period of time other jurisdictions worldwide allow for their bid protest processes.⁹⁴ Even if the GAO dismisses a

ACCOUNTABILITY REPORT FISCAL YEAR 2012 46 (2012). The GAO does not, however, discuss what action was taken. See *id.*

⁹² 31 U.S.C. § 3553(c) (2006).

⁹³ *Id.* § 3554(a)(1).

⁹⁴ See generally GETTING THE DEAL THROUGH, PUBLIC PROCUREMENT: AN OVERVIEW OF REGULATION IN 40 JURISDICTIONS WORLDWIDE (Hans-Joachim Prieß et al. eds., 2012) (discussing bid protest processes in various countries worldwide). As examples, in France, where contracts may not be awarded until the conclusion of a "standstill" provision, an administrative judge has only 20 days from the conclusion of the standstill period to decide, *id.* at 106, Ghana's administrative authority is given 21 days to decide complaints, *id.* at 123, Macedonia's Appeals Commission must decide cases within 15 days of receiving documentation, *id.* at 175, Portugal's administrative review takes about 3 weeks, *id.*

protest, the dismissal can take several weeks, and even the most promptly dismissed protests may trigger a CICA stay that is in place for at least a few days.⁹⁵ In short, the CICA stay does disrupt procurements.

However, the CICA stay applies only to a small percentage of all federal procurements. As discussed above, in FY 2011, approximately 1,470 procurements were protested to the GAO.⁹⁶ While specific information is not publicly available, it is likely that not all of these 1,470 protested procurements would have been stayed, given that only protests filed within specified deadlines trigger a CICA stay.⁹⁷ At least some of these 1,470 protests were untimely filed for GAO protest purposes, so that they were dismissed (indeed, timeliness is one of the GAO's most common bases for dismissing protests⁹⁸) and even some of the protests that were timely filed may have been filed too late to trigger a CICA stay.⁹⁹ For example, a protest filed six to ten days after a debriefing will usually be found timely for the GAO's filing purposes, but it will not trigger a

at 209, and Ukraine's administrative review must be completed within 30 working days of receipt of a complaint, *id.* at 247.

⁹⁵ See BID PROTESTS INVOLVING DEFENSE PROCUREMENTS, *supra* note 44, at 4.

⁹⁶ See discussion *supra* Part IV.A.

⁹⁷ See 31 U.S.C. § 3553(d) (4).

⁹⁸ See Daniel I. Gordon, *Dismissals of Bid Protests at the General Accounting Office*, PROCUREMENT LAW., Winter 2002, at 15, 16.

⁹⁹ See 31 U.S.C. § 3553(d) (4).

CICA stay, because a protest must be filed within five days of a debriefing to trigger a stay.¹⁰⁰

Moreover, the fact that a protest has triggered a CICA stay does not mean that the procurement will be on hold for 100 days. Most protests are resolved well before the 100th day, which is the maximum length of time the GAO has for resolving a protest.¹⁰¹ In 2009, the GAO reported to Congress that it “consistently closed more than half of all [Department of Defense (DoD)] protests within 30 days.”¹⁰² While that report related to protests of DoD procurements,¹⁰³ there is no reason to believe that protests of civilian agencies’ procurements (which are fewer in number than DoD protests¹⁰⁴) take longer for the GAO to close.¹⁰⁵ A CICA stay may end because the protester has withdrawn the protest, or because the GAO has dismissed the case.¹⁰⁶ When an agency takes corrective action, that also ends the stay, but, of course, the corrective action itself will

¹⁰⁰ See *id.* § 3553(d)(4)(B) (noting that a protest must be filed within five days of a requested and required debriefing in order to trigger a CICA stay); 4 C.F.R. § 21.2(a)(2) (2012) (noting that a protest must be filed within ten days of requested and required debriefing in order to be timely at the GAO).

¹⁰¹ 31 U.S.C. § 3554(a)(1) (requiring the GAO to resolve protests within 100 days after they are filed); BID PROTESTS INVOLVING DEFENSE PROCUREMENTS, *supra* note 44, at 5.

¹⁰² BID PROTESTS INVOLVING DEFENSE PROCUREMENTS, *supra* note 44, at 10.

¹⁰³ *Id.* at 5 n.7.

¹⁰⁴ See *id.* at 7.

¹⁰⁵ See *id.* at 5 n.7.

¹⁰⁶ *Id.* at 4, 10.

generally delay progress in the procurement.¹⁰⁷ Even for the minority of protests that make it to the published decision stage, the GAO has reported that, on average, it issues a decision within 80 days.¹⁰⁸

Not only is the delay caused by the CICA stay shorter than it may appear, when a delay, even a relatively short one, could cause harm, CICA provides a mechanism for agencies to move forward with protested procurements while protests remain pending.¹⁰⁹ This "override" mechanism is available to agencies and is used, although information on the frequency of overrides is not readily available.¹¹⁰

Truly long procurement delays lasting for months really only occur when the GAO issues a decision sustaining a protest and the agency implements the GAO's recommendation, which typically calls for the agency to re-do at least part of the

¹⁰⁷ MOSHE SCHWARTZ & KATE M. MANUEL, CONG. RESEARCH SERV., R40227, GAO BID PROTESTS: TRENDS, ANALYSIS, AND OPTIONS FOR CONGRESS 10 (2011).

¹⁰⁸ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-208R, GAO BID PROTEST ANNUAL REPORT TO THE CONGRESS FOR FISCAL YEAR 2004 2 (2005). The citation refers to information for 2004; subsequent reports have not reported this information.

¹⁰⁹ See 31 U.S.C. §§ 3553(c)(2), (d)(3)(C) (2006) (authorizing the head of a procuring activity to override the automatic CICA stay in specified circumstances).

¹¹⁰ For FY 2002, the last year that the GAO included information on overrides in its annual report on protests, the GAO reported that, with respect to the 1,101 protests filed that year, there were 65 instances of agencies' using their override authority to move forward with the procurement, notwithstanding the protest. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-427R, BID PROTEST ANNUAL REPORT TO THE CONGRESS FOR FISCAL YEAR 2002 3, 4 (2003).

competition for the contract.¹¹¹ The universe of such cases, however, is quite small: as explained above, there are only a few dozen sustained protests in a year (as noted above, there were 45 decisions in which the GAO sustained protests in FY 2010),¹¹² and, of those, some do not lead to delay in the procurement after the GAO has issued its decision, either because the decision did not contain a recommendation for corrective action or because the agency declined to follow the GAO's recommendation.¹¹³ That leaves a relatively small number of procurements, which the author estimates is certainly fewer than 40 out of the 200,000 procurements per year estimate used in this Article, in which there is any substantial delay due to a successful protest.¹¹⁴

Finally, in the author's view, there is adequate justification for a substantial delay in a procurement where the GAO has determined that the agency violated procurement law, and that the violation has harmed the protester. At the very least, any delay that such an agency's unlawful action has caused should not be blamed on the bid protest system.

Critics of the protest system may also view the GAO's authority to recommend that successful protesters be reimbursed

¹¹¹ See 31 U.S.C. § 3554(b) (1) (B) .

¹¹² See discussion *supra* Part IV.B.

¹¹³ See discussion *supra* Part IV.B.

¹¹⁴ See discussion *supra* Part IV.A.

the costs of filing and pursuing their protests, including costs attributable to attorneys' fees, as another cost of associated with bid protests.¹¹⁵ This situation arises only when the GAO finds that a protest is clearly meritorious, which means that the contracting agency violated procurement law to the detriment of the protester, and when the agency has unduly delayed taking corrective action.¹¹⁶ In the author's view, reimbursing protesters for their actions as "private attorneys general" is justifiable.¹¹⁷ In any event, the reimbursable rates for attorneys' fees in those situations are now capped, except for small business protesters.¹¹⁸

That said, critics point to abuse of the protest system in particular contexts as causes for concern. Specifically, there

¹¹⁵ See generally 31 U.S.C. § 3554(c)(1)(A)-(B) (permitting the Comptroller General to recommend that the procuring agency pay successful protesters' protest related fees).

¹¹⁶ See, e.g., *Advanced Env'tl. Solutions, Inc.—Costs*, B-296136.2, 2005 CPD ¶ 121, at 2-3 (Comp. Gen. June 20, 2005) (noting that protest costs may be awarded where an agency unduly delayed taking corrective action on a meritorious protest); *Takota Corp.—Costs*, B-299600.2, 2007 CPD ¶ 171, at 3 (Com. Gen. Sept. 18, 2007) (finding no need to award attorney fees because Coast Guard complied with regulations by swiftly taking corrective actions).

¹¹⁷ See generally *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859, 864 (D.C. Cir. 1970) (describing the role of "private attorneys general in monitoring compliance with federal procurement law).

¹¹⁸ 31 U.S.C. § 3554(c)(2). Under CICA, only small businesses may be reimbursed attorneys' fees at a rate over \$150 dollars per hour unless the contracting agency and the GAO find that a higher reimbursement of attorneys' fees at a higher rate is warranted. *Id.*

are persistent complaints that abuse arises in the form of “frivolous” protests, and the author has often heard calls for imposing sanctions on firms that file frivolous protests.¹¹⁹ In the 2009 report to Congress on DoD procurements, the GAO responded to a request from the House Armed Services Committee to address frivolous protests filed in connection with DoD procurements.¹²⁰ The GAO pointed out that the fact that a protest is denied or even dismissed does not mean that it is frivolous; instead, the GAO expressed the view that only a protest filed in bad faith should be viewed as frivolous.¹²¹ In any event, the GAO reported that it did not “categorize protests as frivolous,” and therefore it had no data on the number of frivolous protests filed.¹²² It did point out, however, that contracting agencies rarely assert that protests are frivolous.¹²³ In a footnote, the GAO indicated that the last reported decision noting that an agency had characterized a protest as frivolous was issued in 1996, and that in that case,

¹¹⁹ See Metzger & Lyons, *supra* note 14, at 1240-41; Jonathan R. Cantor, Note, *Bid Protests and Procurement Reform: The Case for Leaving Well Enough Alone*, 27 PUB. CONT. L.J. 155, 172 (1997) (recounting proposed regulations aimed at preventing “frivolous” protests).

¹²⁰ BID PROTESTS INVOLVING DEFENSE PROCUREMENTS, *supra* note 44, at 11-15.

¹²¹ *Id.* at 11-12.

¹²² *Id.* at 12.

¹²³ *Id.* at 12 n.13.

the agency subsequently acknowledged that the evaluation scheme used in the protested procurement was flawed.¹²⁴

In its 2009 report, the GAO asserted that its practice of promptly dismissing protests indicated that there was no problem with frivolous protests.¹²⁵ The GAO also expressed concern that any effort to impose sanctions on frivolous protests (such as imposing a fine or requiring the protester to reimburse the Government for costs incurred in defending against the protest) would risk “the unintended consequence of discouraging participation in federal contracting and, in turn, limiting competition.”¹²⁶ The GAO also pointed out that penalties could not properly be imposed on “frivolous” protesters without adding a new layer of litigation, for which the GAO would then need to determine whether protesters had filed their protests in bad faith.¹²⁷ Besides the burden that such litigation would place on the GAO, distracting it from its focus on resolving protests as quickly as possible, a new layer of litigation could impose additional costs on agencies and protesters, the burden for which might fall disproportionately heavily on small businesses and protesters not represented by counsel that may have

¹²⁴ *Id.*

¹²⁵ *Id.* at 2.

¹²⁶ *Id.*

¹²⁷ *Id.* at 13.

protested in good faith but acted with a misunderstanding of the facts or the law.¹²⁸

Those who allege that some protesters abuse the system sometimes point to one scenario in particular: situations where a service contractor has lost a competition for a follow-on contract and then files a protest in order to continue working during the period of the CICA stay.¹²⁹ This concern would be particularly great if: (1) many protests were found to have been filed by service-contract incumbents that had lost competitions for follow-on contracts, and (2) their protests were completely without merit, but (3) the GAO was so slow in resolving the protests that the incumbent was able to continue performing well after its contract had been due to expire. However, the author is not aware of any data suggesting that many protests meet these conditions. The appropriate response, in any event, would appear to be to press the GAO to continue (or intensify) its efforts to resolve protests promptly, not to create a new round of litigation about the imposition of sanctions, and certainly

¹²⁸ *Id.* It is worth noting that protesters have only limited information about what happened during a procurement at the time that the strict time limits require them to decide whether to file a protest, because many agencies disclose to firms that lost competitions for contract only the bare minimum required by law. See generally FAR 15.505, .506 (requiring pre-award and post-award de-briefings).

¹²⁹ See, e.g., Kovacic, *supra* note 3, at 489 (describing this type of criticism); Keeton Corrs., Inc. v. United States, 59 Fed. Cl. 753, 754-55 (2007).

not to limit or abolish vendors' right to have an independent body consider their claims of unlawful action by contracting agencies.

The final category of costs often associated with the protest system concerns sequential protests, where a protester loses a protest at the GAO and then protests at the Court of Federal Claims.¹³⁰ Presumably, the situation could be made to sound worse by imagining that many cases protesting procurements are first brought to the contracting agency, then to the GAO, then to the Court of Federal Claims, and finally to the Federal Circuit.¹³¹ This scenario is mere speculation, however, with no evidence that the nightmarish four-fora pattern occurs often. Indeed, even when it does occur, it is not clear that the procurement would always be disrupted, since there might be no CICA stay at the GAO,¹³² and the courts would certainly have

¹³⁰ See Schaengold et al., *supra* note 60, at 318 (noting the possibility of sequential protests); see, e.g., *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1381 (Fed. Cir. 2009) (where protester was unsuccessful at the GAO and then sought review by the Court of Federal Claims).

¹³¹ See, e.g., *Honeywell, Inc. v. United States*, 870 F.2d 644, 646-47 (Fed. Cir. 1989) (where a disappointed bidder protested to the Army, the successful bidder protested the Army's corrective action to the GAO, the disappointed bidder then protested the GAO's decision to the Court of Federal Claims, and the successful bidder appealed the Court of Federal Claims' decision to the Federal Circuit).

¹³² There may be no CICA stay if either the protest does not meet the timeliness rules for a CICA stay or if there is an agency override. See FAR 33.104(b), 33.104(c)(1) (indicating the

discretion not to impose a preliminary injunction.¹³³ While there are some protesters that start at the GAO and then go to the Court of Federal Claims,¹³⁴ the number is apparently so small, and the evidence that the underlying procurements to these protests have been substantially delayed is so thin (again, there is no automatic right to a stay at the court¹³⁵), that this cannot legitimately be seen as a significant cost of the bid protest system. More importantly, the court occasionally reaches a different outcome than the GAO did,¹³⁶ which suggests, if nothing else, that the protest was not frivolous.

Another concern about the cost of the protest system relates to what might be called its indirect impact. Fear of protests is often given as the explanation for Contracting Officers' preference for certain courses of action over

timeliness rules for an automatic CICA stay); 31 U.S.C. §§ 3553(c)(2), (d)(3)(C) (2006) (permitting an agency to override the automatic stay in certain circumstances).

¹³³ See 28 U.S.C. § 1491(b)(2) (2006) (granting the Court of Federal Claims jurisdiction to provide injunctive relief); *Akal Sec., Inc. v. United States*, 87 Fed. Cl. 311, 316-17 (2009) (delineating the factors considered in granting injunctive relief).

¹³⁴ See, e.g., *Analytical & Research Tech.*, B-276064, 97-1 CPD ¶ 200 (Comp. Gen. May 7, 1997); *Analytical & Research Tech., Inc.*, 39 Fed. Cl. 34, 40 (1997).

¹³⁵ See 28 U.S.C. § 1491(b)(2) (2006).

¹³⁶ See, e.g., *Turner Constr. Co. v. United States*, 94 Fed. Cl. 561, 586 (2010) (holding that the Army acted improperly in setting aside a previously awarded contract, pursuant to the GAO's recommendation).

others.¹³⁷ In particular, Contracting Officers have told the author that they are acting to avoid bid protests when they decide that a contract should be awarded to the lowest-priced, technically acceptable (LPTA) proposal, rather than to allow for a tradeoff.¹³⁸ There does not appear to be any data that would indicate how often Contracting Officers actually decide to make an award on an LPTA basis for this reason alone, nor any data on how often source selection officials avoid making tradeoffs in award decisions, even when permitted to by the terms of a solicitation, just to avoid protests. If the phenomenon is common, it is unfortunate, since discretion to make tradeoffs is a positive option in the U.S. procurement system.¹³⁹

Similarly, the author has heard for many years that some Contracting Officers prefer to make award based on initial proposals, rather than to conduct discussions, because they fear that discussions with offerors are a legal minefield, such that conducting discussions will increase the likelihood of a bid protest and improve the protester's chances of prevailing if a

¹³⁷ See *Myth-Busting*, *supra* note 63, at 7 (noting that Contracting Officers sometimes attempt to "protest-proof" procurements when that should not be the overriding goal).

¹³⁸ See *generally* FAR 15.101-1(a) (permitting agencies to use tradeoff process when it would be "in the best interest of the Government").

¹³⁹ See *id.*

protest is filed.¹⁴⁰ Again, that would represent a loss, since the ability to conduct discussions with offerors is a good feature of our acquisition system and is not often used in other systems around the world.¹⁴¹ Similar to the extent to which Contracting Officers use LPTA rather than tradeoff to avoid protest, there is a lack of data about how common it is for Contracting Officers to award based on initial proposals in order to reduce the likelihood of a successful protest. In any event, the author is skeptical that there is any good reason to “protest-proof” an acquisition in this way, especially in light of how rare protests are, and how exceedingly rare successful protests are.¹⁴² Moreover, neither using LPTA as the basis for award, nor making award based on initial proposals, without conducting discussions, will ensure that no protest will ever be

¹⁴⁰ See, e.g., *Rig Masters, Inc. v. United States*, 70 Fed. Cl. 413, 420 (2006) (holding that the Contracting Officer’s failure to hold negotiations was not an abuse of discretion).

¹⁴¹ See Christopher R. Yukins, *Integrating Integrity and Procurement: The United Nations Convention Against Corruption and the UNCITRAL Model Procurement Law*, 36 PUB. CONT. L.J. 307, 327-28, 328 n.70 (2007) (suggesting that the United States preference for negotiated procurement is a strong advantage, but is not widely used worldwide because the U.S. enjoys relatively low levels of corruption); IVAR STRAND ET AL., *PUBLIC PROCUREMENT IN EUROPE: COST AND EFFECTIVENESS* 7, 15 (2011) (noting that the Eurozone rarely uses negotiation); Shigeki Kusunoki, *Japan’s Government Procurement Regimes for Public Works: A Comparative Introduction*, 32 BROOK. J. INT’L L. 523, 528 (2006) (noting that, historically, negotiated procurements were rarely used in Japan).

¹⁴² See discussion *supra* Part IV.A.

held, as GAO and Court of Federal Claims decisions ruling on protests of LPTA awards and initial-proposal awards demonstrate.¹⁴³ That said, it must be recognized that in both areas, and potentially in others as well, it is quite possible that the fear of protests, whether justifiable or not, is harming the acquisition system by driving bad decisions by federal contracting personnel. To mitigate this harm, efforts should be made to improve Contracting Officers' knowledge about the rarity of protests and the fact that making LPTA awards or awards based on initial proposals will not prevent protests, as well as the benefit to the Government of using tradeoffs and discussions as means to obtain a better deal for taxpayers.

VI. Benefits of the Protest Process

As noted above, countries around the world are developing bid protest systems, and such systems have become, or are fast becoming, part of the norm for good government in the acquisition arena.¹⁴⁴ That can be attributed to several benefits associated with bid protests.

First, protests introduce a relatively low-cost form of accountability into acquisition systems by providing disgruntled

¹⁴³ See, e.g., *Guzar Mirbachakot Transp. v. United States*, 104 Fed. Cl. 53 (2012) (lowest price, technically acceptable (LPTA) case at the CoFC); *Ahtna Facility Servs., Inc., B-404913 et al.*, 2011 CPD ¶ 134 (Comp. Gen. June 30, 2011) (LPTA case at the GAO).

¹⁴⁴ See discussion *supra* Part III.

participants a forum for airing their complaints.¹⁴⁵ Protesting firms decide which procurements are to be investigated: if no one protests, then neither the GAO nor the Court of Federal Claims would look into a procurement, but if someone does protest, then the GAO and the court would consider the procurement if the protest passes procedural hurdles, such as timeliness.¹⁴⁶ While reliance on audits by government officials would also inject accountability into the workings of procurement systems, it may be more efficient to focus on procurements where a participant is dissatisfied by a government agency's conduct; that is what the "private attorney general" model of a protest provides.¹⁴⁷ In blunt terms, if no one is

¹⁴⁵ See Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627, 681 (2001) (contending that "[i]n economic terms, the protest and dispute regimes are a bargain" and that "[o]pponents of litigation are hard pressed to demonstrate a more cost effective, less intrusive compliance regime.").

¹⁴⁶ See 31 U.S.C. § 3553(a) (2006) (conferring jurisdiction on the GAO to review procurements protested by an interested party); *id.* § 3551(2) (defining "interested party" as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract" or an agency official or agent representing federal employees who stand to be injured by private competition); 28 U.S.C. § 1491(b)(1) (2006) (granting the Court of Federal Claims jurisdiction to hear claims brought by "interested parties"); R. CT. FED. CL. (procedural rules governing the Court of Federal Claims); 4 C.F.R. §§ 21.1, .2 (2012) (procedural rules governing bid protests at the GAO).

¹⁴⁷ See *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859, 864 (D.C. Cir. 1970) ("The public interest in preventing the granting of contracts through arbitrary or capricious action can properly be

dissatisfied with the way the Government conducted a procurement, then it may not be a wise use of auditors' time to investigate it.¹⁴⁸

Second, by being directly responsive to participants' complaints, protests can increase potential bidders' confidence in the integrity of the procurement process, and thereby lead more players to participate, thus increasing competition.¹⁴⁹ Increasing competition, in turn, can translate into bidders offering lower prices, higher quality, or both, to contracting agencies.¹⁵⁰

Third, protests can increase the public's confidence in the integrity of the public procurement process. While the public

vindicated through a suit brought by one who suffers injury as a result of the illegal activity, but the suit itself is brought in the public interest by one acting essentially as a 'private attorney general.'"); Schooner, *supra* note 145, at 630, 680-84 (arguing that "private attorneys general" litigation is a public good).

¹⁴⁸ It should, though, be noted that in situations where all the bidders are colluding, none may have an interest in protesting, so that the protest system would not provide accountability in that case. Indeed, if anything, in those situations protests may serve as a means for colluding bidders to police their collusive agreement. See Kovacic, *supra* note 3, at 490-91.

¹⁴⁹ See generally Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUB. PROCUREMENT L. REV. 103 (2002) [hereinafter *Desiderata*] (discussing the goals of a procurement system, including competition).

¹⁵⁰ See *Am. Fed'n of Gov't Emps. v. Rumsfeld*, 262 F.3d 649, 657 (7th Cir. 2001) (noting that CICA, by requiring full and open competition, was intended to "save money, curb cost growth, promote innovation and the development of high quality technology" (quoting *Am. Fed'n of Gov't Emps., Local 219 v. Cohen*, 171 F.3d 460, 472 (7th Cir. 1999))).

only rarely focuses on public contracting, having a protest process mentioned in the press - as happened when The Boeing Company successfully protested the Air Force's award of a tanker contract to Northrop Grumman¹⁵¹ - may raise the public's trust in the fairness of the Government's acquisition system and the way it spends taxpayer funds.

Fourth, because protests are a known avenue for complaints, their availability empowers those in contracting agencies who face pressure to act improperly. Thus, if a Contracting Officer were to be pressed by users within an agency to award a sole-source contract to a favored firm, the Contracting Officer, who may lack the bureaucratic clout to resist the pressure, could point to the risk of a successful protest as one additional reason to follow the statutory and regulatory requirements for competition.¹⁵²

Fifth, protest decisions, because they are public, and have been released publicly since the GAO issued the first one in 1926,¹⁵³ provide a high level of transparency into what is

¹⁵¹ See *Boeing Co., B-311344 et al.*, 2008 CPD ¶ 114 (Comp. Gen. June 18, 2008); Leslie Wayne, *Audit Says Tanker Deal Is Flawed*, N.Y. TIMES, June 19, 2008, at C1.

¹⁵² See generally Vernon J. Edwards & Ralph C. Nash, Jr., *Postscript II: The Role of the Contracting Officer*, 24 NASH & CIBINIC REP. ¶ 15 (discussing pressures that Contracting Officers routinely face).

¹⁵³ See *Autocar Sales & Serv. Co.*, 5 Comp. Gen. 712 (1926).

happening in the federal procurement system.¹⁵⁴ While, in theory, databases such as the Federal Procurement Data System (FPDS) should provide transparency into the system,¹⁵⁵ protest decisions can often provide more useful information than databases. This is particularly the case where protests demonstrate how problematic certain issues are. For example, when the GAO sustained a significant number of protests challenging the way agencies were conducting public/private competitions under OMB Circular A-76 in the 1990s, the importance of improving the way those competitions were

¹⁵⁴ See generally *Desiderata*, *supra* note 149 (describing transparency as a goal of an effective procurement system).

¹⁵⁵ The Federal Procurement Data System (FPDS) was created by the Office of Federal Procurement Policy (OFPP) in response to a congressional requirement in the Office of Federal Procurement Policy Act that the OFPP "establish[] a system for collecting, developing, and disseminating procurement data which takes into account the needs of the Congress, the executive branch, and the private sector." Office of Federal Procurement Policy Act, Pub. L. No. 93-400, § 6, 88 Stat. 796, 798 (1974) (codified at 41 U.S.C. §§ 1101-1131 (Supp. IV 2010)); see also FAR 4.602 (describing the FPDS); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-960R, IMPROVEMENTS NEEDED TO THE FEDERAL PROCUREMENT DATA SYSTEM-NEXT GENERATION 1-2 (2005) [hereinafter IMPROVEMENTS NEEDED TO THE FEDERAL PROCUREMENT DATA SYSTEM]. Although the FPDS is meant to provide transparency in federal contracting by enabling the public and members of the Government to access accurate data about government procurements, the accuracy and timeliness of the data in the FPDS have been criticized. See IMPROVEMENTS NEEDED TO THE FEDERAL PROCUREMENT DATA SYSTEM, *supra*, at 2-5; Letter from Sen. John F. Kerry, U.S. Senator, to Robert A. Burton, Assoc. Adm'r of the Office of Fed. Procurement Policy (Nov. 14, 2005), available at http://asbl.com/asbl.resource/content/supdoc/kerry_letter.pdf (noting several limitations of the Federal Procurement Data System that hinder transparency).

conducted was highlighted, and the decisions ultimately led to revisions to the Circular as well as the creation of the congressionally-chartered Commercial Activities Panel.¹⁵⁶ Similarly, it was the GAO sustaining of a number of protests alleging organizational conflicts of interest that focused attention on this area and may have led to congressional and regulatory action.¹⁵⁷

Finally, the fact that protest decisions are published and widely read by practitioners brings an additional benefit: the decisions provide guidance, particularly to agency counsel and attorneys representing potential protesters, as well as to their

¹⁵⁶ Following a number of the GAO bid protest decisions arising from public/private competitions under OMB Circular A-76, the Congress created the Commercial Activities Panel through the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001. See Pub. L. No. 106-398, § 832, 114 Stat. 1654, 1654A-221 (2000); COMMERCIAL ACTIVITIES PANEL, IMPROVING THE SOURCING DECISIONS OF THE GOVERNMENT: FINAL REPORT 90-99 (2002) (summarizing GAO protest decisions arising from public/private competitions under OMB Circular A-76). The Panel recommended a number of changes, many of which were adopted in the 2003 revision of OMB Circular A-76. COMMERCIAL ACTIVITIES PANEL, IMPROVING THE SOURCING DECISIONS OF THE GOVERNMENT 51-52 ((2002)).

¹⁵⁷ See Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 35 PUB. CONT. L.J. 25, 32-41 (2005) (discussing organizational conflict of interest bid protests). Section 207 of the Weapons Systems Acquisition Reform Act of 2009 (WSARA) called for tightening of the rules governing organizational conflicts of interest (OCIs). See Pub. L. No. 111-23, § 207, 123 Stat. 1704, 1728. As of the time of this writing, a proposed rule is being considered to revise the FAR provisions on OCIs. FAR Case 2011-001, Federal Acquisition Regulation: Organizational Conflicts of Interest, 76 Fed. Reg. 23,236 (proposed Apr. 26, 2011) (proposed rule) (to be codified at FAR pts. 2-4, 7, 9, 11-16, 18, 37, 42, 52-53).

clients. To give just one example that has been true for decades: any corporate counsel who follows GAO bid protest decisions knows how strictly the GAO applies the "late is late" rule,¹⁵⁸ so that counsel will ensure that their client appreciates the importance of submitting bids on time.

VII. Conclusion: The Costs of the Bid Protest System are Overstated, and the System's Benefits Outweigh Them

As explained above, the costs that bid protests impose on the acquisition system are often misunderstood and therefore overstated, in terms of the frequency of protests, the length of time that they last, and the risk that an agency's choice of contractor will be overturned in the process. Moreover, the benefits of the protest system may not be fully appreciated, as is the fact that the United States is required by its international trade agreements to have a protest system. Whatever costs protests impose on the procurement system are outweighed, at least in the author's view, by the benefits that protests bring, in terms of transparency, accountability, education, and protection of the integrity of the U.S. federal acquisition system.

¹⁵⁸ See Gregg A. Engler, *Limiting Application of the Late Proposal Rule: One Time, One Place, One Method*, ARMY LAW., Oct. 2003, at 15. See generally FAR 15.208(b)(1) (providing that proposals, modifications, and revisions are considered "late" if received after the time specified).

Appendix A: Agency Did Not Redo the Protest Procurement

	GAO Did Not Recommend that the Agency Redo the Procurement ¹⁵⁹
A1	Biblia, Inc., B-403006, 2010 CPD ¶ 203 (Comp. Gen. Sept. 13, 2010) (protested work completed prior to issuance of GAO decision).
A2	RBC Bearings Inc., B-401661 <i>et al.</i> , 2009 CPD ¶ 207 (Comp. Gen. Oct. 27, 2009) (agency had overridden the stay and made award notwithstanding the protest).
A3	Bruce Bancroft–Agency Tender Official, B-400404.7 <i>et al.</i> , 2010 CPD ¶ 9 (Comp. Gen. Nov. 17, 2009).
A4	Frank A. Bloomer–Agency Tender Official, B-401482.2 <i>et al.</i> , 2009 CPD ¶ 203 (Comp. Gen. Oct. 19, 2009).

	Agency Declined to Follow GAO's Recommendation ¹⁶⁰
A5	Rice Servs., Inc., B-403746, 2010 CPD ¶ 220 (Comp. Gen. Sept. 16, 2010).
A6	Rice Servs., Inc., B-402966.2, 2010 CPD ¶ 217 (Comp. Gen. Sept. 16, 2010).
A7	DGR Assocs., Inc., B-402494, 2010 CPD ¶ 115 (Comp. Gen. May 14, 2010).

¹⁵⁹ Note that A3 and A4 involved protests of public-private competitions, where the federal employees' representative won the protest and may have been satisfied that no further competition would be held.

¹⁶⁰ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-211SP, GAO'S BID PROTEST ANNUAL REPORT TO THE CONGRESS FOR FISCAL YEAR 2010 1 (2010).

Appendix B: Agency Took Corrective Action, but Protester did not get the Protested Contract

B1	Analysis Grp., LLC, B-401726 <i>et al.</i> , 2009 CPD ¶ 237 (Comp. Gen. Nov. 13, 2009); Analysis Grp., LLC, B-401726.3, 2011 CPD ¶ 166 (Comp. Gen. Apr. 18, 2011) (denying protest of agency's implementation of the GAO's recommendation in the earlier, sustained protest, where the agency's implementation led it to confirm award to the original awardee).
B2	Port of Bellingham, B-401837, 2009 CPD ¶ 245 (Comp. Gen. Dec. 2, 2009); Press Release, Port of Newport, Port Commission Briefed on Construction Progress for International Terminal Renovation and NOAA MOC-P Projects (Sept. 29, 2010).
B3	Navistar Def., LLC, B-401865 <i>et al.</i> , 2009 CPD ¶ 258 (Comp. Gen. Dec. 14, 2009); <i>FMTV 2010-2015: Pyrrhic Victories? Oshkosh Wins the Re-Compete</i> , DEF. INDUS. DAILY (Apr. 16, 2012), http://www.defenseindustrydaily.com/FMTV-2010-2015-Oshkosh-Wins-The-Re-Compete-05744#US-Army-vehicles .
B4	Velos, Inc., B-400500.8 <i>et al.</i> , 2009 CPD ¶ 13 (Comp. Gen. Dec. 14, 2009); Velos, Inc., B-400500.11 (Comp. Gen. May 26, 2011) (unpublished decision) (on file with author).
B5	Coastal Env'ts, Inc., B-401889, 2009 CPD ¶ 261 (Comp. Gen. Dec. 18, 2009); Letter from Linda M. Fredendall, Contracting Officer, Dep't of the Army, to Victor Palma, Ecological Communications Corporation (Feb. 15, 2010) (reaffirming award to original awardee) (on file with author).
B6	C&B Constr., Inc., B-401988.2, 2010 CPD ¶ 1 (Comp. Gen. Jan. 6, 2010); Letter from Cynthia B. Armour, Contracting Officer, U.S. Dep't of Agric., to Mike Herrick & Justin Isle, Aquatic Contracting (May 25, 2010) (on file with author) (awardee's task order terminated, with work expected to be added to a future task order).
B7	McKissack+Delcan JV II, B-401973.2 <i>et al.</i> , 2010 CPD ¶ 28 (Comp. Gen. Jan. 13, 2010); Letter from Carolyn A. Horne, Contracting Officer, Fed. Transit Admin., to Brian Stearman, McKissack & Delcan Joint Venture II

	(June 4, 2010) (on file with author) (exclusion of protester's proposal confirmed).
B8	Gen. Dynamics One Source, LLC, B-400340.5 <i>et al.</i> , 2010 CPD ¶ 45 (Comp. Gen. Jan. 20, 2010); Unisys Corp., B-400340.9 <i>et al.</i> , 2010 CPD ¶ 171 (Comp. Gen. July 27, 2010) (denying protest after agency implemented the GAO's recommendation, but still made award to the original awardee).
B9	Cahaba Safeguard Adm'rs, LLC, B-401842.2, 2010 CPD ¶ 39 (Comp. Gen. Jan. 25, 2010); C2C Solutions, Inc., B-401106.6, 2010 CPD ¶ 145, at 5 n.5 (Comp. Gen. June 21, 2010) (denying protest of the way agency implemented the GAO's recommended corrective action in sustained protests - both in <i>Cahaba</i> and <i>C2C</i> , <i>infra</i> B10 - where the effect of the agency's method apparently allowed the original awardee to keep the protested contract).
B10	C2C Solutions, Inc., B-401106.5, 2010 CPD ¶ 38 (Comp. Gen. Jan. 25, 2010); C2C Solutions, Inc., B-401106.5 <i>et al.</i> , 2010 CPD ¶ 145 (Comp. Gen. June 12, 2010) (denying protest of the way agency implemented the GAO's recommended corrective action in sustained protests -both in <i>C2C</i> and <i>Cahaba</i> , <i>supra</i> B9 - where the effect of the agency's method apparently allowed the original awardee to keep the protested contract).
B11	McCarthy/Hunt, JV, B-402229.2, 2010 CPD ¶ 68 (Comp. Gen. Feb. 16, 2010); Turner Constr. Co. v. United States, 94 Fed. Cl. 561, 586 (2010), <i>aff'd</i> 645 F.3d 1377 (Fed. Cir. 2011) (rejecting the GAO's analysis and effectively reinstating award to the original awardee).
B12	B.L. Harbert-Brasfield & Gorrie, JV, B-402229, 2010 CPD ¶ 69 (Comp. Gen. Feb. 16, 2010) (a separate decision on the same procurement as <i>McCarthy/Hunt</i> , <i>supra</i> B11, and also effectively reversed through the courts' decisions in <i>Turner Constr. Co.</i> , <i>supra</i> B11).
B13	Med. Dev. Int'l, Inc., B-402198.2, 2010 CPD ¶ 185 (Comp. Gen. Mar. 29, 2010); <i>Comprehensive Medical Services - FCC Terre Haute</i> , FEDBIZOPPS (June 8, 2011), https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=7f95e6ef952104fd783510846ce50d17 (corrective action resulted in award to original awardee).

B14	J2A ² JV, LLC, B-401663.4, 2010 CPD ¶ 102 (Comp. Gen. Apr. 19, 2010), <i>Y-Sarasota National Cemetery Phase 1B Development Sarasota, Florida</i> , FEDBIZOPPS (Dec. 23, 2010), https://www.fbo.gov/index?s=opportunity&mode=form&id=0aba165105ae9b45415bd9f0c7bb1a55&tab=core&_cview=1 (indicating that the agency apparently issued a new solicitation and awarded contracts to two companies, neither the protester nor the awardee).
B15	Contract Int'l, Inc., B-401871.5 et al., 2010 CPD ¶ 126 (Comp. Gen. May 24, 2010); Memorandum from Dir., Joint Eng'r Directorate, U.S. Forces-Afghanistan, to the U.S. Forces Army Cent. (USARCENT), Kuwait G7 (Oct. 7, 2012) (on file with author) (solicitation cancelled).
B16	JER 370 Third St., LLC, B-402025 et al., 2010 CPD ¶ 120 (Comp. Gen. June 1, 2010); U.S. GEN. SERVS. ADMIN., U.S. GOV'T LEASE FOR REAL PROPERTY, LEASE No. GS-09B-GS-09B-02312 (June 1, 2011) (on file with author) (contract awarded to different offeror).
B17	Wackenhut Servs., Inc., B-402550.2, 2010 CPD ¶ 204 (Comp. Gen. June 7, 2010); <i>Armed Guard Service - DEA HQ and Labs VA and MD</i> , FEDBIZOPPS (Apr. 28, 2011), https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=b238d4ac2f13cecf300586b571e630e7&_cview=0 (corrective action resulted in award to original awardee).
B18	MPRI, Div. of L-3 Servs., Inc., B-402548 et al., 2010 CPD ¶ 108 (Comp. Gen. June 4, 2010); <i>Contract Actions Matching "w91crb09r0009,"</i> FPDS.gov, https://www.fpds.gov/dbsight/search.do?indexName=awardfull&templateName=1.4.4&s=FPDSNG.COM&q=w91crb09r0009 (last visited Jan. 12, 2012) (award remained with original awardee).
B19	Sys. Eng'g Int'l, Inc, B-402754, 2010 CPD ¶ 167 (Comp. Gen. July 20, 2010); Contract No. EP10HO1229, Modification No. 0003, U.S. Evtl. Protection Agency (Nov. 2, 2011) (on file with author).
B20	DRS ICAS, LLC, B-401852.4 et al., 2010 CPD ¶ 261 (Comp. Gen. Sept. 8, 2010).
B21	Info. Ventures, Inc., B-403321, 2010 CPD ¶ 223 (Comp. Gen. Sept. 27, 2010); <i>Mission Support Services for Preparation of Toxicological Profiles</i> , FEDBIZOPPS (Nov. 19, 2010), https://www.fbo.gov/?s=opportunity&mode=form&id=a3e74cdbe8ae50d896268cb7559b0f65&tab=core&_cview=1 (solicitation cancelled Nov. 19, 2010).

B22	Shaw-Parson Infrastructure Recovery Consultants, B-401679 <i>et al.</i> , 2010 CPD ¶ 77 (Comp. Gen. Mar. 10, 2010); Parsons Infrastructure Recovery Consultants, LLC, B-401679.8 <i>et al.</i> , 2010 CPD ¶ 2100 (Comp. Gen. Sept. 8, 2010) (stating that the agency implemented the GAO's recommendation, but selected the same firms for award as earlier).
B23	Shaw-Parsons Infrastructure Recovery Consultants, LLC, B-401679.8 <i>et al.</i> , 2010 CPD ¶ 211 (Comp. Gen. Sept. 8, 2010) (challenging the reevaluation of the procurement pursuant to the <i>Shaw-Parson</i> decision, <i>supra</i> B22); <i>Public Assistance Technical Assistance Contract (PA TAC III)</i> , FEDBizOpps (June 15, 2009), https://www.fbo.gov/?s=opportunity&mode=form&id=08fceab6b86734c234917a77eda5a564&tab=core&_cview=1 .

**Appendix C: Agency Took Corrective Action, and Protester
Obtained either the Protested Contract or the Specific Relief
Requested**

C1	AINS, Inc., B-400760 <i>et al.</i> , 2010 CPD ¶ 32 (Comp. Gen. Jan. 19, 2010) (sustaining protested award of a single blanket purchase agreement to a firm other than the protester); AINS, Inc., B-405902.3, 2012 CPD ¶ 189, at 1 (Comp. Gen. May 31, 2012) (stating that both AINS and the other firm have blanket purchase agreements for what appear to be the services at issue in the protest).
C2	Humana Military Healthcare Servs., B-401652.2 <i>et al.</i> , 2009 CPD ¶ 219 (Comp. Gen. Oct. 28, 2009) (sustaining protest of award to another firm); UnitedHealth Military & Veterans Servs., LLC, B-401652.8 <i>et al.</i> , 2012 CPD ¶ 83 (Comp. Gen. June 14, 2011) (denying protest of another firm challenging award to Humana, the earlier protester).
C3	Health Net Fed. Servs., LLC, B-401652.3 <i>et al.</i> , 2009 CPD ¶ 220 (Comp. Gen. Nov. 4, 2009); <i>TRICARE Third Generation Managed Care Support Services for the North Region</i> , FEDBIZOPPS (May 18, 2010), https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=2306443561cd2064ef5f946a03fb1b55 (award to protester).
C4	Ewing Constr. Co., B-401887.3 <i>et al.</i> , 2010 CPD ¶ 108 (Comp. Gen. Apr. 26, 2010); Contract No. N69450-10-C-0789, NAVFAC Se. (Aug. 10, 2010) (on file with author).
C5	AMEC Earth & Envtl., Inc., B-401961 <i>et al.</i> , 2010 CPD ¶ 141 (Comp. Gen. Dec. 22, 2009); Nat'l Multiple Award Constr. Contract Contact Information, U.S. Coast Guard (on file with author) (protester awarded one of multiple-award contracts).
C6	Milani Constr., LLC, B-401942, 2009 CPD ¶ 87 (Comp. Gen. Dec. 22, 2009); <i>Rehabilitate Anacostia Park, National Capital Parks East</i> , FEDBIZOPPS (Apr. 5, 2010), https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=1a5812911b516e2840156e2907c715c5&_cvview=0 .
C7	Irving Burton Assocs., Inc., B-401983.3, 2010 CPD ¶ 92 (Comp. Gen. Mar. 29, 2010) (on file with author)

	(agency documents indicate former awardee's task order terminated for convenience of the government and task order awarded to protester).
C8	PMO P'ship Joint Venture, B-401973.3 <i>et al.</i> , 2010 CPD ¶ 29 (Comp. Gen. Jan. 14, 2010); <i>Project Management Oversight</i> , FEDBIZOPPS (Jan. 21, 2011), https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=1a5812911b516e2840156e2907c715c5&_cview=0 .
C9	Eagle Home Med. Corp., B-402387, 2010 CPD ¶ 82 (Comp. Gen. Mar. 29, 2010) (information the author obtained through a Freedom of Information Act request indicates that the agency cancelled the solicitation and stated that it would resolicit using the size standard that the protester advocated; it is unknown whether protester ultimately received the contract).

Appendix D: Ultimate Outcome Not Yet Identified

D1	Brican Inc., B-402602, 2010 CPD ¶ 141 (Comp. Gen. June 17, 2010).
D2	Powersolv, Inc., B-402534 <i>et al.</i> , 2010 CPD ¶ 206 (Comp. Gen. June 1, 2010).
D3	DynCorp Int'l LLC, B-402349, 2010 CPD ¶ 59 (Comp. Gen. Mar. 15, 2010).
D4	Sci. Applications Int'l Corp., B-401773, 2009 CPD ¶ 229 (Comp. Gen. Nov. 10, 2009) (agency implemented recommendation and then made award to protester, but that award was successfully protested by earlier awardee in <i>Rapiscan Sys., Inc.</i> , B-401773.2 <i>et al.</i> , 2010 CPD ¶ 60 (Comp. Gen. Mar. 15, 2010), and the ultimate outcome has not yet been identified.
D5	Rapiscan Sys., Inc., B-401773.2 <i>et al.</i> , 2010 CPD ¶ 60 (Comp. Gen. Mar. 15, 2010).
D6	Am. Sec. Programs, Inc., B-402069 <i>et al.</i> , 2010 CPD ¶ 2 (Comp. Gen. Jan. 15, 2010).