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GAO Bid Protests: Trends and Analysis

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Summary

Bid protests on federal government contracts filed with the Government Accountability Office (GAO) have recently received increased congressional scrutiny due to protests of high-profile awards and reports that the number of protests is increasing. The delay of contract award or performance triggered by a GAO protest, coupled with the increasing number of GAO protests, has also prompted concerns about the potential impact of protests upon government agency operations, especially in the Department of Defense.

There has been a significant shift in bid protest trends over the last five years. From FY2001 to FY2008, total government procurement spending, adjusted for inflation, increased at a faster rate (over 100%) than the number of protests filed (35%). This trend reversed itself in FY2008: from FY2008-FY2012 total government spending, adjusted for inflation, decreased more than 10% while total protests increased 45%. This data indicates that, when compared to the rate of government spending, bid protests decreased from FY2001-FY2008, and increased from FY2008-FY2012.

The rate at which GAO sustains protests has also seen a significant shift in recent years. From FY2001-FY2008 GAO sustained protests in 22% of their opinions; from FY2008-FY2012 that number dropped to 18%. This data suggests that while companies are more likely to file a bid protest, they are somewhat less likely to win a bid protest. According to one recent analysis, in FY2010, there was less than a 1% chance that GAO would sustain a protest and the protesting party would go on to win the contract. However, this figure does not account for cases where the agency took corrective action prior to GAO issuing an opinion. Taking into account agency corrective action, one observer estimated a “protester has a 12% chance of ultimately winning a contract award as a result of its protest.”

In addition to GAO sustaining a protest a contracting agency voluntarily acts to correct the allegation charged in the protest. Many analysts consider the increasing willingness of agencies to voluntarily take corrective action as one of the most significant trends in bid protests. In many cases, voluntary action by an agency could indicate that the agency believes a given protest has merit. However, there may be instances when an agency takes corrective action even when it believes the procurement was done properly (e.g., meeting with the protesting party to clarify why the protester lost the competition). The percentage of protesters obtaining relief—either through a protest being sustained or through voluntary action taken by an agency—is called the effectiveness rate. Over the last 5 fiscal years the effectiveness rate has remained relatively stable, averaging 43%.

Companies file protests based on the belief that the government has made a material error in the bidding process. When agencies do not adequately debrief losing bidders, the losing companies may also file a protest to determine why they lost the competition. A number of analysts have also suggested that companies are increasingly likely to file protests when it is in their business interest to do so, even when they do not believe there was an error in the procurement process.

The specter of a company filing a bid protest can influence agency behavior. Fear of protests may motivate agency officials to conduct more rigorous market research, hold a competition instead of awarding a sole-source contract, or conduct more thorough and fair competition. On the other hand, fear of a protest could also prompt officials to try to structure a contract in a manner they

deem less likely to be protested, such as using lowest price technically acceptable award criteria instead of a best-value competition.

DOD contracts are less likely to be protested than those of the rest of government. From FY2008-FY2012, on average, DOD accounted for 70% of government contract obligations but only 57% of protests filed against the federal government. Protests against DOD are sustained at a lower rate than the rest of government. From FY2008-FY2012, 2.6% of protests filed against DOD were sustained by GAO, compared to 5.3% of protests filed against federal civilian agencies. Protests against civilian agencies are also growing at a faster rate than protests against DOD.

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Introduction

Bid protests of federal government contracts filed with the Government Accountability Office (GAO) have received congressional scrutiny due to high-profile protests of awards, including a \$10 billion U.S. military contract for the distribution of food products in Afghanistan (protested by Supreme Foodservice AG), a contract to provide light air support planes to the Afghan military (protested by Beechcraft Corp.), and the Air Force's \$7 billion NetCents 2 technology award (protested by 19 different companies).¹ The increasing number of protests, and the impact protests can have in delaying contract award or performance, have raised concerns regarding the impact of protests on agency operations, especially in the Department of Defense (DOD).²

This report is one of two providing Congress with background on the GAO bid-protest process. It analyzes (1) trends in bid protests filed with GAO, (2) the impact bid protests have in delaying contracts, (3) why companies protest, (4) the most common grounds for GAO to sustain a protest, and (5) trends in bid protests filed against DOD. Its companion report, CRS Report R40228, *GAO Bid Protests: An Overview of Time Frames and Procedures*, provides an overview of the GAO bid protest process, including (1) what issues can be protested; (2) who can file or be a party to a protest; (3) the procedures for bringing and resolving protests; (4) the timeframes involved in protests; (5) the automatic stay of contract award or performance triggered by a protest, as well as the basis for agency overrides of automatic stays and judicial review of agency override determinations; (6) the basis and effects of GAO decisions; and (7) requests for reconsideration and "appeal" of decisions to the Court of Federal Claims.

Background

The Federal Acquisition Regulation (FAR), first issued in 1984, regulates how the federal government acquires goods and services by implementing statutes and codifying uniform policies and procedures for the executive branch.³ The intent of the FAR is to help guide the federal acquisition system to "deliver on a timely basis the best value product or service to the [government], while maintaining the public's trust and fulfilling public policy objectives."⁴

¹ Bid protests are formal, written objections to an agency's solicitation for bids or offers; cancellation of a solicitation; or award or proposed award of a contract. See 31 U.S.C. § 3551(1)(A)-(D). For the Supreme Foodservice protest see GAO bid protest file number B-405400.6 and B-405400.7; see also, Danielle Ivory, "Supreme Foodservice Wins Protest of \$10 Billion U.S. Award," *Bloomberg Business Week*, October 25, 2012. For Beechcraft Corp. protest see GAO bid protest file number B-406170.4; see also, Lance Duroni, "Beechcraft Can't Halt \$428M Afghan Contract for Bid Protest," *Law 360*, April 22, 2013. For the protest of the NetCents 2 procurement, see GAO protest bid file number B-405389; see also, Nick Wakeman, "Air Force makes NetCents 2 awards, now what," April 20, 2013. Number of protests for the NetCents 2 procurement based on data provided by the Air Force.

² In one case, the 110th Congress held hearings on a protested procurement and considered legislation that would have precluded government agencies from making a contested award. See, Air Force Aerial Refueling Tanker Replacement: Hearing before the House Committee on Armed Services, July 10, 2008; KC-X Tanker Re compete Act, H.R. 6426, 110th Congress, at § 2(a).

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

⁴ FAR 1.102.

One of the guiding principles of the FAR, as set forth in the Competition in Contracting Act (P.L. 98-369), is to promote competition for government contracts.⁵

In an effort to protect the integrity of the procurement system, the FAR and federal law provide mechanisms for contractors to object to (protest) contract awards. Generally, any interested party who believes that a contract has been awarded unlawfully can seek relief and contest the award by filing a bid protest.⁶ GAO has been a forum for resolving bid protest disputes for more than 85 years and is the only administrative institution with the authority to hear protests across the federal government; the Court of Federal Claims (COFC) is the only judicial forum for hearing such protests.⁷ Companies can also file a protest with the agency awarding the contract, and under certain circumstances, with specialized entities, such as the Small Business Administration or the Bureau of Indian Affairs.⁸ GAO, however, remains the primary location for resolving government contract bid protests.⁹

GAO Bid Protests

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

⁵ Ibid.

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

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

⁸ See FAR Subpart 19.3.

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

¹⁰ 31 U.S.C. § 3554(a)(1).

¹¹ 4 C.F.R. § 21.1(f).

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

¹³ 4 C.F.R. § 21.7(a).

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

¹⁵ 31 U.S.C. § 3553(c)-(d). However, in certain circumstances, a timely protest will not result in an automatic stay. For (continued...)

GAO may dismiss, deny, or sustain a protest. A dismissal or denial allows the agency to proceed with the challenged procurement. A sustained decision, in contrast, generally disrupts the procurement because GAO accompanies sustainments with recommendations to the agency about the challenged procurement—such as re-competing the contract or amending the existing solicitation.¹⁶ GAO’s recommendations are not legally binding upon the agency, but the agency must notify GAO if it does not fully implement GAO’s recommendations.¹⁷ GAO is, in turn, required to inform Congress of any instances in which agencies do not fully implement GAO recommendations.¹⁸ Agencies almost always comply with GAO recommendations on protested procurements.¹⁹ Protesters who are disappointed with GAO’s decision can seek reconsideration from GAO.²⁰ They can also effectively appeal GAO’s decision by filing a new bid protest with the Court of Federal Claims.²¹

Number of Bid Protest Cases Filed With GAO

In FY2012, GAO received 2,475 cases, an increase of 5% compared to FY2011, and an increase of more than 115% since FY2001.²² When looking at the increase in the number of cases since 2001, it should be noted that in FY2007 Congress expanded GAO’s jurisdiction to include protests of some task/delivery orders,²³ A-76 contracts,²⁴ and Transportation Security Administration contracts.²⁵ In FY2012, more than 200 bid protests were filed as a result of GAO’s expanded jurisdiction. Excluding protests from expanded jurisdiction, the number of cases filed in FY2012 (2,266) increased by 3% compared to FY2011 and 100% since FY2001 (see **Figure 1**).

(...continued)

more information see CRS Report R40228, *GAO Bid Protests: An Overview of Time Frames and Procedures*, by Kate M. Manuel and Moshe Schwartz.

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

¹⁷ 31 U.S.C. § 3554(b)(3).

¹⁸ *Ibid.*

¹⁹ Based on CRS analysis of GAO annual reports to Congress for FY2001-FY2012.

²⁰ 4 C.F.R. § 21.14(a). For more information regarding the GAO bid protest process, please see CRS Report R40228, *GAO Bid Protests: An Overview of Time Frames and Procedures*, by Kate M. Manuel and Moshe Schwartz.

²¹ 31 U.S.C. § 3556.

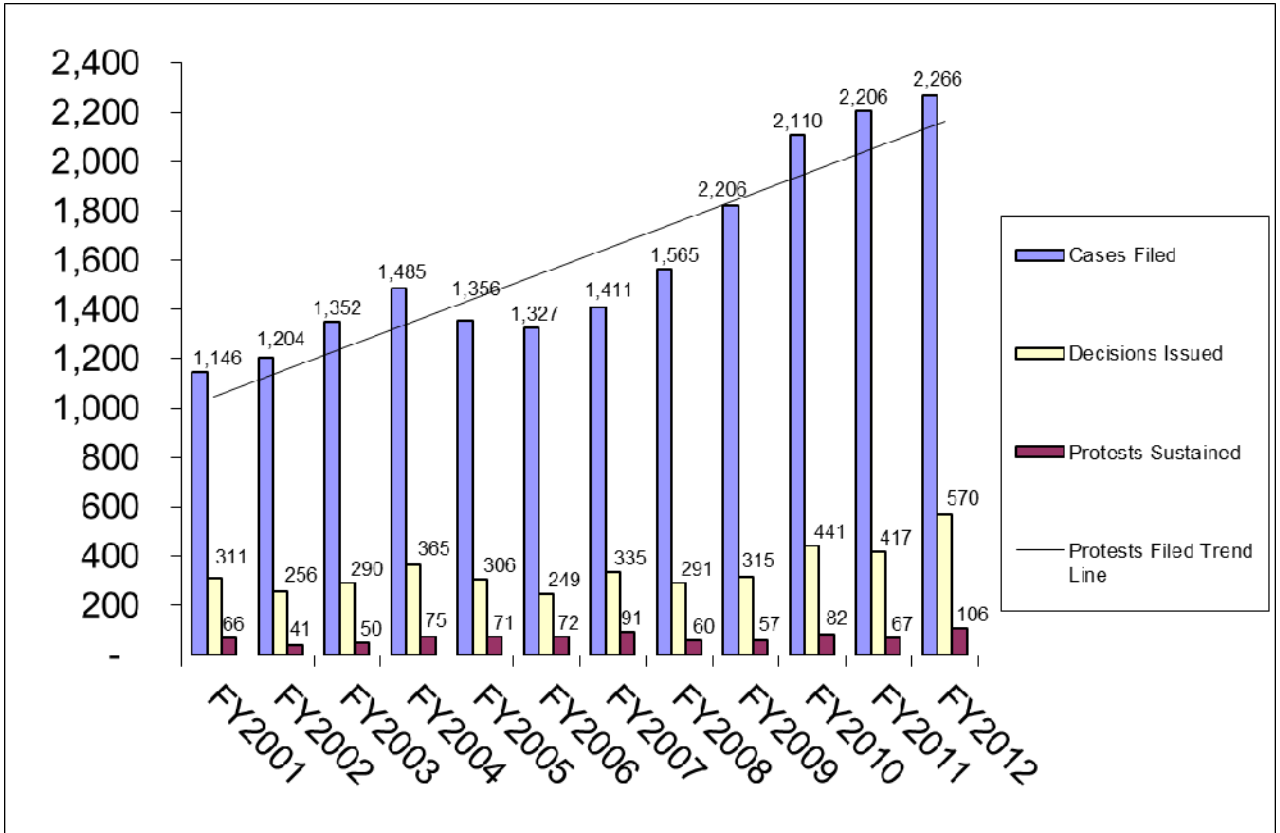
²² CRS analysis of data contained in GAO’s annual reports to Congress.

²³ A task or delivery order contract is a contract that does not procure or specify a specific quantity of services or goods (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks or deliveries during the period of the contract. See FAR 16.501-1. GAO hears protests of task/delivery orders that exceed \$10 million in value.

²⁴ An A-76 contract refers to OMB Circular A-76, which outlines the process for managing public-private competitions to perform functions for the federal government. For more information on GAO jurisdiction for A-76 contracts, see *GAO Bid Protests: An Overview of Time Frames and Procedures*. For more on A-76 contracts, see CRS Report R40854, *Circular A-76 and the Moratorium on DOD Competitions: Background and Issues for Congress*, by Valerie Bailey Grasso.

²⁵ The expanded jurisdiction for all three categories took effect during FY2008 (see Government Accountability Office, “Government Accountability Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts,” 73 *Federal Register* 32427, June 9, 2008). For more information on GAO’s expanded jurisdiction, see *GAO Bid Protests: An Overview of Its Timeframes and Procedures*.

Figure I. Number of Bid Protest Cases Filed With GAO
FY2001-FY2012



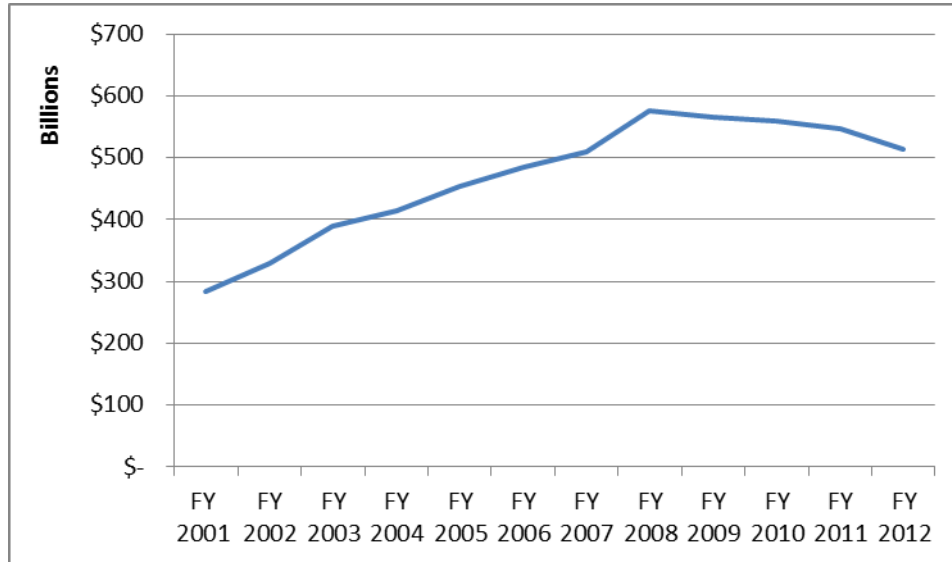
Source: CRS analysis of Comptroller General annual reports to Congress for FY2001-FY2012. See <http://www.gao.gov/decisions/bidproan.htm> for copies of the reports.

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

In statistical terms, the R² value for the linear trend line is 0.823. R² is a statistical term used to describe the goodness of the fit between the trend line and the data points. R² is a descriptive measure between 0 and 1. The closer the R² value is to one, the better the fit of the trend line to the data.

Just as the number of protests filed with GAO has increased, the number—and value—of contract actions by the federal government has also increased (see **Figure 2**). According to the Federal Procurement Data System (FPDS), between FY2001 and FY2012, after adjusting for inflation, the value of total federal government contract obligations increased more than 80% compared to an increase of almost 100% in the number of protests filed over the same period. Over the 12-year period, the number of protests increased at a faster rate than government contract obligations.

Figure 2. Total Government Contract Obligations
FY2012 Dollars



Source: CRS analysis of data from Federal Procurement Data System-Next Generation.

Most protests are dismissed, withdrawn by the protester, or settled prior to GAO issuing an opinion. Since FY2001, on average, GAO issued an opinion on 22% of all cases filed. When GAO issued an opinion, on average, the protest was sustained 21% of the time. As a result, from FY2001 to FY2012, approximately 4% of all protests filed were sustained (see **Figure 5**). However, this data may overstate the number of procurements with sustained protests, as a single procurement can have multiple protests sustained (see discussion “Number of Government Procurements Protested”).²⁶

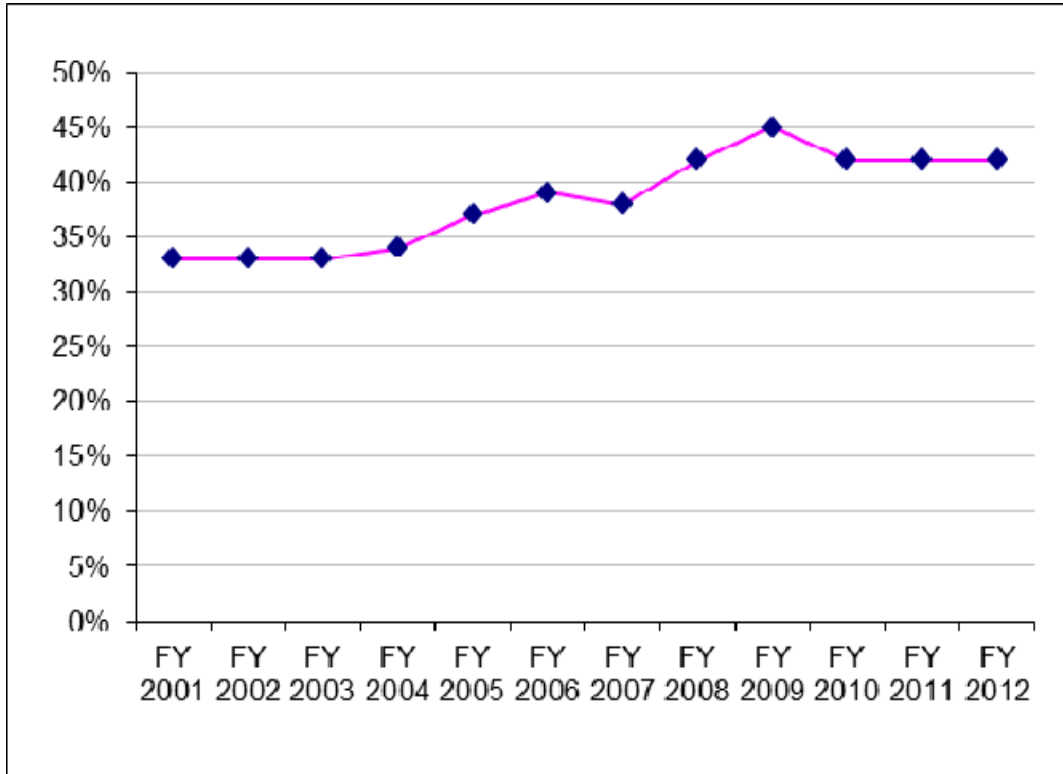
In addition to GAO sustaining a protest, protesters can also obtain relief when a contracting agency voluntarily acts to correct the allegation charged in the protest. For example, if a protester claims that a request for proposal did not accurately describe the contract requirements, the agency could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

The percentage of protesters obtaining relief—either through a protest being sustained or through voluntary action taken by an agency—is called the effectiveness rate. Thus, the effectiveness rate may be a rough measure of the number of protests that have actual or potential merit. From FY2001 to FY2012, the effectiveness rate of GAO protests grew from 33% to 42% (see **Figure 3**). Over the last five fiscal years the effectiveness rate has remained relatively stable, averaging 43%. Some have attributed the increase in the effectiveness rate to the predictable nature of GAO opinions. If GAO decisions are sufficiently predictable to allow agencies to determine how GAO

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

will rule in a given situation, agencies may be more likely to voluntarily take corrective action than wait for GAO to sustain a protest.

Figure 3. Effectiveness Rate of Protests
FY2001-FY2012



Source: CRS analysis of GAO annual reports to Congress for FY2001–FY2012.

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

Number of Government Procurements Protested

The bid protest data reported to Congress, while an accurate reflection of the *work load* assumed by GAO in its function as a forum for bid protests, over-represents the *number* of procurements protested. In those instances where more than one protest is filed in connection to a single procurement, each protest is counted separately and assigned a distinct tracking number. The data GAO provides to Congress also includes cost claims and requests for reconsiderations.²⁷ Between FY2001-FY2012, GAO received 950 requests for reconsideration, which are essentially petitions to reconsider a ruling that it just issued on a bid protest. According to GAO, in only one instance did it grant a request for reconsideration, essentially reversing its prior ruling.²⁸

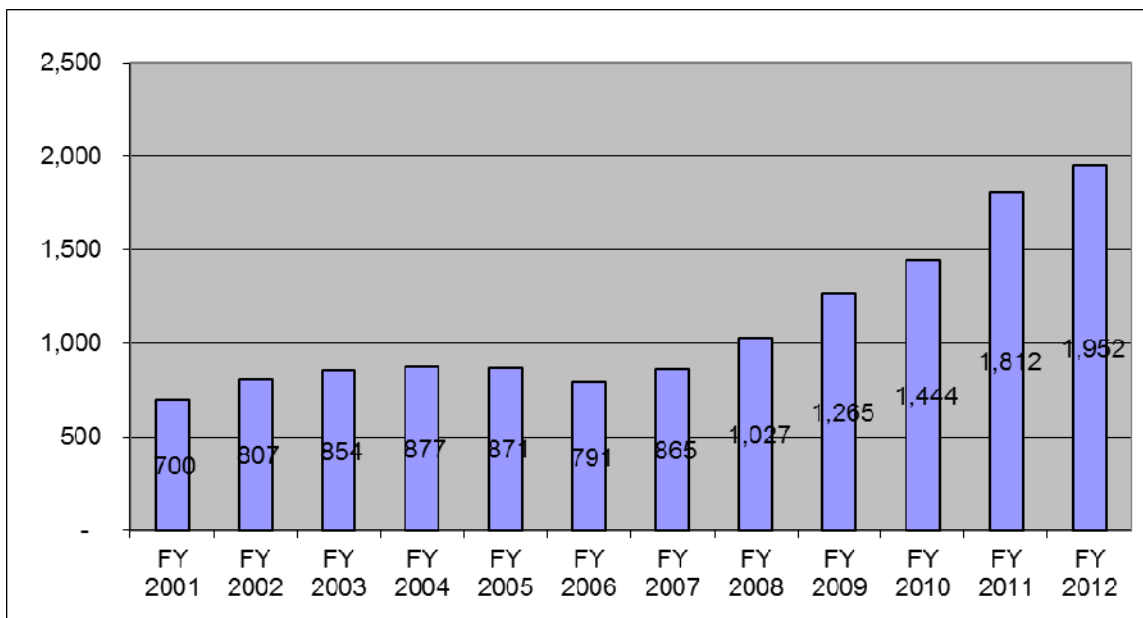
²⁷ Cost claims are GAO recommendations for reimbursement of costs incurred by protesters. See 4 C.F.R. § 21.8(f)(1). A request for reconsideration is when a party involved in the protest requests reconsideration of a bid protest decision. See 4 C.F.R. § 21.14 for more information see CRS Report R40228, *GAO Bid Protests: An Overview of Time Frames and Procedures*, by Kate M. Manuel and Moshe Schwartz.

²⁸ Based on data provided by GAO.

Adjusting for cost claims, requests for reconsideration, multiple filings on a single procurement, and expanded jurisdiction, in FY2012, GAO's workload consisted of 2,266 filings, but only 1,952 procurements were protested. From FY2001-2012, the number of procurements protested increased from some 700 to over 1,950, an increase of over 180% (see **Figure 4**).²⁹

Figure 4. Number of Procurements Protested

FY2001-FY2012



Source: GAO data provided to CRS.

According to the Federal Procurement Data System, the number—and value—of procurements conducted by the federal government also increased. Between FY2001-FY2012, adjusted for inflation, the value of total federal government procurement obligations increased by 80% compared to an increase of 180% in the number of procurements protested over the same period.³⁰

Number of Bid Protests Sustained by GAO

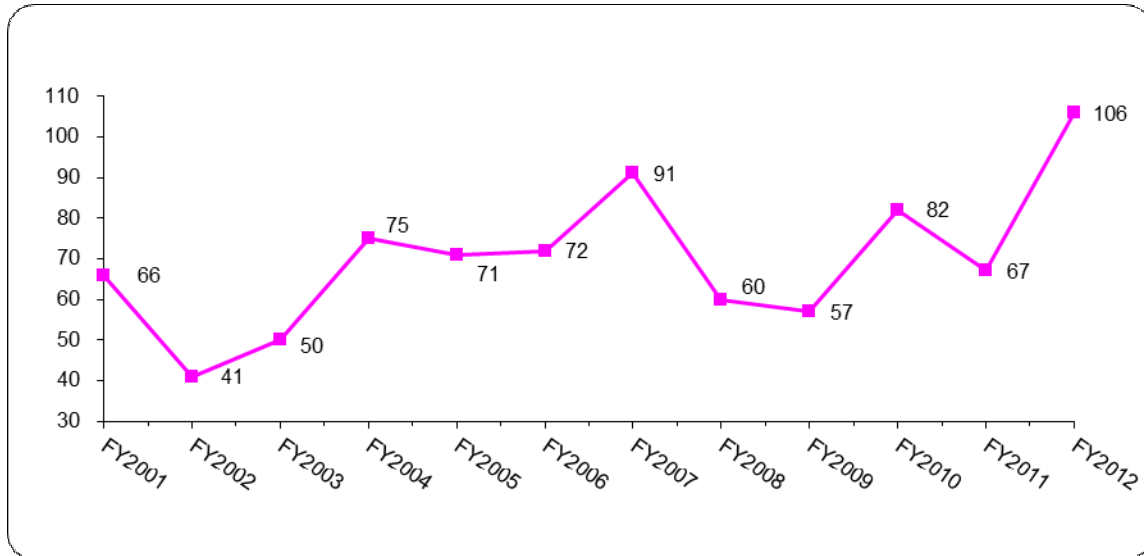
In recent years, the number of bid protests sustained by GAO has trended higher (see **Figure 5**).³¹ However, the percentage of overall protests sustained by GAO has trended lower (see **Figure 6**). This data seems to indicate that the increase in the number of protests sustained is a reflection of the increased number of protests filed, not an increase in the rate of government error.

²⁹ Based on data provided by GAO.

³⁰ Donna Borak, "GAO Says Federal Contract Protests by U.S. Businesses Hit 10-Year High in 2008," *Associated Press Newswires*, December 30, 2008. To compare obligations to procurements protested, obligation data have been adjusted to exclude task and delivery orders, blanket purchase agreement calls, basic ordering agreements, and contract modifications. Deflators for converting into constant dollars derived from the National Income and Product Accounts Table, Table 1.1.4. Price Indexes for Gross Domestic Product.

³¹ Date on protests sustained includes protests emanating from GAO expanded jurisdiction. CRS does not have a breakdown of protests sustained in the expanded jurisdiction cases and therefore cannot adjust the data.

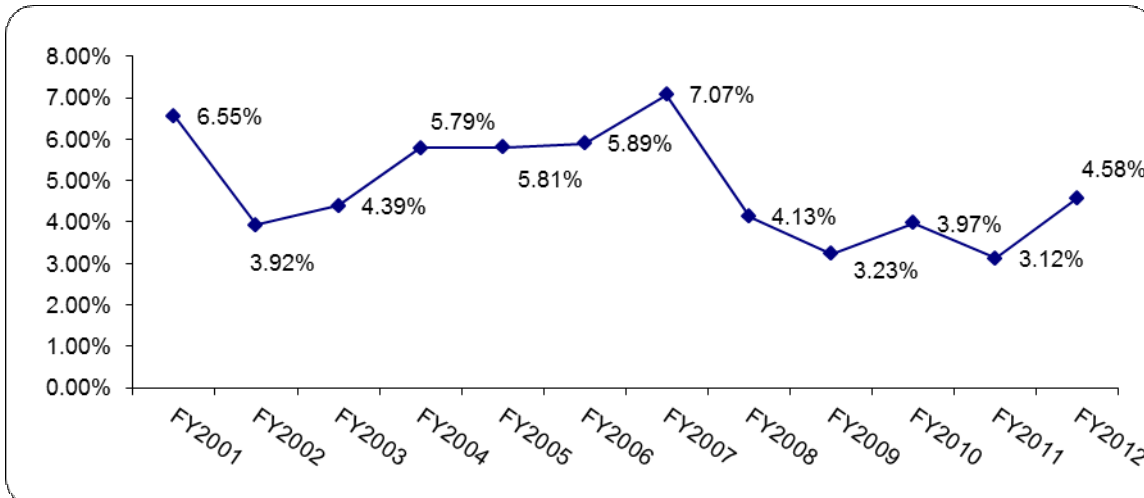
Figure 5. Number of Protests Sustained by GAO
FY2001-FY2012



Source: CRS analysis of Comptroller General annual reports to Congress for FY2001-FY2012.

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

Figure 6. Percentage of Protests Sustained by GAO
FY2001-FY2012



Source: GAO data provided to CRS.

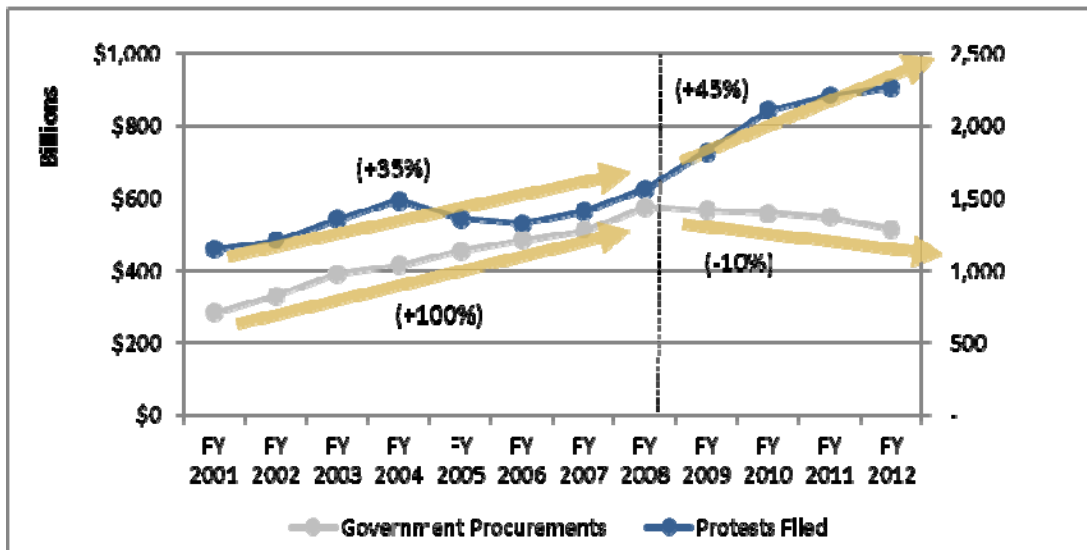
Note: Data does not adjust for multiple filings in single procurement.

Changing Trends in GAO Protests

A closer look at the data indicates a significant shift in bid protest trends over the last five years (see **Figure 7**). From FY2001-FY2008, total government procurement spending, adjusted for inflation, increased at a faster rate (over 100%) than the number of protests filed (35%). This

trend reversed itself in FY2008: from FY2008-FY2012 total government spending, adjusted for inflation, decreased more than 10% while total protests increased 45%. This data indicates that, when compared to the rate of government spending, bid protests decreased from FY2001-FY2008, and increased from FY2008-FY2012.³²

Figure 7. Comparison of Total Contract Obligations to Bid Protests Filed
(FY2012 dollars)



Source: CRS analysis of data provided by GAO.

The rate at which GAO sustains protests has also seen a significant shift in recent years. From FY2001-FY2008 GAO sustained protests in 22% of their opinions; from FY2008-FY2012 that number dropped to 18% (see **Figure 8**). This data seems to indicate that while companies are more likely to file a bid protest, they are somewhat less likely to win a bid protest.

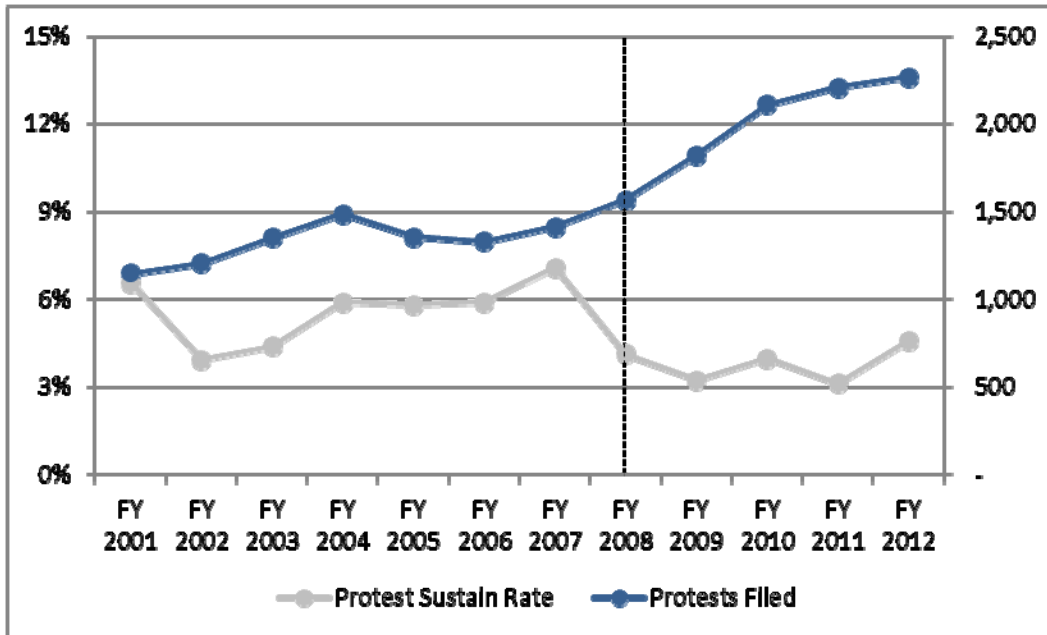
Even when GAO sustains a protest, the protesting company is not guaranteed to win the contract in question. According to one recent analysis, out of some 1,500 procurements protested in FY2010, GAO sustained a protest in only 45 procurements; out of those 45 procurements, in only 8 instances did the protesting party go on to win the contract.³³ In other words, of the original 1,500 procurements protested, GAO sustained a protest and the protesting party went on to win the contract only 0.5% of the time. However, this figure does not account for cases where the agency took corrective action prior to GAO issuing an opinion. Taking into account agency corrective action, one observer estimated that a “protester has a 12% chance of ultimately winning a contract award as a result of its protest.”³⁴

³² An analysis of the number of procurements protested reveals a virtually identical trend. From FY2001-2008, the number of procurements protested increased 47% compared to a 130% increase in government contract obligations (adjusted for inflation). From FY2008-2012, the number of procurements protested increased 90% compared to a decrease of 22% in government contract obligations (adjusted for inflation).

³³ At the time the analysis was published, a final outcome had not been determined in 7 cases. In the remaining 30 cases the contract was awarded to a company other than the protesting party. Daniel I. Gordon, “Bid Protests: The Costs are Real, But the Benefits Outweigh Them,” *The Public Contract Law Journal*, Spring 2013, p. 22-24.

³⁴ Thomas Papson, Jason Carey, and Luke Meier, “The Odds of Winning a Contract After Protesting Are Higher Than (continued...)”

Figure 8. Comparison of Protests Filed to Rate of Protests Sustained



Source: CRS analysis of data provided by GAO.

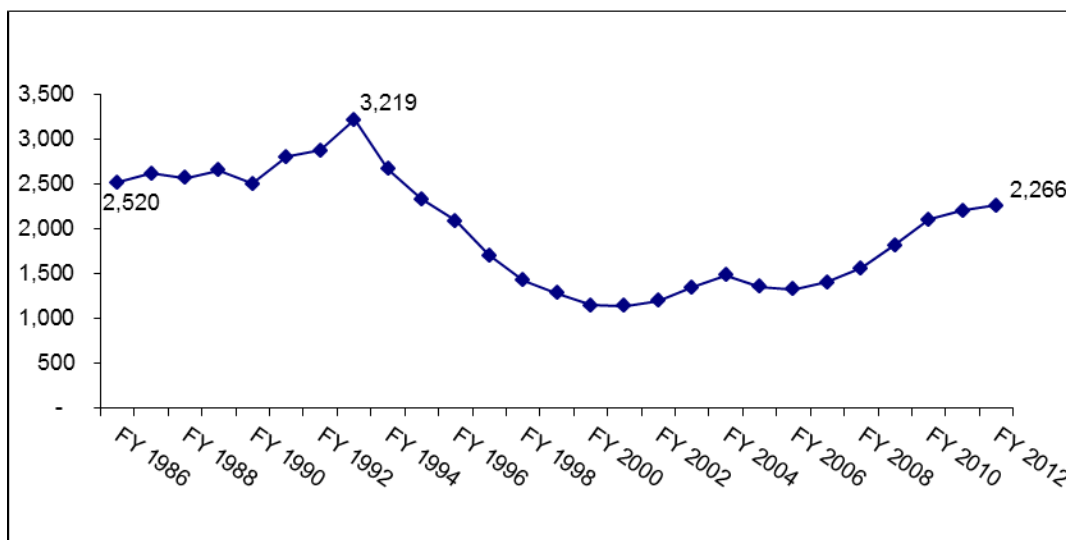
Even though protests have increased significantly over the last five years, the number of protests filed in FY2012 was not very high by historical standards (see **Figure 10**). From FY1986-FY2000, GAO received over 2,200 protests annually.³⁵

(...continued)

You Think,” *The Government Contractor*, vol. 55, no. 16 (April 24, 2013).

³⁵ See Richard D. Lieberman, “Bid Protests at the Court of Federal Claims and the General Accounting Office,” *Federal Contracts Report*, March 31, 1997, and GAO annual report to Congress.

Figure 9. Number of Bid Protest Cases Filed with GAO
FY1986-FY2012



Source: CRS analysis of Comptroller General annual reports to Congress for FY1986-FY2012.

Notes: FY2008-FY2012 data excludes bid protests filed as a result of GAO's expanded jurisdiction over task and delivery orders, A-76 protests, and Transportation Security Administration protests. CRS has not ascertained what precipitated the decrease in bid protests from FY1992-2000.

Why Companies File Bid Protests

Media reports discussing the increase in bid protests over the last few years have fueled the debate over why the number of protests is rising.³⁶ Generally, companies file a bid protest based on the belief that the government has made a material error in the bidding process. According to analysts, the most common government errors cited in protests are poorly written or vague contract requirements, failure to follow the process or criteria laid out in the request for proposals, and failure to adequately document their findings.³⁷ Some analysts have attributed these errors to an inexperienced or insufficiently trained acquisition workforce.³⁸

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

³⁶ See Robert Brodsky, "Bid Protests Reach 10-Year High," *Nextgov.com*, January 5, 2009, <http://www.nextgov.com>; Nick Wakeman, "Bid Protests Keep Rising," *Washington Technology*, November 18, 2011; Jack Moore, "Bid Protests Increase in 2012, Nearing 15-Year High," *FederalNewsRadio.com*, December 17, 2012; Jim McElhatton, "As Budgets Tighten, Contract Attorneys Expect Uptick in Bid Protests," *federaltimes.com*, April 3, 2013.

³⁷ Steve Roemeran, "Why DoD Contractors File Protests, Why Some Don't, and What the Government Can Do," *Defense AT&L*, November/December 2010, pp. 10-11; Steven M. Maser, Vladimir Subbotin, and Fred Thompson, "The Bid-Protest Mechanism: Effectiveness and Fairness in Defense Acquisitions?" (Atkinson Graduate School of Management), pp. 1, 9.

³⁸ Steve Roemeran, "Why DoD Contractors File Protests, Why Some Don't, and What the Government Can Do," *Defense AT&L*, November/December 2010, pp. 9-12; Steven M. Maser, Vladimir Subbotin, and Fred Thompson, "The Bid-Protest Mechanism: Effectiveness and Fairness in Defense Acquisitions?" (Atkinson Graduate School of Management), pp. 9-10; Discussions at the "What's the Value of a GAO Protest?" conference, George Washington University Law School, Washington, DC, June 4, 2013.

Not understanding the award criteria can lead contractors to think they were treated unfairly or that an error was made in the award process.³⁹ A number of analysts and government acquisition officials have attributed confusion on behalf of contractors to poor communication between government and industry, including agencies not adequately debriefing losing bidders after a contract award. When agencies do not adequately debrief losing bidders, the losing companies may file a protest to determine why they lost the competition.

Many analysts have argued that the increase in the value of individual contracts, longer periods of contract performance, policy trends to insource more work, and decreased defense spending make contractors more desperate to win each contract—and more willing to protest an award.

A number of analysts have suggested that companies are increasingly likely to file protests when it is in their business interest to do so, even when they do not believe there was an error in the procurement process. For example, an incumbent contractor might file a protest with GAO to trigger an automatic stay of award.⁴⁰ If a stay of award is granted, the incumbent may get a temporary bridge contract, thereby extending the time it has to work on the contract and generate revenue. Other reasons companies may protest, include hoping to influence the outcome of future competitions (akin to “yelling at the referee”); proving to shareholders and executive managers that they are doing everything they can to win contracts; or even seeking to hurt the competition by delaying a contract award.⁴¹

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

Common Grounds for GAO Sustaining Bid Protests

Knowing what aspect of the contracting process most often results in bid protests being sustained could help agencies focus on improving those aspects of contracting. Such improvements could help reduce the number of protests being filed and sustained. In the FY2013 National Defense Authorization Act (P.L. 112-239), Congress required GAO to include in its annual report the most common ground for sustaining protests.⁴²

³⁹ Steven M. Maser, Vladimir Subbotin, and Fred Thompson, “The Bid-Protest Mechanism: Effectiveness and Fairness in Defense Acquisitions?” (Atkinson Graduate School of Management), pp. 9-10.

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

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

⁴² Section 867.

GAO officials stated that they had not previously tracked the most common reasons protests are sustained.⁴³ Officials believe, however, that in recent years, the most common grounds for sustaining protests were

- agencies not maintaining adequate documentation,
- errors in how agency officials conduct discussions with offerors,
- flaws in cost evaluations, and
- agencies not adhering to established evaluation criteria.

Are Bid Protests Delaying Contracts?

Many analysts and acquisition professionals are concerned that bid protests can delay contract awards for weeks and even months, costing millions of dollars and preventing government from getting the goods and services it needs when it needs them. In an August 2007 memorandum, John Young, then Acting Under Secretary of Defense for Acquisition, Technology and Logistics, wrote that DOD

has experienced a significant increase in the number of competitive source selection decisions which are protested by industry. Protests are extremely detrimental to the warfighter and the taxpayer. These protest actions consume vast amounts of the time of acquisition, legal, and requirements team members; delay program initiation and the delivery of capability.⁴⁴

Identifying which protests tend to experience the longest delays—and working to minimize such delays—could help the government save hundreds of millions of dollars and receive the goods and services it needs when it needs them.

Bid Protests Trigger an Automatic Stay

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

⁴³ Based on conversations with GAO officials, December 17, 2008 and April 29, 2010.

⁴⁴ Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Under Secretaries of Defense, August 24, 2007, available at <http://acquisition.navy.mil/rda/content/download/5263/23838/file/enhancing%20competition%201-18-2008.pdf>.

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

⁴⁶ 31 U.S.C. § 3553(c)(1).

⁴⁷ 31 U.S.C. § 3553(d)(1).

⁴⁸ 31 U.S.C. 3553(c) and (d).

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

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

If an agency believes that circumstances are such that further delay in contract execution will have severe consequences, CICA provides grounds for agency overrides of automatic bid-protest stays.⁵⁰ According to CICA, agencies may override stays when there are “urgent and compelling circumstances” that impact the interests of the United States and when performing the contract is in “the best interests of the United States.”⁵¹ According to data provided by GAO, in FY2012, agencies sought to override CICA stays in 33 procurements (2% of procurement protests).⁵²

GAO and the 100 Day Time Limit

GAO is required to complete its involvement in a protest within 100 calendar days of the protest being filed.⁵³ According to GAO officials, GAO has never failed to complete its work within the required time period. In many cases the protest is resolved much earlier, most often as a result of the protesting party withdrawing the case or GAO dismissing the protest.⁵⁴ GAO can dismiss protests that do not meet filing guidelines and can issue a summary decision on a protest at any time.⁵⁵ Cases that are withdrawn or dismissed are generally resolved within approximately 30 days.⁵⁶

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

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

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

⁵⁰ 31 U.S.C. § 3553(c)(1) & (d)(3). See *Ameron, Inc. v. U.S. Army Corp. of Eng'rs*, 607 F. Supp. 962, 974 (D.N.J. 1985) (describing the override as a “built-in safety value to prevent undue harm” to the government).

⁵¹ See *GAO Bid-Protests: An Overview of Its Timeframes and Procedures*.

⁵² Data provided by GAO. For more information on overrides see *GAO Bid-Protests: An Overview of Its Timeframes and Procedures*.

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

⁵⁴ Based on conversation with GAO officials, December 17, 2008. According to officials, even in those cases where a supplemental protest is filed, the supplemental protest is generally resolved within 100 days of the filing of the original bid protest.

⁵⁵ 4 C.F.R. § 21.10(e).

⁵⁶ Based on data provided by GAO.

In FY2012, approximately 58% of all GAO protests were dismissed, withdrawn by the protester with no further action, or resolved in the agency's favor. Generally, for reasons discussed above, these protests delayed a contract for fewer than 100 days.

In FY2012, approximately 37% of all GAO bid protests were resolved based on the protestor obtaining some form of relief from the agency subsequent to filing a protest—but prior to GAO issuing an opinion.⁵⁷ For example, an agency may recognize an error in the contracting process and choose to re-compete the contract. In these cases, protests are usually withdrawn as a result of the settlement between the parties or dismissed by GAO because the basis for the protest has been resolved. While the withdrawal or dismissal of these protests generally occurs well within 100 days, it could take more than 100 days to provide relief. For example, if an agency agrees that an error occurred and opts to re-compete a contract, conducting a new competition could take more than 100 days. However, in cases where procurement law was violated, agency action to correct the violation may exceed 100 days. The extensive delay may be appropriate to ensure a fair and lawful competition. CRS was unable to obtain data on the extent to which such bid protests delay the award or execution of a contract.⁵⁸

DOD Contracts and Bid Protests

The number of bid protest cases against DOD has increased from approximately 603 in FY2001 to 1,207 in FY2012, an increase of 100% (see **Figure 10**).⁵⁹ Most of the protests against DOD were dismissed, withdrawn by the protester, or resolved prior to GAO issuing an opinion. In FY2012, GAO issued an opinion on 20% of these bid protests.⁶⁰ Fewer still are sustained by GAO. From FY2001 to FY2012, on average only 4% of protests against DOD were sustained by GAO (see **Table A-1** for number of protests filed and sustained, by service).

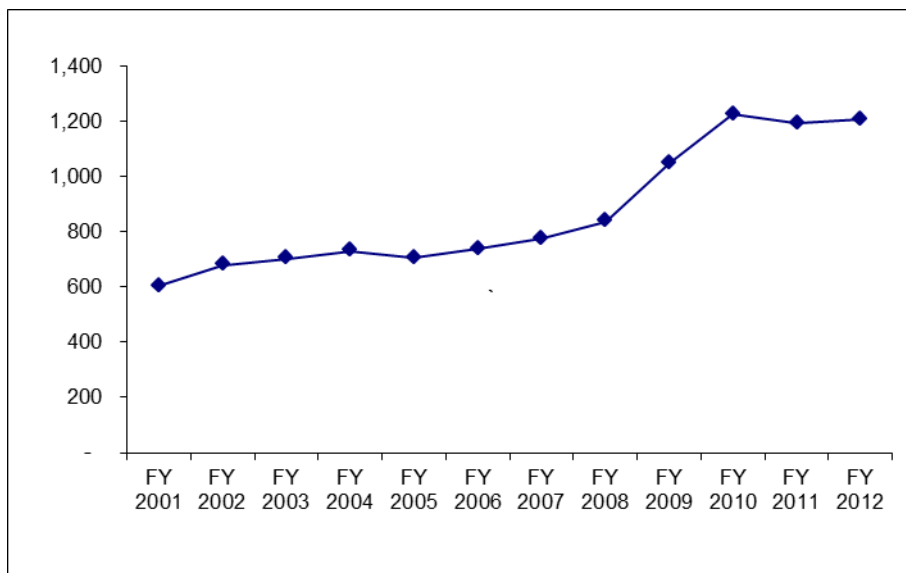
⁵⁷ In the remaining 5% of cases, GAO sustained the protest, often leading to agency action that took more than 100 days to implement GAO's recommendations.

⁵⁸ According to GAO, in FY2012, protests resolved prior to the agency filing a report with GAO (in response to the protest allegation) concluded, on average, in 22 days. Protests where GAO issued an opinion took the longest to resolve (average 92 days).

⁵⁹ Data based on protests closed in a fiscal year and not on protests filed in a fiscal year. Data also includes protests from expanded jurisdiction. Some protests can be filed in 1 year and closed in the following year; this data does not reconcile with information contained in GAO's annual report to Congress because the annual report to Congress reports on protests filed in a given year and not on the number of protests closed.

⁶⁰ Data provided by GAO.

Figure 10. Number of Bid Protests Against DOD
FY2001-FY2012



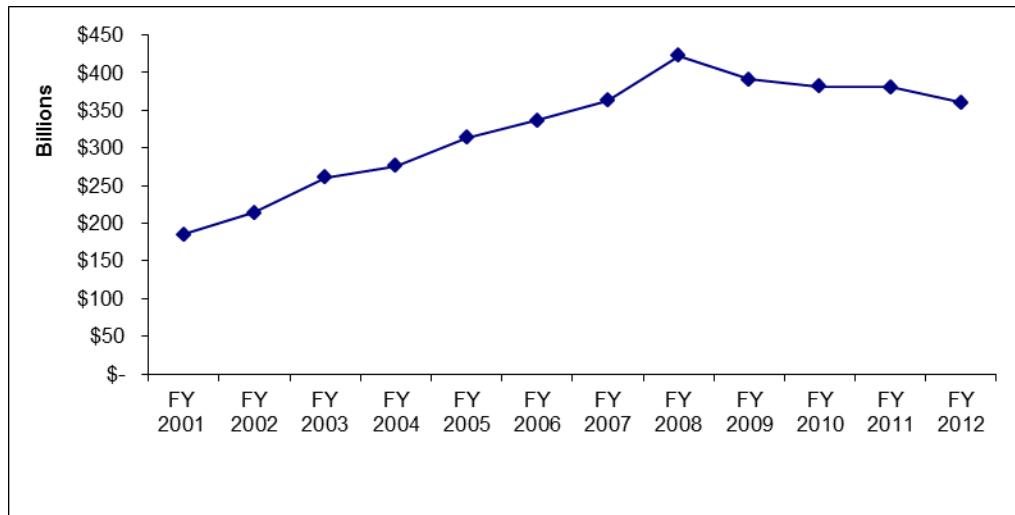
Source: CRS analysis of GAO data.

Note: Based on number of protests closed.

Just as the number of protests filed against DOD has increased, the number—and value—of contract actions signed by DOD has also increased (see **Figure 11**).⁶¹ According to the Federal Procurement Data System, between FY2001 and FY2012, after adjusting for inflation, the value of total DOD contract obligations increased 95% compared to an increase of 100% in the number of protests filed in the same period.

⁶¹ Deflators for converting into constant dollars derived from Office of the Under Secretary of Defense (Comptroller), Department of Defense, National Defense Budget Estimates, Department of Defense Deflators—TOA, 'Total Non-Pay.' CRS was unable to ascertain whether the average dollar value of a contract increased, decreased, or remained constant. Such information would help evaluate more precisely the correlation between the increase in bid protests and the increase in contract spending.

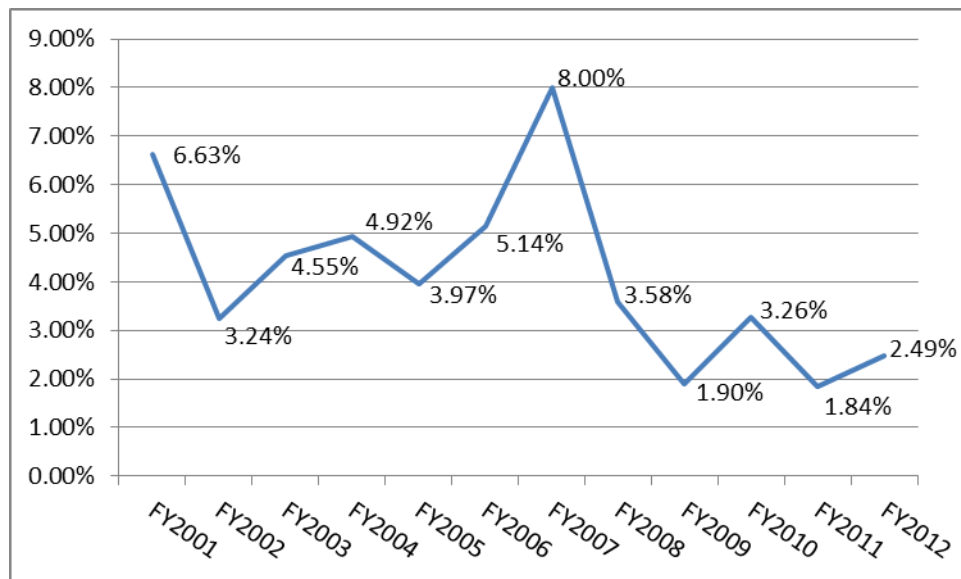
Figure 11. DOD Contract Obligations
(FY2012 Dollars)



Source: CRS analysis of data from FPDS.

In recent years, the percentage of protests sustained against DOD has decreased (see **Figure 12**). From FY2001-FY2008, GAO sustained on average more than 5% of all protests filed; from FY2008-FY2012, GAO sustained approximately 2.6% of all protests filed.

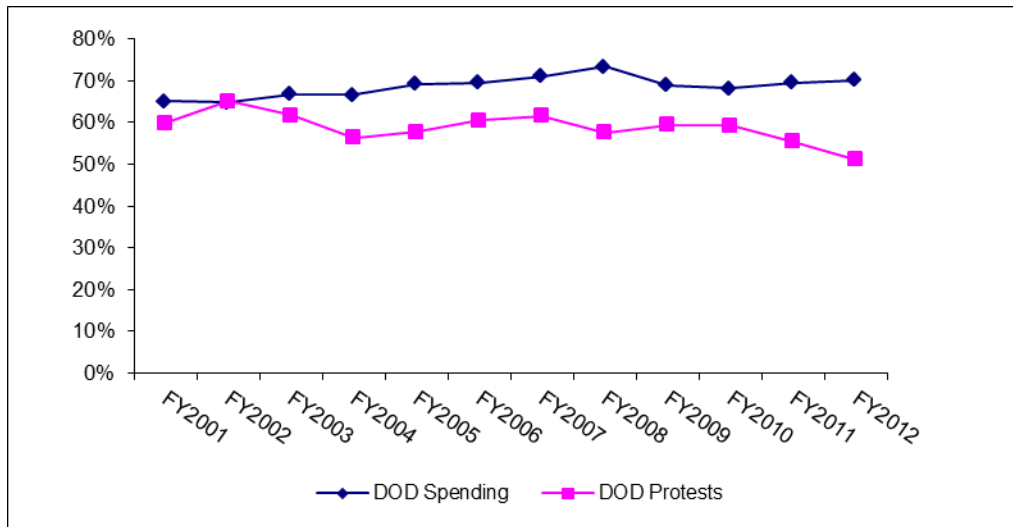
Figure 12. Percentage of Protests Against DOD Sustained by GAO
FY2001-2012



Source: Data provided by GAO.

DOD procurements are less likely to be protested than those of the rest of government. From FY2008 to FY2012, on average, DOD accounted for 70% of total government contract obligations but only 57% of total protests against the federal government (see **Figure 13**).

Figure 13. DOD Share of All Federal Contract Spending and Bid Protests
FY2001-FY2012



Source: Spending data obtained from FPDS. Protest data obtained from GAO.

Note: Data from FY2001-FY2012 based on number of protests closed.

Protests against DOD are also sustained at a lower rate than the rest of government. From FY2008-FY2012, 2.6% of all protests against DOD were sustained by GAO, compared to 5.3% of all protests against federal civilian agencies. Protests against civilian agencies are also growing at a faster rate than protests against DOD. From FY2001-FY2012, the number of DOD procurements that were protested increased 149% (from 421 to 1,057) compared to an increase of 221% (from 279-895) for civilian agencies (see **Table 1**).

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

	DOD	Civilian Agencies
FY2001-2012	149%	221%
FY2008-2012	71%	115%

Source: Data provided by GAO.

Appendix A. Bid Protests Filed Against DOD

Table A-1. Bid Protests Against DOD

Based on Cases Closed

	Total Cases	Protests Sustained	Percent sustained	Total Cases	Protests Sustained	Percent sustained
	Air Force			Army		
FY2001	145	5	3%	224	12	5%
FY2002	136	4	3%	254	11	4%
FY2003	154	2	1%	229	20	9%
FY2004	132	3	2%	324	18	6%
FY2005	127	13	10%	282	7	2%
FY2006	148	13	9%	334	12	4%
FY2007	136	16	12%	323	22	7%
FY2008	154	9	6%	396	9	2%
FY2009	189	3	2%	503	7	1%
FY2010	205	2	1%	566	23	4%
FY2011	180	1	1%	547	10	2%
FY2012	235	4	2%	530	17	3%
Average	163	6	4%	376	14	4%
	Marines			Navy		
FY2001	25	6	24%	116	7	6%
FY2002	16	-	0%	120	5	4%
FY2003	20	-	0%	148	1	1%
FY2004	14	3	21%	112	11	10%
FY2005	12	1	8%	135	5	4%
FY2006	32	1	3%	101	4	4%
FY2007	20	-	0%	129	8	6%
FY2008	22	2	9%	126	9	7%
FY2009	43	2	5%	149	3	2%
FY2010	30	-	0%	182	6	3%
FY2011	37	-	0%	179	3	2%
FY2012	34	-	0%	179	5	3%
Average	25	1	6%	140	6	4%
	Defense Logistics Agency			DOD (Misc)		
FY2001	80	3	4%	13	7	54%
FY2002	119	-	0%	35	2	6%
FY2003	107	1	1%	46	8	17%

	Total Cases	Protests Sustained	Percent sustained	Total Cases	Protests Sustained	Percent sustained
FY2004	115	1	1%	34	-	0%
FY2005	121	-	0%	29	2	7%
FY2006	70	3	4%	54	5	9%
FY2007	97	-	0%	70	16	23%
FY2008	87	1	1%	53	-	0%
FY2009	127	3	2%	39	2	5%
FY2010	171	3	2%	72	6	8%
FY2011	174	3	2%	76	5	7%
FY2012	119	-	0%	92	4	4%
Average	116	2	1%	51	5	12%

Source: CRS analysis of data provided by GAO.

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

Appendix B. Data on Expanded Jurisdiction

Congress expanded GAO's jurisdiction in FY2007 to include protests on some task and delivery orders, A-76 contracts, and Transportation Security Administration contracts. The effective date for GAO to hear protests of certain task and delivery orders was May 27, 2008. The effective date for GAO to hear protests of A-76 contracts was January 28, 2008. The effective date for GAO to hear protests of Transportation Security Administration actions was June 23, 2008. For more information, see 73 *Federal Register* 32427, June 9, 2008, and CRS Report R40228, *GAO Bid Protests: An Overview of Time Frames and Procedures*, by Kate M. Manuel and Moshe Schwartz.

Figure B-1. Expanded Jurisdiction Data

	FY08 Expand Actual	Start of Jurisdiction	Run Rate Inflator	FY08 Run Rate Estimate	FY09 Actual	FY10 Actual	FY11 Actual	FY12 Actual
Task Orders	49	27-May-08	1.67	82	139	189	147	209
A-76	30	28-Jan-08	1.66	50	16	0	0	0
TSA	8	30-Jun-08	1.25	10	13	0	0	0
	87			141	168	189	147	209

Source: GAO.

Notes: Run rate inflator for FY2008 calculated based on start date of jurisdiction.

Table B-I. Comparison of Protests Closed Against DOD vs. Civilian Agencies

	Civilian		DOD		Civilian + DOD					
	Total Cases	Decisions Sustained	Total Cases	Decisions Sustained	Total Cases	Total Sustained	Percent Sustained Civilian	Percent Sustained DOD	% Cases from DOD	% Sustain from DOD
FY2001	404	26	603	40	1,007	66	6%	7%	60%	61%
FY2002	365	19	680	22	1,032	41	5%	3%	65%	54%
FY2003	435	18	704	32	1,139	50	4%	4.5%	62%	64%
FY2004	565	39	731	36	1,296	75	7%	5%	56%	48%
FY2005	517	43	706	28	1,223	71	8%	4%	58%	39%
FY2006	483	34	739	38	1,222	72	7%	5%	60%	53%
FY2007	483	27	775	62	1,258	89	6%	8%	62%	70%
FY2008	616	30	838	30	1,454	60	5%	4%	58%	50%
FY2009	716	37	1050	20	1,766	57	5%	2%	59%	35%
FY2010	841	42	1,226	40	2,067	82	5%	3%	59%	49%
FY2011	957	45	1,193	22	2,150	67	5%	2%	55%	33%
FY2012	1,151	78	1,207	30	2,358	108	7%	2.5%	51%	28%

Source: CRS Analysis of data provided by GAO.

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

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