

## Recommendation 67: Reduce potential bid protest processing time by eliminating the opportunity to file a protest with the COFC after filing at the GAO and require the COFC to issue a decision within 100 days of ordering a procurement be delayed.

### Problem

Currently, the U.S. bid protest system allows for challenges in the procuring agency, GAO, and COFC. The system is further bifurcated into preaward and postaward challenges of procurement decisions.

Complicating matters, challengers that lose at the agency level may bring the same, or a more refined protest to GAO or COFC. Challengers that lose at GAO may bring the same protest to COFC. This possibility creates potential for the agency to have to relitigate the same protest at three different levels—agency, GAO, and then COFC. Relitigating a protest at COFC after an unsuccessful protest outcome at GAO is what is often referred to as *two bites*. Only once COFC rules is a record created that may be subject to appellate review by the United States Court of Appeals for the Federal Circuit at the request of either party.

Allowing protestors to litigate a protest at GAO and, if not satisfied with the GAO decision, file the same or a refined version of the protest at COFC undermines one of the critical aspects of GAO's jurisdictional mandate: "providing for the inexpensive and expeditious resolution of protests."<sup>1</sup> In the current system, GAO cannot conclusively resolve a protest. The option remains to relitigate that very same protest at COFC. For GAO to achieve its statutory purpose, the opportunity for a second protest opportunity at COFC must be eliminated.

### Background

What appears to be the first protest was filed by an attorney on behalf of the English Construction Company at GAO, which at that time was the General Accounting Office.<sup>2</sup> The attorney seeking relief at GAO from irregularities in the bidding process wrote:

*It is respectfully protested that not only is the acceptance of the Sloan Dickinson Corporation's bid without authority of law but results in such unfair and unequal treatment of all the other bidders as to present a situation where without a doubt all bids should be rejected and the work re-advertised in the interest of the Government and for the protection of the rights of contractors in general.<sup>3</sup>*

Prior to the English Construction Company case, the term *protest* was often used by litigants filing actions in the United States Court of Claims. As early as 1889 the Court recognized that a claimant had "protested against the contract being awarded" and "at the time the bids were opened plaintiff protested to the Architect against the award to any one (sic) but his associate."<sup>4</sup> In this particular case, the claimant was not arguing that the government violated certain procurement rules, but that the

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<sup>1</sup> Decisions on Protests, 31 U.S.C. § 3554(a)(1).

<sup>2</sup> Daniel I Gordon, *In the Beginning: The Earliest Bid Protests Filed with the US General Accounting Office*, 13 Public Procurement Law Review 147, 154 (2004).

<sup>3</sup> *Ibid*, 155.

<sup>4</sup> *Schillinger v. United States*, 24 Ct. Cl. 278 at 287 (Ct. Cl. Mar. 18, 1889).

award violated the claimant's patent rights. The court dismissed the claim because there was no actual or implied contract between the claimant and the government.

In the English Construction Company protest, the disappointed bidder also did not have a contract with the government. The GAO solicitor, or general counsel, ultimately concluded that the GAO had the authority to decide protests filed by disappointed bidders but dismissed the protest finding no violation of law.<sup>5</sup> This case marks the first time that an adjudicative body of the federal government exercised jurisdiction over an alleged violation of procurement rules filed by a party that did not have a contractual relationship with the government. Less than 2 years later GAO published its first written bid protest decision.<sup>6</sup>

To decide the first bid protest, the Comptroller General, determined GAO had jurisdiction by virtue of GAO's authority to give advance decisions to certifying and disbursing officers on the legality of payments. Bid protest authority was not codified until, as part of the Debt Reduction Act of 1984, Congress passed the CICA.<sup>7</sup> Subsection D of CICA specifically provided for the Procurement Protest System now codified at 31 USC § 3551, et. seq.

The Comptroller General is charged with "providing for the inexpensive and expeditious resolution of protests" filed at GAO and to issue final decisions within 100 days after the protest is submitted.<sup>8</sup> To be eligible for a stay of award or stay of performance, a postaward bid protests must be filed with GAO no later than 10 days after the date of contract award, or 5 days after the date of a required debriefing, whichever is later.<sup>9</sup> GAO will consider a protest timely if it is filed within 10 days after the protestor knew or should have known of the basis for the protest.<sup>10</sup> In reviewing protests of agency procurement decisions, GAO is limited to whether the "agency's judgement was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations" and whether the agency's action was prejudicial to the protestor.<sup>11</sup> Although bid protests originated at GAO, bidders may now file a bid protest at any or potentially all of three options: the agency, GAO, and COFC.

The agency forum, detailed in FAR 33.103, implementing EO 12979, provides that an interested party may file a protest with the contracting officer and request an independent review of its protest at one level above the contracting officer.<sup>12</sup> The FAR states that the "agency should provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests."<sup>13</sup> Preaward protests must be filed before bid opening and in all other cases the protest must be filed within 10 days after the basis of

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<sup>5</sup> Daniel I Gordon, *In the Beginning: The Earliest Bid Protests Filed with the US General Accounting Office*, 13 Public Procurement Law Review 147, 156 (2004).

<sup>6</sup> *Ibid*, 162.

<sup>7</sup> Pub. L. No. 98-369, Title VII, 98 Stat. 1175 (1984).

<sup>8</sup> Decisions on Protests, 31 U.S.C. § 3554(a)(1). Congress also directed the Comptroller General utilize an express option when appropriate, that would resolve protests within 65 days after filing. Agencies are required to file an agency report with the relevant portions of the administrative record for the procurement in response to a protest within 30 days.

<sup>9</sup> Review of Protests; Effect on Contracts Pending Decision, 31 U.S.C. § 3553(d)(4).

<sup>10</sup> 4 CFR § 21.2(a)(1).

<sup>11</sup> *Ostrom Painting & Sandblasting, Inc.*, B-285244 (Comp. Gen. Jul. 18, 2000).

<sup>12</sup> "Interested party for the purpose of filing a protest" as defined at FAR 33.101 means "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." The same definition is used in 31 U.S.C. § 3551(2)(A). FAR 33.103(d)(4).

<sup>13</sup> FAR 33.103(c).

a protest is known or should have been known.<sup>14</sup> Most often this would be 10 days after the contract award.

COFC was first established as the Court of Claims in 1855 and was responsible for resolving claims during the Civil War. COFC jurisdiction was subsequently expanded by the Tucker Act of 1887, as later amended in 1996 by the Administrative Disputes Resolution Act (ADRA).<sup>15</sup> The Tucker Act provides COFC jurisdiction over claims against the United States founded on, among other things, “any express or implied contract with the United States.” This authority was initially viewed as limited to contract disputes. Later the Court recognized jurisdiction over implied in-fact contracts for which the United States is obligated to fully and fairly consider the proposals of offerors, effectively adopting jurisdiction over protests. The ADRA amended the Tucker Act to provide COFC exclusive jurisdiction, resting jurisdiction away from the district courts, over preaward and postaward bid protests. District Court jurisdiction is often referred to as *Scanwell* jurisdiction, as it arose out of the decision of the Court of Appeals for the D.C. Circuit in *Scanwell Laboratories v. Shaffer*. *Scanwell* jurisdiction was based on the Court’s finding that the Administrative Procedures Act gave disappointed offerors standing to challenge contract awards.<sup>16</sup> The exclusive jurisdiction of COFC became effective on January 1, 2001.<sup>17</sup>

COFC requires a more formal legal process than GAO, although GAO has developed its own set of formal practices over the years. Protests before COFC more closely resemble litigation in the district courts with many of the associated rules of procedure. COFC requires protestors, for example, to be represented by counsel.<sup>18</sup> Some argue that the additional procedures at COFC and the requirement for representation account for the fact that more than 95 percent of DoD protests are filed at GAO.<sup>19</sup> Additional key differences between GAO and COFC include agency representation by the Department of Justice at COFC and the remedies that can be granted. Perhaps most significant is that COFC is authorized to review “any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.”<sup>20</sup> COFC and the United States Court of Appeals for the Federal Circuit have interpreted the “in connection with” phrase to be “very sweeping in scope.”<sup>21</sup> Its review is therefore potentially more expansive and less predictable than GAO’s.

Some might argue that a positive result of COFC’s broader jurisdictional scope is that the court may, and recently has, reviewed agency decisions related to requirements development. The injunction

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<sup>14</sup> FAR 33.103(d)(4).

<sup>15</sup> 28 U.S.C. § 1491. See also what is described as the “Little Tucker Act” at 28 U.S.C. § 1346, which appears to give concurrent jurisdiction to contract related claims under \$10,000 to both the COFC and the District Courts. However, pursuant to § 1356(A)(2) the “Little Tucker Act” does not apply to contracts subject to the Contracts Dispute Act found in 41 U.S.C. §§ 7104 and 7107.

<sup>16</sup> *Scanwell Laboratories v. Shaffer*, 424 F.2d 859, 861-873 (D.C. Cir. 1970).

<sup>17</sup> Pub. L. No. 104-320 §§ 12(a) and (d), 110 Stat. 3874 (1996). The ADRA provided a sunset provision which terminated the district courts on January 1, 2001 unless Congress acted to extend that date. Congress did not take such action.

<sup>18</sup> See RCFC 83.1. COFC allows pro se representation of individuals or families, but corporations and partnerships must be represented by counsel. The Department of Justice (DoJ) represents DoD at COFC.

<sup>19</sup> RAND reported that from 2008-2016 11,459 protests actions were filed at GAO while only 475 were filed at COFC. Mark V. Arena et al., *Assessing Bid Protests of U.S. Department of Defense Procurements*, RAND Corporation, December 2017, 35, accessed November 9, 2018, [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR2300/RR2356/RAND\\_RR2356.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR2300/RR2356/RAND_RR2356.pdf).

<sup>20</sup> There can be significant differences in the interests of DoJ and the interests of DoD in given protest. These differences manifest themselves in more adversarial proceeding before COFC than before GAO. *Space Exploration Technologies Corps. v. US*, No. 14-354C, Order to Grant Temporary Injunction (April 30, 2014), accessed November 26, 2018, [https://ecf.cofc.uscourts.gov/cgi-bin/show\\_public\\_doc?2014cv0354-0-0](https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2014cv0354-0-0).

<sup>21</sup> *Ibid*.

COFC issued as a result of a 2014 SpaceX protest ultimately led to mediation between the U.S. Air Force and SpaceX, resulting in a delay in competing space launch requirements while SpaceX was becoming certified for national security launches.<sup>22</sup> The injunction was not issued because of a violation of procurement laws, but because COFC found that the contract awardee's source of supply may have been restricted by EO.<sup>23</sup> In the Palantir case, the Court ruled the U.S. Army violated a procurement statute by refusing to consider commercially available solutions, such as Palantir's, in procuring a software solution.<sup>24</sup> The Palantir ruling came after Palantir had unsuccessfully protested the procurement before GAO.<sup>25</sup> On its review, COFC set the conditions for agencies to seek broader competition, which should result in substantial benefits to the government, including access to better technology and lower prices.<sup>26</sup> It should be noted that not all share the view that COFC's review in these two cases was ideal, even though, at least in the case of SpaceX, COFC's decision appears to have resulted in savings for the taxpayer and increased capability for DoD.<sup>27</sup>

According to presentations made by GAO and COFC to the Section 809 Panel, in FY 2017 there were 2,596 bid protests filed at GAO governmentwide, with 55 percent being defense-related, and 132 bid protests cases were filed at COFC.

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<sup>22</sup> SpaceX Gets Air Force Certification to Compete for Military Launches, nbcnews.com (26 May 2015).

<https://www.nbcnews.com/science/space/spacex-gets-air-force-certification-compete-military-launches-n364986>.

<sup>23</sup> Space Exploration Technologies Corps. v. US, No. 14-354C, Order to Grant Temporary Injunction (April 30, 2014), accessed November 26, 2018, [https://ecf.cofc.uscourts.gov/cgi-bin/show\\_public\\_doc?2014cv0354-0-0](https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2014cv0354-0-0).

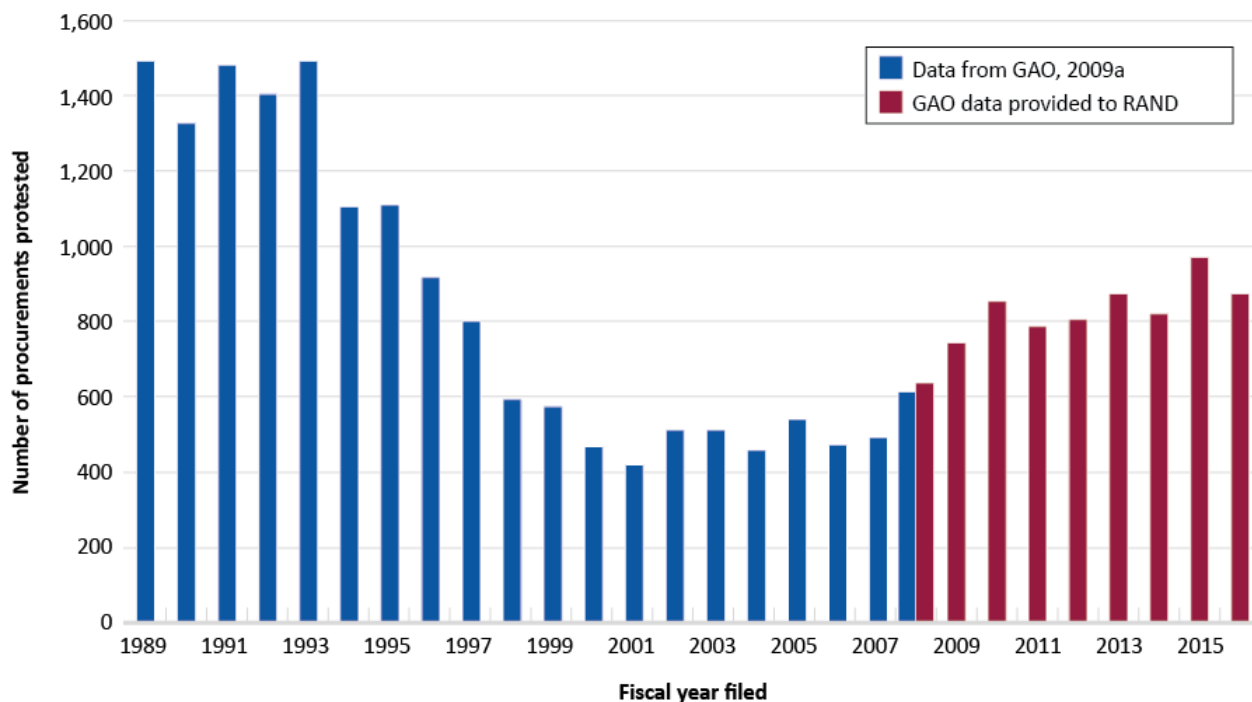
<sup>24</sup> Palantir USG, Inc. v. US, No. 16-748C (Nov 3, 2016), accessed November 26, 2018, [https://ecf.cofc.uscourts.gov/cgi-bin/show\\_public\\_doc?2016cv0784-113-0](https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2016cv0784-113-0).

<sup>25</sup> Ibid.

<sup>26</sup> In March of 2017, Palantir filed a GAO protest of a similar Navy software procurement and the Navy chose to withdraw the solicitation and "re-examine the procurement record and its acquisition approach." Lizette Chapman, *Palantir Wins Bid Protest Against Navy Over Contract Bid Request*, Bloomberg.com (March 28, 2017), accessed November 26, 2018, <https://www.bloomberg.com/news/articles/2017-03-29/palantir-wins-protest-against-navy-over-contract-bid-request>.

<sup>27</sup> Those who do not share the view, believe that it is not COFC's role to second-guess DoD's requirements determinations but only to determine if DoD followed applicable procurement law and did not act arbitrarily or capriciously in acquiring the products and services that meet those requirements.

Figure 6-2. DoD Procurement Protests at GAO, FYs 1989-2016<sup>28</sup>



SOURCE: RAND analysis of GAO, 2009a, and GAO-provided data.  
 RAND RR2356-4.2

Regarding GAO protests, Section 885 of the FY 2017 NDAA directed RAND to create a report, *Assessing Bid Protests of the U.S. Department of Defense Procurements Identifying Issues, Trends and Drivers*, which shows that between FY 2008 and FY 2016, protesters initiated 21,186 actions at GAO.<sup>29</sup> “Protest actions associated with DoD agencies accounted for roughly 60 percent of the total protest actions over this period.”<sup>30</sup> The number of protests filed at GAO has risen slightly since 2007, but according to Figure 6-2, protest numbers are still lower today than they were in the early 1990s.

Among the 11,459 protest actions related to the 7,368 DoD procurements RAND analyzed, 26.9 percent were preaward protests. Among the approximately 8,376 postaward protests, DoD issued a stay override in only 1.2 percent of the cases.<sup>31</sup> Of all GAO protests, 21.2 percent result in a decision by GAO, with only 2.6 percent of the protests being sustained.<sup>32</sup> Approximately 38 percent of Do- related protests result in corrective action.<sup>33</sup> GAO combines these two numbers into an effectiveness rate of

<sup>28</sup> Mark V. Arena et al., *Assessing Bid Protests of U.S. Department of Defense Procurements*, RAND Corporation, December 2017, 30, accessed November 9, 2018, [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR2300/RR2356/RAND\\_RR2356.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR2300/RR2356/RAND_RR2356.pdf).

<sup>29</sup> The RAND study analyzed protest “actions.” Multiple protest actions may be filed related to one procurement. Mark V. Arena et al., *Assessing Bid Protests of U.S. Department of Defense Procurements*, RAND Corporation, December 2017, 27-28, accessed November 9, 2018, [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR2300/RR2356/RAND\\_RR2356.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR2300/RR2356/RAND_RR2356.pdf).

<sup>30</sup> Mark V. Arena et al., *Assessing Bid Protests of U.S. Department of Defense Procurements*, RAND Corporation, December 2017, 29-30, accessed November 9, 2018, [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR2300/RR2356/RAND\\_RR2356.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR2300/RR2356/RAND_RR2356.pdf).

<sup>31</sup> Ibid, 35.

<sup>32</sup> Ibid, 37.

<sup>33</sup> Ibid.

41 percent and argues that because this rate has held rather steady since 2009, it is reasonable to conclude that claims of frivolous protests accounting for the recent increase in protests is overblown.<sup>34</sup>

With regard to the timeliness at both GAO and COFC, the RAND report included a compilation of data on the time it took both GAO and COFC to render decisions.

RAND found that 50 percent of all GAO protests are resolved within 30 days and 70 percent within 60 days. If a protest goes to a decision, however, GAO takes almost the full 100 days to either sustain or deny the protest.<sup>35</sup> If DoD takes corrective action, it typically does so prior to submitting the agency report.<sup>36</sup> See Figure 6-3.

GAO, as part of the Legislative Branch, is only authorized to make recommendations to the Executive Branch agency to remedy a violation of procurement laws or regulations.<sup>37</sup> The executive agency has discretion whether it follows those recommendations, but from FY 2014 through FY 2017, only twice did an agency choose not to follow a GAO recommendation resulting from a sustained protest.<sup>38</sup> Any of the parties to a protest may seek reconsideration of an adverse GAO decision; however, GAO's decisions are not binding on the agency, so there is no path to an appellate review at a court.<sup>39</sup>

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<sup>34</sup> Ibid.

<sup>35</sup> Ibid, 44.

<sup>36</sup> Ibid.

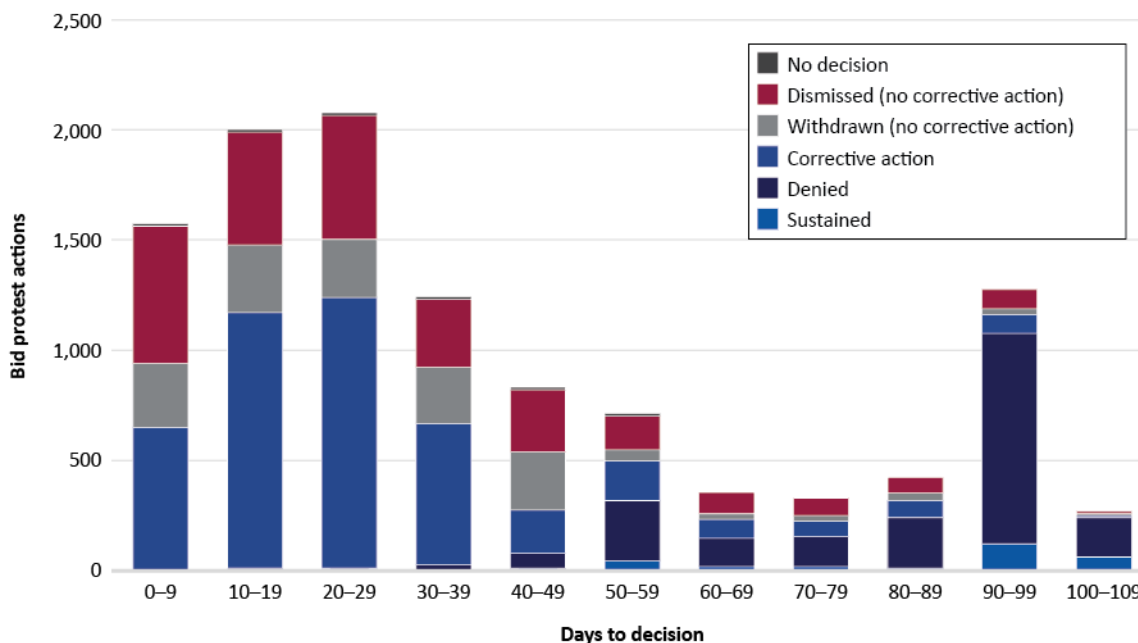
<sup>37</sup> 31 U.S.C. § 3554(b)-(c).

<sup>38</sup> See GAO Bid Protest Annual Report to Congress for Fiscal Years 2014-2017 available at [https://www.gao.gov/legal/bid-protests/reference-materials#annual\\_reports](https://www.gao.gov/legal/bid-protests/reference-materials#annual_reports).

<sup>39</sup> 4 CFR § 21.14.



**Figure 6-3. Days to Close a Protest Action at GAO, FYs 2008-2016<sup>40</sup>**



SOURCE: RAND analysis of GAO data.  
 NOTES: Excludes reconsiderations. All protest cases were resolved within the 100-day window.  
 The interval of 100–109 days includes only decisions that took 100 days.  
 RAND RR2356-4.11

Once a preaward protest is filed with GAO, the contracting officer may not make a contract award for that procurement while the protest is pending.<sup>41</sup> If a postaward protest is filed within a certain timeframe, the contracting officer must suspend contract performance while the protest is pending.<sup>42</sup> This delay in awarding or performance of a procurement under protest is known as a *CICA stay*. It is important to note that the stay may be overridden by the head of the procuring activity based on certain written findings. To award a contract when a procurement is subject to a preaward protest, the head of the procuring activity must make a written finding that “urgent and compelling circumstances which significantly affect the interests of the United States will not permit waiting for the decision of the Comptroller General.”<sup>43</sup> The head of the procuring activity may authorize performance of a contract subject to a postaward protest under the same rationale, or by finding that “performance of the contract is in the best interests of the United States.”<sup>44</sup>

The CICA stay does not apply to agency-level protests, but FAR 33.103 prohibits the award of a contract while a preaward protest is pending and requires the contracting officer to suspend performance of a contract while a postaward protest is pending.<sup>45</sup> As an exception, the agency may determine that there are urgent and compelling reasons for making award or that it is otherwise in the

<sup>40</sup> Mark V. Arena et al., *Assessing Bid Protests of U.S. Department of Defense Procurements*, RAND Corporation, December 2017, 44, accessed November 9, 2018, [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR2300/RR2356/RAND\\_RR2356.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR2300/RR2356/RAND_RR2356.pdf).

<sup>41</sup> 31 U.S.C. § 3553(c)(1).

<sup>42</sup> 31 U.S.C. § 3553(d)(3).

<sup>43</sup> 31 U.S.C. § 3353(c)(2).

<sup>44</sup> 31 U.S.C. §§ 3553(d)(3)(C).

<sup>45</sup> See FAR 33.103(f)(1) and (3).

best interests of the government to proceed.<sup>46</sup> Agency processes may vary in how the *at least one level above the contracting officer* standard of review is applied, but almost all agencies require that legal counsel assess any final decision in response to the agency protest to ensure the legal sufficiency of the decision, even though not required by the EO or the FAR.

The CICA stay does not apply to protests filed at COFC; instead plaintiffs (protestors) must seek a preliminary injunction to prevent the contract from being awarded or the contract performance from beginning or continuing.<sup>47</sup> In practice, the need for a stay is often agreed to by the parties at the outset of the litigation and does not require a formal motion.

Regarding COFC protests, the RAND study shows that between January 2008 and May 2017 protestors filed 475 cases related to DoD procurements.<sup>48</sup> These bid protests make up approximately 20 percent of the court's docket.<sup>49</sup> Of the 475 case filed, only 9 percent were sustained, and RAND found that the sustain rate at COFC has been falling since 2008.<sup>50</sup> As RAND points out, this situation could suggest that "protestors are being less selective in the cases they bring to COFC."<sup>51</sup> The parties appealed to the Federal Circuit in 12 percent of the cases.<sup>52</sup>

Timelines at COFC have been improving over the last few years, with the court issuing a decision within 133 days, on average, of the protester filing the complaint.<sup>53</sup> Yet in the 10-year period, COFC took more than 450 days to close approximately 20 cases.<sup>54</sup> See Figure 6-4.

The time it takes the government to file the complete administrative record with the Court can drive the timeline at COFC. The government took an average of 37 days to file the administrative record with COFC, but in at least one case, it took more than 350 days to file the complete administrative record.<sup>55</sup> Some of COFC's extended timelines can be linked directly to the agency's inability to provide the administrative record in a timely fashion.

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<sup>46</sup> FAR 33.103(F)(1)

<sup>47</sup> Michael J. Shcaengold, T. Michael Guiffre Elizabeth M. Gill, *Choice of Forum for Federal Government Contract Bid Protests*, 18 Fed. Circuit B.J. 243, 310-311 (2009).

<sup>48</sup> Mark V. Arena et al., *Assessing Bid Protests of U.S. Department of Defense Procurements*, RAND Corporation, December 2017, 47, accessed November 9, 2018, [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR2300/RR2356/RAND\\_RR2356.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR2300/RR2356/RAND_RR2356.pdf).

<sup>49</sup> *Ibid.*, 48.

<sup>50</sup> *Ibid.*, 55. In FY 2008 almost 20 percent of the cases heard by COFC were sustained, but in FYs 2012 and 2014-2016, 6 percent or less of protests were sustained. In 2013 there as a spike up to almost 15 percent, but the overall trend is clearly down.

<sup>51</sup> Mark V. Arena et al., *Assessing Bid Protests of U.S. Department of Defense Procurements*, RAND Corporation, December 2017, 54, accessed November 9, 2018, [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR2300/RR2356/RAND\\_RR2356.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR2300/RR2356/RAND_RR2356.pdf).

<sup>52</sup> *Ibid.*

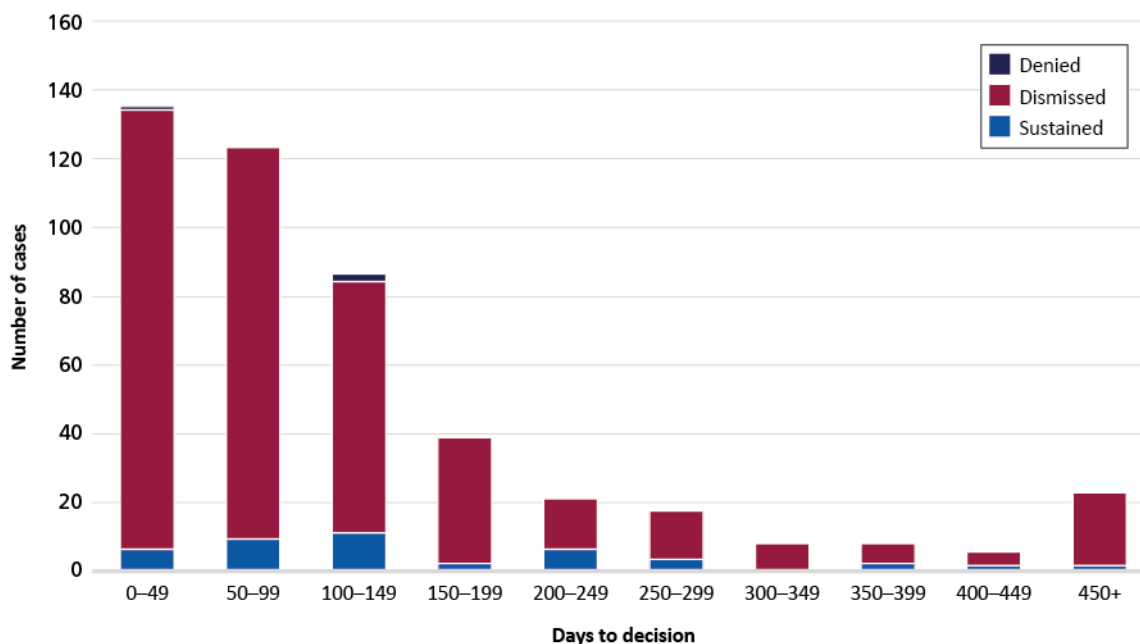
<sup>53</sup> *Ibid.*, 57.

<sup>54</sup> *Ibid.*, 58.

<sup>55</sup> *Ibid.*, 58.



**Figure 6-4. Number of Days to Close Cases with the COFC, CYs 2008-2017<sup>56</sup>**



SOURCE: RAND analysis of COFC data.  
 NOTE: Data cover the period through May 2017.  
 RAND RR2356-5.10

## Discussion

Agency attorneys expressed concern to the Section 809 Panel over the opportunity for a protestor to litigate a protest at GAO and then relitigate that protest at COFC. There is nothing to prevent a protestor from filing a protest with GAO, getting an unfavorable result, and filing the same or a refined version of protest at COFC with the expectation of a different result. The circumstances that create this opportunity for two-bites include GAO being a legislative body, not a court, and a lack of timeliness rules for filing postaward protests at COFC other than the 6-year Tucker Act statute of limitations.<sup>57</sup> RAND concluded that an increase in the number of cases filed at COFC that reference GAO “suggests—but does not prove—that a large fraction of cases at COFC were filed previously at GAO, where the protestor did not achieve the outcome it wanted.”<sup>58</sup> The data RAND relies on shows an increase in the percentage of cases filed at COFC that referenced GAO from less than 20 percent in 2008 to almost 70 percent in 2016.<sup>59</sup> A reference to GAO in a bid protest filed at COFC, however, does not mean the protest was previously adjudicated at GAO. It is just as likely that cases filed at COFC more often references previous GAO opinion(s) in support of the protestor’s position as GAO has developed a robust body of published opinions that COFC might find persuasive.

<sup>56</sup> Mark V. Arena et al., *Assessing Bid Protests of U.S. Department of Defense Procurements*, RAND Corporation, December 2017, 58, accessed November 9, 2018, [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR2300/RR2356/RAND\\_RR2356.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR2300/RR2356/RAND_RR2356.pdf).

<sup>57</sup> *Blue and Gold Fleet L.P. v. United States*, 492 F.3d 1308, 1315 (Fed. Cir. 2007) effectively applied GAO pre-award protest timeliness rules to pre-award protests filed at COFC. COFC also applies the doctrine of laches and dismisses postaward protests that are filed so long after an award that the Government would be prejudiced in mounting a defense.

<sup>58</sup> Mark V. Arena et al., *Assessing Bid Protests of U.S. Department of Defense Procurements*, RAND Corporation, December 2017, 53, accessed November 9, 2018, [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR2300/RR2356/RAND\\_RR2356.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR2300/RR2356/RAND_RR2356.pdf).

<sup>59</sup> *Ibid.*

Because GAO opinions are nonbinding recommendations, they cannot be appealed directly to a court of law, and COFC is not obligated to follow or provide any deference to GAO opinions.<sup>60</sup> COFC requires the agency to produce a more substantial record, and will review the agency's actions and not the propriety of GAO's previous analysis and recommendation. For years DoD has proposed legislation that would eliminate the opportunity for protestors to relitigate at COFC by applying timeliness rules for filing bid protests at COFC patterned after those established for GAO.<sup>61</sup>

Section 822 of the FY 2019 NDAA directed DoD to spend 18 months studying the number of protests filed at both GAO and COFC and the details associated with those cases to include the extent of the procurement delay resulting from each protest. The DoD legislative proposal that resulted in this legislation lists a number of cases for which a protest was adjudicated by GAO, then the protestor filed suit at COFC delaying each procurement by between 12 months and nearly 24 months.<sup>62</sup> In each case, the eventual outcome after months of litigation was the same as the outcome determined by GAO.<sup>63</sup> This recommendation is patterned after the DoD proposal, which was not intended to result in a study. The two-bite process is not expeditious, is costly to all parties involved, and in each of the cases presented in the DoD proposal provided no added value to the system by way of additional accountability.

## Conclusions

An 18-month study is unnecessary to understand that expeditious resolution of a protest cannot happen at GAO if that resolution can be relitigated at a separate forum that is not obligated to give any deference to GAO's findings. Applying timeliness rules to COFC for filing of DoD postaward protests that mirror those that apply to GAO and codifying the preaward timeliness rules currently based on case law, would require protestors to file protests at COFC in a timelier manner and ensure that GAO remains available as an expeditious means of resolving protests. This recommendation would expand on the existing statutory mandate for COFC to "give due regard to the interests of national security and need for expeditious resolution" of actions.<sup>64</sup> In addition, applying GAO's protest resolution timeliness rules to the Court for rendering judgement on a procurement related action, will ensure the Court meets its mandate for expeditious resolution, but only when the Court has ordered a procurement be stayed pending resolution of the action. This approach allows the Court to focus resources on resolving those cases for which performance has been stayed while allowing for longer timelines for cases not subject to an ordered delay.

Protestors would be able to make the choice of protest forum based on the perceived advantages and disadvantages of the different options, and nothing would prevent a protestor from first filing a protest with the agency. The lack of the option to appeal a GAO decision to a court is a consideration that may influence certain protestors to file at COFC rather than GAO, but most of the stakeholders the Section 809 Panel heard from agreed that the vast majority of protestors would choose the more affordable,

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<sup>60</sup> See Raymond M. Saunders and Patrick Butler, *Article, A Timely Reform: Impose Timeliness Rules for Filing Bid Protests at the Court of Federal Claims*, 39 Pub. Cont. L.J. 539, 553 (Spring 2010).

<sup>61</sup> DoD Legislative Proposal, Sec. \_\_\_\_\_. *Timeliness Rules for Filing Bid Protests at the United States Court of Federal Claims*, April 3, 2018, accessed November 27, 2018, <http://ogc.osd.mil/olc/docs/3April2018.pdf>, filename: Bid Protest.pdf.

<sup>62</sup> *Ibid*, 4.

<sup>63</sup> *Ibid*, 4-5.

<sup>64</sup> 28 U.S.C. § 1491(b)(3).

predictable, and efficient GAO forum. This recommendation protects the rights of protestors to choose the forum that will hear their protest, eliminates the potential for extraordinary delays that result from relitigating protests at separate forums, and ensures GAO achieves its statutory purpose.

## **Implementation**

### ***Legislative Branch***

- Amend 28 U.S.C. § 1491(b)(3) to place protest filing timeliness rules on COFC that mirror those established for filing protests at GAO and prevent procurements protested at GAO to later be the subject of an action at the COFC.
- Amend 31 U.S.C. § 3556 to ensure protests may be filed at either GAO or COFC, but not both.

### ***Executive Branch***

- There are no regulatory changes required for this recommendation.

### ***Implications for Other Agencies***

- These changes only apply to DoD protests, but could be expanded to cover protests of national security related procurements at federal government agencies.