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A Closer Look at Bid Protests in the Department of Defense

Jack Chutchian—is a second year Master of Public Policy candidate at the Sanford School of Public Policy at Duke University. He graduated from Northeastern University with a BA in political science and international affairs before spending two years in Huntsville, AL, with Teach for America. Upon graduation in May 2018, he will use his policy analysis education to work for a consulting firm in Washington, DC. [jzc6@duke.edu]

Abstract

Congress tasked the Section 809 Panel with streamlining the acquisition process at the Department of Defense (DoD; Section 809 Panel, 2018). Streamlining the acquisition process should make government more efficient and attract new business partners. The notion of large private contractors excessively protesting at the Government Accountability Office (GAO) is a potential barrier to entry for new businesses.

This paper will explore congressional attempts to limit protests filed at the GAO through reforms in the National Defense Authorization Act for Fiscal Year 2018. The reform instituted a three year “losers pay” pilot program that requires contractors with unsuccessful protests to reimburse the DoD for costs incurred in processing certain protests. Based on my analysis of the data collected and a concurrent study by the RAND Corporation, this reform will not achieve the desired result of streamlining the acquisition process.

Instead, the data and information gathered from the GAO, Federal Business Opportunities, and stakeholder interviews suggest that condensing protests into a singular review would streamline the acquisition process more effectively. Companies sometimes file multiple protests at the GAO regarding a single solicitation to obtain information about why they lost the bid. This policy alternative will make the federal government transparent for current contractors and potential partners.

Introduction

The Section 809 Panel was tasked by Congress in the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 to streamline and improve the defense acquisition process. The panel is divided into 10 teams. Team Four addresses “Barriers to Entry.” This team evaluates and removes regulatory, cultural, or bureaucratic barriers to entry at the Department of Defense (DoD) marketplace (Section 809 Panel, 2018).

The Section 809 Panel proposes that the current bid-protesting environment may prevent new companies from conducting business with the DoD. Subsequently, bid-protest reforms became a policy initiative of Team Four “Barriers to Entry.” Administrative costs and the loss of time connected to contract protests may outweigh the potential benefits of new companies bidding on and securing DoD contracts. This paper will analyze the protesting landscape at the Government Accountability Office (GAO) regarding DoD contracts and make appropriate recommendations based on the findings of this and other scholarly research.



Policy Question

This paper addresses the following policy questions: Considering the passage of Government Accountability Office (GAO) Bid Protest Reforms in the FY 2018 NDAA, what is the potential effect on protests of DoD contract awards? Furthermore, are there other policy options that the Section 809 Panel should consider outside of the FY 2018 NDAA recommendations? And if so, how would these alternatives alter the protest process to make it easier for private contractors to do business with the federal government?

Background

In this section, I will address the original intent of contract protests and current trends in the contract protest at the GAO, and I will summarize the RAND Corporation findings. This section will not cover court systems' protest history nor current trends because there is no uniform procedure in which the courts adjudicate bid protests.

Original Intent of the Contract Protest

Bid protesting to the federal government began in the 1920s shortly after the creation of the GAO. Losing companies wrote to the agency complaining that government contracts had been unjustly awarded to competitors and petitioned the GAO to review and mitigate the dispute (Gordon, 2013). The GAO delivered its first decision in 1926 when the agency intervened in a trucking contract regarding the Panama Canal. The Autocar Sales and Service Company petitioned the GAO to review a contract awarded to Federal Motor Truck Company. The contract stipulated certain truck features unique to Federal Motor Truck Company vehicles and the Autocar Sale and Service Company sought remedies for the unfair favoritism (GAO, 2017). Federal Motor Truck Company kept the contract, yet the GAO's review and decision prevented future contracts from containing specific modifications that favored one private company.

Since the original Panama Canal bid protest presented to the GAO in 1926, several laws have attempted to funnel the protest process into a single government agency or system. However, these laws always included a sunset clause or were replaced by new laws with different methods of bid protest. While the GAO has accepted and reviewed bid protests since the 1920s, the current definition of a bid protest was not formalized until the Competition in Contracting Act (CICA) of 1984. Federal Agencies amended the Federal Acquisition Regulation (FAR) in 1995 to reflect CICA. FAR Part 33 Section 101 Definitions contains the four conditions in which a losing bidder may provide a written objection:

- (1) A solicitation or other request by an agency for offers for a contract for the procurement of property or services.
- (2) The cancellation of the solicitation or other request.
- (3) An award or proposed award of the contract.
- (4) A termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract. ("Rules and Regulations," 1995)

Protests provide businesses a valuable mechanism that serves two purposes. First, protests allow entities doing business with the government to air their grievances about government contracting processes and seek relief. Without this mechanism, private entities may be less inclined to do business with the federal government. Second, the protest mechanisms hold procurement officials and government agencies accountable by highlighting and correcting inaccuracies in the bid process (Manuel & Schwartz, 2016).



CICA established the GAO as the venue for contractors to address perceived errors in the bid process by all federal agencies. Upon a protest receipt to the GAO, the law stipulated that activities pertaining to the awarded contract and within the scope of the legislation must be suspended until the GAO rules on the case. Federal agencies may override the stay if agencies determine urgent and compelling circumstances will not permit waiting for the GAO's decision, or if performance of the contract is in the best interests of the United States (Manuel & Schwartz, 2016). Originally, the law established a deadline of 90 working days for the GAO to issue a ruling on a protest. Newer laws extended the deadline to 100 days. Furthermore, the awarding agency (DoD, Energy, etc.) may take up to 60 days to administer the GAO's recommendations (Manuel, 2011).

Current Trends

The White House recently confirmed the need for acquisition reform in the President's Management Agenda for 2018. The agenda indicated a problem with acquisition managers who are more concerned with compliance than best business practices.

Major acquisitions (over \$50 million) often fail to achieve their goals because many federal managers lack the program management and acquisition skills required to successfully manage and integrate large and complex acquisitions into their projects. These shortcomings are compounded by complex acquisition rules that reward compliance over creativity and results. (President's Management Council, 2018)

This sentiment will be discussed later while analyzing stakeholder interviews from government officials and private companies.

Prior to FY 2018, reports from the Congressional Research Service, the GAO, and others described trends in the *number* of protest cases brought to the GAO by the DoD and other government agencies. However, little information existed about the cost of these protests. The sheer number of protests in recent years has doubled, specifically for the DoD. Protests regarding DoD contracts increased from approximately 600 in FY 2001 to 1,200 in FY 2015 (Manuel, 2011). The GAO did not necessarily issue a decision on each DoD bid-protest. However, each protest carried the possibility of an operations delay which could negatively impact the business and the warfighter.

Some analysts within the government and defense industries suggest that the mere threat of a bid protest affects both the bidding business and the awarding agency business practices and workflow. Maser and Thompson (2010) assert that "rejected offerors have incentives to threaten to protest as a way to obtain a percentage of the award as a subcontractor to the winner, or to obtain a settlement payment from the agency to avoid a protest." However, little statistical evidence supports the threat of protesting claim, and it will, therefore, receive limited attention in the following research. Some reports suggest that "contractors knowingly file frivolous protests with GAO in order to harass their competitors and delay awards, or in the hopes of obtaining short-term contracts from the government while the GAO is reviewing the protest" (Defense Industry Daily, 2010).

The U.S. Air Force's CSAR-X contract awarded to Boeing to supply its H-47 Helicopter in 2006 illustrates some of the cost and problems associated with excessive protests. Two of the losing bidders, Sikorsky and Lockheed Martin, filed protests with the GAO over the Boeing award. The GAO sustained the protests and recommended a re-compete of the CSAR-X program. More protests followed this contract over the next two years. Protests challenged the Air Force's compliance with the GAO's recommendations and for fuel-cost specifications in the Request for Proposal, among others. The Pentagon's Inspector General began an audit into "key performance parameters" in the CSAR-X RFP in



March 2008. Due to the Pentagon audit's adverse findings, Defense Secretary Gates decided to cancel the program "for convenience" in April 2009. Commander of the Air Force Materiel Command, General Bruce Carlson estimated that the GAO protest process cost the USAF \$800 million in the CSAR-X RFP case (Defense Industry Daily, 2010). It is unclear how General Carlson calculated his estimate, and this paper challenges his estimate later on.

RAND Corporation Findings

The RAND Corporation published a study in February 2018 regarding bid-protest reform in the federal government titled *Assessing Bid Protests of U.S. Department of Defense Procurements* (Arena, 2018). Their research into protests was much broader than my narrow GAO focus. Their four research questions were as follows:

1. When bid protests are filed, what is the nature and value of these contracts, and what is their share of total defense procurement contract dollars?
2. What are the outcomes of bid protests?
3. How do protesters perceive post-award debriefings in which the reasons for the contract award are explained?
4. When a protester is successful, how often is voluntary corrective action taken by the DoD contracting agency? (Arena, 2018)

The report produced three key findings. First, RAND discovered that despite a steady increase in bid protests filed by DoD contractors, the overall number of protests remains small. Second, RAND found that DoD agencies and the private sector had differing views on the bid protest process. Last, RAND noted the different trends between the GAO and court-filed protests (Arena, 2018). I intentionally omitted court-filed protests in my research. The GAO has nearly a century of policies in place that govern their bid-protest process, and their data is relatively accessible to the public. Omitting court filed bid protests will not take away from the research question nor the solutions provided. Furthermore, courts have multiple appeals systems which companies can file protests within. Retrieving data from multiple court systems was too large in scope for this project.

RAND recommended six courses of action for the federal government. Five of the recommendations are most applicable to my research:

- Enhance the quality of post-award debriefings. Improved debriefings will give disappointed bidders a better understanding of the evaluation and award process and help them better analyze potential protest grounds before filing a protest.
- Be careful in considering reductions to the timeline for resolving bid protests filed with the U.S. Government Accountability Office (GAO) from 100 to 65 days. Seventy percent of protest cases are resolved within 60 days, but complex decisions typically take close to the 100-day limit.
- Be careful in considering restrictions on task-order protests. These protests are more likely to be sustained or involve corrective action, so they may fill an important role in improving the fairness of DoD procurements.
- Consider implementing an expedited process for adjudicating protests involving contracts valued under \$0.1 million. The costs to adjudicate



these protests under the current system may exceed the value of the procurements. (Arena, 2018)

Analysis of FY 2018 NDAA

A *Washington Post* article on October 10, 2017, reported on a new provision of the Senate's version of FY 2018 NDAA that would institute penalties for unsuccessful protests on companies with annual revenues over \$100 million (Davenport, 2017). The law would encompass every DoD bid and subsequent protest filed through the GAO. The DoD is by far the largest contracting agency within the federal government which is why the Senate included the protest reform targeting the DoD within its version of the FY 2018 NDAA. The penalties were intended to dissuade large companies with annual revenues over \$100 million from excessive protesting at the GAO. The theory was that if a large company was fined for losing every protest it filed, companies would be more selective when filing future protests. The GAO would subsequently spend less time and money reviewing the smaller protests.

The proposed Senate reform may have caught the attention of defense companies like Boeing, Lockheed Martin, Raytheon, Northrop Grumman, General Dynamics, and other defense contractors whose annual revenues exceed \$100 million. Senate staffers and others working on protest reform believed that these companies' wealth would encourage them to protest more frequently in absence of any penalty (Contractor, personal communication, March 19, 2018). The relevant wording of Section 821 of the Senate's version of FY 2018 NDAA is presented below:

(a) Payment Of Costs For Denied Protests.—

(1) **IN GENERAL.**—A contractor who files a protest described under paragraph (2) with the GAO on a contract with DoD shall pay to DoD costs incurred for processing a protest at the GAO and the DoD.

(2) **COVERED PROTESTS.**—A protest described under this paragraph is a protest—

(A) all of the elements of which are denied in an opinion issued by the GAO; and

(B) filed by a party with revenues exceeding \$100 mil during the previous year.

(b) Withholding Of Payments Above Incurred Costs Of Incumbent Contractors.—

(1) **IN GENERAL.**—Contractors who file a protest on a contract on which they are the incumbent contractor shall have all payments above incurred costs withheld on any bridge contracts or temporary contract extensions awarded to the contractor as a result of a delay in award resulting from the filing of such protest.

(2) **DISPOSITION OF WITHHELD PAYMENTS ABOVE INCURRED COSTS.—**

(A) **RELEASE TO INCUMBENT CONTRACTOR.**—All payments above incurred costs of a protesting incumbent contractor withheld pursuant to paragraph (1) shall be released to the protesting incumbent contractor if—



- (i) the solicitation that is the subject of the protest is cancelled and no subsequent request for proposal is released or planned for release; or
 - (ii) if the Government Accountability Office issues an opinion that upholds any of the protest grounds filed under the protest.
- (B) RELEASE TO AWARDEE.—Except for the exceptions set forth in subparagraph (A), all payments above incurred costs of a protesting incumbent contractor withheld pursuant to paragraph (1) shall be released to the contractor that was awarded the protested contract prior to the protest.
- (C) RELEASE TO DoD IN EVENT OF NO CONTRACT AWARD.—Except for the exceptions set forth in subparagraph (A), if a protested contract for which payments above incurred costs are withheld under paragraph (1) is not awarded to a contractor, the withheld payments shall be released to the DoD and deposited into an account that can be used by the Department to offset costs associated with GAO bid protests. (S. 115-125, 2017)

Section 821 was added by the Senate after the House passed its own NDAA without the protest reform language.

The GAO, Congress, and the DoD repeatedly called for protest reform through speeches and reports over the last decade. However, most defense contractors criticized the proposed legislative change while acknowledging only some companies would be affected.

Steven Koprince is a managing partner at Koprince Law LLC and primary contributor to SmallGovCon, a legal news and notes outlet for small government contractors. He identified potential pitfalls with the Senate reform in a July 2017 article. Koprince questioned whether a problem of “frivolous” protest existed. He noted that over 99% of contracts are not protested and that even though protesters have the burden of proof, overall GAO protests are successful roughly 40% of the time (Koprince, 2017). However, Koprince failed to separate the DoD from other government agency protests which could illustrate a different environment of protesting.

Koprince also failed to elaborate on what constitutes a “successful” protest at the GAO. There are five decisions the GAO can issue for a protest: Granted, Sustained, Withdrawn, Dismissed, or Denied. If he considers “successful” protests as those which the GAO issued a final ruling in favor of the protestor (Sustained or Granted), then my data will show a significantly lower success rate than 40%. His definition of success is further muddled by the government’s ability to take “corrective action.” When the government takes corrective action to address an error or misstep, many protests which are then “Dismissed” or “Withdrawn” could be considered a success. “Denied” protests go through the full protest process and their grounds are rejected in the final decision by the GAO (Arena, 2018).

Koprince wrote the article during the Senate sessions on the NDAA in the summer of 2017. He identified a serious problem with the legislation; the bill would allow the protesting company to recover its profits under two circumstances: if the solicitation in question was cancelled, or if the GAO issued an opinion to uphold any of the protest grounds filed under the protest. These caveats could have allowed protestors to rescind their protests on the last



day or recoup their money if just one small piece of the protest was upheld. While the reconciled bill eliminated withholding profits, Koprince's other reservations about the reform still hold true. Even considering the flaws highlighted by Koprince and others, Section 821 of the Senate's FY 2018 NDAA was the first attempt at fixing a perceived problem with bid protests in the federal government.

On November 16, 2017, the NDAA left conference committee with a diluted protest reform provision. The final version of the NDAA for FY 2018 submitted to the President for signature contained three major differences from Section 821 of the Senate version of the bill. First, the resolved bill changed the "loser pays" protest reform from a law affecting all companies with revenue exceeding \$100 million into a three-year pilot program beginning in 2019 applicable only to companies with revenues over \$250 million. Second, the reconciled bill no longer withheld profits from incumbent contractors who protest contract awards. Third, the bill eliminated the accelerated GAO decision time frame. The GAO's 100-day decision deadline remained intact (Lasky, 2017). Section 827: Pilot Program on Payment of Costs for Denied Government Accountability Office Bid Protests of the final FY 2018 NDAA is presented below:

- (a) **PILOT PROGRAM REQUIRED.**—The Secretary of Defense shall carry out a pilot program to determine the effectiveness of requiring contractors to reimburse the Department of Defense for costs incurred in processing covered protests.
- (b) **DURATION.**—The pilot program shall—
 - (1) begin on the date that is two years after the date of the enactment of this Act; and
 - (2) end on the date that is five years after the date of the enactment of this Act.
- (c) **REPORT.**—Not later than 90 days after the date on which the pilot program under subsection (a) ends, the Secretary shall provide a report to the Committees on Armed Services of the House of Representatives and the Senate assessing the feasibility of making permanent such pilot program.
- (d) **COVERED PROTEST DEFINED.**—In this section, the term "covered protest" means a bid protest that was—
 - (1) denied in an opinion issued by the Government Accountability Office;
 - (2) filed by a party with revenues in excess of \$250,000,000 (based on fiscal year 2017 constant dollars) during the previous year; and
 - (3) filed on or after October 1, 2019 and on or before September 30, 2022. (H.R. 2810, 2017)

This diluted reform still attempts to address the perceived problem of too many costly bid protests from DoD contractors. However, after the FY 2018 NDAA was signed into law, the RAND Corporation produced its report that dispelled the notion of excessive protesting. RAND found that the share of contracts protested remains very small—less than 0.3%. A significant number of these protests concerned smaller-value contracts (\$0.1 million or less; Arena, 2018). Larger contractors are not prevented from bidding on smaller contracts but if RAND found that more protests stem from smaller solicitations, then Section 827 of the FY 2018 NDAA may have missed the mark.



Another problem with the compromise reform in FY 2018 NDAA is how the government will determine the cost of protesting to the government. The vague language in FY 2018 NDAA does not specify what constitutes reimbursement to “the Department of Defense for costs incurred in processing covered protests” (H.R. 2810, 2017). There is no payment to companies who won the protests but lose time working on it due to stays from the bid-protest review at the GAO. It remains unclear what “costs incurred” to the DoD are and how the pilot program plans to calculate this fine.

In FY 2018 NDAA, the federal government attempted to address the perceived problem of excessive protesting by large government contractors. Congress initially tried to impose fines and withhold profits from large protestors but the final reform in FY 2018 NDAA imposes unclear and highly targeted fines. The three-year pilot program that penalizes large companies for unsuccessful protests will undergo further analysis using GAO and Federal Business Opportunities (FBO) data later in this paper.

Data and Methods

Introduction

To operationalize my research question, I looked at data provided by the GAO and FBO’s Opportunities list. FBO is a free web-based portal which allows vendors to review federal procurement opportunities over \$25,000 (Department of Commerce, 2012). The government website also retains all posted solicitations over the last calendar year in its archives. This data provided the average value of protests at time of award decided by the GAO, the decisions the GAO ruled regarding the protests, and the number of companies protesting DoD contracts. I linked high value at time of award with large companies because those businesses have greater resources to bid and perform on high value contracts. Trends in bid protest values and companies who file them provided by GAO and FBO data will help analyze the potential effects of GAO Bid Protest Reform in FY 2018 NDAA. The analysis will also provide useful information to propose new reforms that could help Section 809 fulfil its duty to streamline the acquisition process.

Patterns in Bid-Protesting Methodology

The GAO maintains a database that records every protest brought to the Office in recent years. I could not record the thousands of DoD subdivision protests due to time and resource constraints. Instead, I first noted all Department of Defense contracts and recognized that the subdivision of Defense Logistics Agency contained the largest number of protests. I proceeded to select the similar Army Material Command and Navy Supply Systems command to complete my three subdivision choices.

After identifying the three subdivisions, I decided on the timeframe and type of protest to research. By restricting the search to Closed Docket DoD protests decided within the last calendar year, I could record the success rate of DoD protests. I initially selected FY 2016 because it would have contained the most updated record of GAO protests within a solid timeframe. However, once I began recording data, many of the older protests disappeared from the GAO server. To ensure a complete cache of bid protests, I changed my parameters to protests decided between January 17, 2017, through January 24, 2018, for the Defense Logistics Agency; January 26, 2017, through January 24, 2018, for Army Material Command; and February 8, 2017, through January 30, 2018, for Navy Supply Systems Command. These slightly different date parameters may have missed a small number of decided protests, but that number should not affect the findings. I recorded 472 closed bid protests from the GAO from the three DoD subdivisions.



I then populated 472 closed bid protests from the GAO with the “value at award” of each solicitation found in the Federal Business Opportunities (FBO) archived database. I searched other databases including the Federal Procurement Data System (FPDS), but the site contained less accessible information than FBO. Some incomplete or missing solicitation numbers from the GAO prevented me from obtaining the value at award information for some protests. However, many more protests on my GAO list displayed complete solicitation numbers but were undiscoverable on the FBO website. In total, I found value at award information on 159 out of 472 closed docket protests. The 33.7% completion rate may be caused by incorrect data entry by the GAO or FBO or more likely, the initial solicitation notice was over a year old. Per FBO’s support department, “some of the notices could have been archived more than a year ago, (and FBO’s) archive database only looks back 365 days. Also, fbo.gov does not communicate directly with the GAO site, (GAO is) independent. So, it is possible that some of the notices were not posted on FBO” (Federal Business Opportunities, 2018).

Once the matrix was completed, I analyzed the data to determine if larger contracts (which are likely to be bid upon by companies with revenues over \$250 million) are in fact protested more than smaller contracts (under \$250 million). Analyzing the closed-docket protests over the last year served to test a perception that the rate of protest varies with size. Government officials tend to believe that a major factor in determining a company’s protest strategy is the sheer size of the contract. A higher value contract results in more profit so larger companies will use their extra assets to protest the valuable contracts (Contractor, personal communication, March 19, 2018). Furthermore, the analysis of whether there is a higher rate of protest among larger companies will operationalize my research question. Answering the rate of protest question by comparing the rates side by side will determine whether the proposed policy change targeting only large companies is more effective in saving federal money than small companies.

Results

GAO and FBO Findings

I was unable to find the value at time of award for over 66% of the 472 closed docket protests between the three subdivisions. Part of the reason for the lack of dollar value information may be because companies filed protests during the solicitation process and before the contract was awarded. Additionally, the GAO and FBO regularly miscommunicate and share inconsistent information with each other according to a GAO official contacted for this research.

Nevertheless, there was still valuable information among the protests with incomplete information. The 159 completed closed-docket bid protests provided a valuable snapshot of the perceived problem regarding excessive protest filing at the GAO from DoD contractors. The average value at time of award for the bid-protest in this research was \$188,703,404.28. Two DoD subdivisions reflected similar average values at time of award: Defense Logistics Agency averaged \$23,222,383.76 among their 39 protests and Navy Supply Systems Command averaged \$31,690,997.52 among their 24 protests. Army Material Command was a significant outlier given the average value at the time of award was \$292,140,760.84 within the data set of 97 protests. Attributing to the inflated Army Material Command average values are multiple bid protests over the same high-value DoD solicitation. I will discuss the inflated Army Material Command average values in the analysis section.



As mentioned earlier, the GAO designates five possible outcomes for a protest: Dismissed, Withdrawn, Denied, Granted, and Sustained. The GAO generally sustains protests where it determines that the contracting agency violated procurement statutes or regulations, unless it concludes that the violation did not prejudice the protester (GAO, 2018). In the fully populated 472 protests, 381 protests did not go through the entire protest process. 293 were Dismissed and 88 were Withdrawn. Ninety-one protests were completed: 85 were Denied, five were Sustained, and one was Granted. This information is represented in Figure 1.

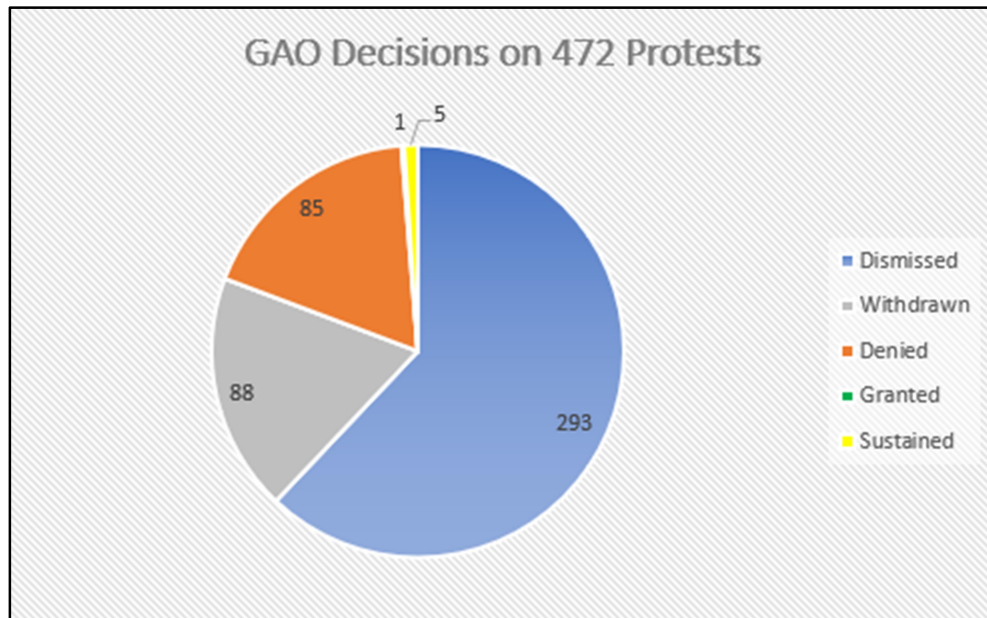


Figure 1. GAO Decisions on 472 Protests

In the 159 complete protests dataset, 127 protests did not go through the entire protests process. Ninety-nine were Dismissed, and 28 were Withdrawn. Thirty-two protests were completed with 31 Denied and only one protest Sustained (see Figure 2).

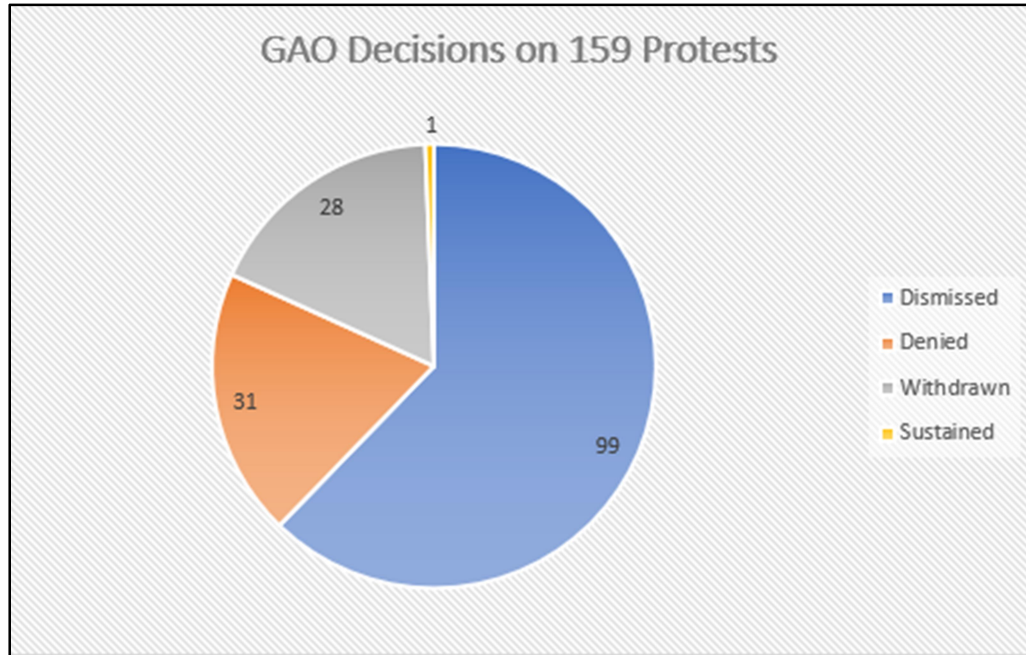


Figure 2. GAO Decisions on 159 Protests

The average value of the 127 Withdrawn and Dismissed protests was \$219,999,788.66. The average value of the 31 Denied protests was \$75,506,673.33; and the value of the singular Sustained protest was \$3,161,460.00.

My data showed average values at time of award for Army Material Command nearly 10 times higher than Defense Logistics Agency or Navy Supply Systems Command. There were protests with a very high “Maximum Potential Contract” ceiling for Army Material Command solicitations. Fifty-four of the 97 closed docket bid protests were valued at over \$100 million. However, those 54 protests represented only seven different solicitations. One \$500 million solicitation for electronic computing technology, W52P1J-15-R-0122, generated 34 separate protests from 23 companies. One company alone submitted four protests for a \$248 million engineering contract award, W900KK-15-R-0012. Table 1 displays the protests regarding high value solicitations.

Table 1. Protests for High Value Solicitations

Count of Company Name	Column Labels								
Row Labels	\$110,000,000.00	\$133,899,937.00	\$248,000,000.00	\$500,000,000.00	\$580,200,000.00	\$750,389,911.00	\$975,000,000.00	Grand Total	
W15QKN-15-R-0002						1		1	
W52P1J-15-R-0122				34				34	
W52P1J-16-R-0058		1						1	
W58RGZ-15-R-0045							2	2	
W900KK-15-R-0012			5					5	
W900KK-17-R-0001							7	7	
W911QY-17-R-0020	4							4	
Grand Total	4	1	5	34	1	2	7	54	



Multiple protests from one company was another pattern established in my data. The GAO processed and closed protests for 263 unique companies within the last calendar year for the three DoD subdivisions. Four companies alone accounted for 15.5% of the GAO processed protests and one company, Aerosage, accounted for 6.8% of the 472 closed docket protests. This trend is reflected in the entire dataset, not just the high value contracts displayed previously.

Stakeholders' Perspective

The RAND Corporation report provided robust information regarding stakeholders' views on the protest process. A key takeaway from their stakeholder analysis was that DoD personnel generally believe incumbent companies are more likely to protest when they have lost in a follow-on competition (Arena, 2018). In addition to the RAND findings, I conducted interviews with individuals who questioned the perceived problem of excessive protesting.

A lawyer for a major defense contractor cited the RAND study and his own work when he rejected the idea that companies were engaging in frivolous protesting. Furthermore, he claimed the majority of his company's protests, especially those of larger value, were protested not for substantive reasons. Instead, the bids were protested for more information. In such cases, protests were often withdrawn or dismissed once the company was satisfied with the information regarding their loss of a contract. RAND addressed this in their recommendation when they suggested the GAO improve their debriefings to losing companies. My interviewer acknowledged that debriefs have improved over the years but that there is still no standard method of delivering debriefs to companies and said this needs to change.

In general, the interviewer placed the responsibility of improving the protest process on the government. He suggested that the overwhelming majority of protests are due to a lack of information from the government or a government mistake. Protesting a bid is, therefore, a tool to keep the government accountable for intentional or unintentional harmful business practices. Furthermore, he questioned the ability of the federal government to accurately audit its own cost of processing a protest. FY 2018 NDAA's language remains vague in this regard, thus, leading to skepticism that the government will enact any penalty.

His final comments placed doubt on the effectiveness of the "loser pays" provision in the FY 2018 NDAA. Speaking candidly, he said the threat of paying the cost of GAO processing is essentially a non-factor when his company decided to protest. If his company lost a high value contract worth over \$250 million, the opportunity cost of not protesting would be incredibly high. Discovering the relevant information to become more competitive in future bids outweighs any administrative penalties the federal government would impose (Contractor, personal communication, March 19, 2018). He also floated the idea of shifting all protests to the court system and eliminating the GAO to save the government money but acknowledged this will likely never happen.

After reviewing the results of the bid protest data provided by the GAO and FBO, the need for an alternative solution is clear. The following criteria and alternatives section may better reform the bid protest process than the solution in FY 2018 NDAA. I will analyze these alternatives against the criteria to determine if they satisfy my second research question: how the Section 809 Panel can make it easier for private companies to conduct business with the DoD.

Criteria for Policy Evaluation

Some criteria are required to evaluate potential solutions to GAO filed protests. Listed below are three criteria which, if satisfied, will indicate a potentially successful policy



option to improve the protest process and fulfill the Section 809 Panel's goal to make it easier for private companies to conduct business with the DoD. They are derived from a GAO report on protest reform along with suggestions from former Director of Defense Procurement and Acquisition Policy, Deidre Lee. The purpose of the policies is to

- decrease the number of contract protests presented to the GAO,
- increase potential new business partners with the DoD, and
- save the government money and time (Murphy, 1995).

Policy Alternatives

The criteria for successful bid protest reform will be matched against the following three policy alternatives. The first policy alternative is a continuation of FY 2018 NDAA beyond the three-year pilot program. The next two policy alternatives were developed through an interview with a lawyer at a major defense contractor who is affected by the FY 2018 NDAA reforms.

1. **Make “losers pay” pilot program in FY 2018 NDAA permanent law.** This alternative would codify the three-year pilot program into permanent law extending beyond 2022.
2. **Funnel all DoD protests regarding a singular solicitation into one review.** Companies currently file one protest for each issue they identify with a single solicitation. This alternative would require the GAO to consider all points of contention regarding one solicitation in a single review and decision process.
3. **Eliminate the GAO's role in adjudicating bid protests.** The GAO established a procedure for reviewing bid protests nearly 100 years ago and the number of reviewed DoD protests has grown rapidly over the last decade. This policy alternative would eliminate the GAO's role in judging bid protests and move it to the court system.

Analysis

The three policy alternatives will be graded against each individual criterion to determine a final score. This score will demonstrate the likelihood that the policy alternative will solve part of the protest problem established in the policy question.



Table 2. Criteria Scoring System

Score	Explanation
0	Fails to satisfy criterion
1	Partially Satisfies criterion
2	Fully satisfies criterion

Table 3. Policy Alternative 1

Alternative	Decrease Contracts Protested	Increase DoD Business	Save Time and Money	Total Score
Losers Pay Law	0	0	1	1

As shown in my data and RAND’s data, the highest volume of bid protests originates with contracts valued under \$1,000,000 and companies affected by the pilot program are less likely to bid on such contracts. Furthermore, this alternative will not deter large companies from protesting bids on high value contracts. My interview subject asserted that the consensus of the contracting sector is if a large company decides to file a protest regarding a large solicitation, the penalties imposed by the GAO and the DoD are simply the cost of business (Contractor, personal communication, March 19, 2018). This policy alternative does not affect companies with annual revenues under \$250 million and is therefore unlikely to decrease the number of protests filed at the GAO.

Turning the pilot program into permanent law is unlikely to attract new business to the DoD because few new companies would be large enough to be affected by the protest penalties. Additionally, because the number of protests is unlikely to decrease, new companies will not view the policy alternative as a new opportunity for business.

Turning the pilot program into permanent law will minimally impact the GAO or DoD budget or time spent on protests. The number of protests is likely to remain the same and the fines imposed on contractors is unclear. The DoD may recuperate some money from the fines imposed on contractors but only when the GAO fully denies the protest. The data shows this is a small portion of the protests and therefore will not save the government much time or money.

The RAND Corporation, my interview subject, and other stakeholders all highly doubt that the “losers pay” provision of the FY 2018 NDAA will generate dramatic changes to the federal procurement and acquisition system. Section 809 Panel is charged with making recommendations that will shape the DoD’s acquisition system into one that is bold, simple, and effective (Section 809 Panel, 2018). Establishing this insignificant pilot program to an already complex acquisition system is counterproductive.



Policy Alternative 2: Funnel all DoD protests regarding a single solicitation into one review.

Table 4. Policy Alternative 2

Alternative	Decrease Contracts Protested	Increase DoD Business	Save Time and Money	Total Score
Funnel Protests	2	1	2	5

Forcing the GAO to consider all protests regarding one solicitation at the same time will decrease the number of protests filed at the GAO. Unlike ASRC Communications who filed four protests regarding one \$248 million engineering contract award, this alternative will allow companies to air all their grievances in one protest.

The streamlining mechanism would improve the efficiency image of the federal government and potentially attract new businesses. However, this is only speculative, and therefore only partially satisfies the criterion of bringing new business partners to the DoD.

Currently, each protest is processed separately at the GAO and potentially by different GAO officers. If the bid was for a re-compete, a vast number of protests could significantly delay the process and keep the bridge-contractor working on the contract. By funneling all protests regarding one solicitation to a single review, the government will save time and money while addressing the concerns of business partners.

Policy Alternative 3: Eliminate the GAO’s role in adjudicating bid protests.

Table 5. Policy Alternative 3

Alternative	Decrease Contracts Protested	Increase DoD Business	Save Time and Money	Total Score
Eliminate the GAO’s role	0	0	1	1

Transferring protest review responsibility from the GAO to the courts will not decrease the number of protests within the federal government. This alternative would only impose a later shift of the protest responsibility.

If DoD contractors enjoy the courts protest review system more than the GAO, it could potentially attract new business to the DoD. However, there is no guarantee that the courts would perform better than the GAO. Therefore, this alternative only partially satisfies the second criterion.

The court system does not have a standard method of hearing protest cases. While the GAO’s protest process has its flaws, there is a standard practice in place that has developed over nearly a century. Uncertainty in the court systems would cost the government more time and money in the larger scheme.



Conclusion

The federal government and private companies hold different views on the problems surrounding protests filed at the GAO. Government officials expressed their belief that large corporations are filing frivolous protests to hurt competitors at a high cost to the federal government. Private corporations and data from RAND, the GAO, and FBO assert that there is no such problem of frivolous protesting. Private corporations view protests as a mechanism to obtain information from the federal government about why they lost the bid, so they can improve in the future. However, the information often comes in separated by multiple protests regarding the same solicitation. Converting the GAO Bid Protest Reform section of FY 2018 NDAA into permanent law does not satisfy the mission of the Section 809 Panel to streamline acquisition. My analysis and scoring shows that the government should look into funneling all protests regarding a single solicitation into one protest review.

Recommendation

Table 6. Policy Alternative Evaluation Matrix

Alternative	Decrease Contracts Protested	Increase DoD Business	Save Time and Money	Total Score
Losers Pay Law	0	0	1	1
Funnel Protests	2	1	2	5
Eliminate GAO's role	0	0	1	1

The analysis from the data shows lower propensity of the GAO filed protests for low-value solicitations. The data also showed multiple protests regarding one solicitation even from the same company. Therefore, the Section 809 Panel should recommend instituting the RAND Corporation recommendations, abandoning the pilot program established in the FY 2018 NDAA, and funneling all protests regarding a singular solicitation into one review.



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Disclaimer

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