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SUBCOMMITTEE ON GOVERNMENT OPERATIONS

CHAIRMAN SESSIONS, RANKING MEMBER MFUME, AND MEMBERS OF THE SUBCOMMITTEE, I appreciate the opportunity to discuss the important topic of bid protest reform.

I am a partner in the government contracts group of Haynes and Boone, LLP and teach government contracts negotiations at the George Washington University Law School. I represent contractors on both sides of bid protests before GAO and the Court of Federal Claims (COFC), defending awards against protests brought by disappointed offerors and representing protesters. I share the following testimony with the Subcommittee based on my personal experience and assessment of the available data.

Bid Protests Are An Effective Mechanism to Ensure Fairness and Integrity in the Procurement System

The Federal government spends roughly ¾ of a trillion dollars annually through government contracts. Bid protests are the first line of defense to ensure the government complies with the laws enacted by Congress and its own regulations that govern the acquisition of goods and services. Bid protests help ensure fairness and integrity in government procurement and serves to instill faith in the process. The taxpayers and the government both have a substantial interest in ensuring those contracts are awarded fairly and transparently. As the D.C. Circuit observed decades ago, "[t]he public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity ..."[1] The bid protest process serves this purpose.

The decision to protest is not taken lightly. Protests can delay procurement, are expensive, and can antagonize critical customers. And indeed, protests are not generally frivolous, as shown by the effectiveness rate. Since 2017, the effectiveness rate for bid protests at GAO has been approximately 50%. For the past three years in a row, that rate has exceeded 50%. Roughly speaking, this means that more than half of the agency decisions that are protested contain some kind of legal flaw.

The total protested procurements represent only a small fraction of all contract award decisions—substantially less than 2% of all awards, at most. And the number of protests filed at GAO in recent years has dropped substantially, from approximately 2600 in 2015-2017 to approximately 1800 last year; a reduction of 31%.

Procuring agencies benefit from GAO guidance in making contract selection decisions and structuring procurements. Agencies also benefit from the opportunity to take corrective action in response to issues raised in protests. As one example, protests often alert the agency to organizational conflicts of interests, such as former agency personnel with source selection

[1] *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859, 864 (D.C. Cir. 1970).

information or other insider knowledge working for an awardee, or an awardee's subcontractor that established the ground rules for the procurement under another government contract. Bid protests are a meaningful way for industry to self-police the revolving door restrictions. As another example, pre-award protests may alert the agency that the criteria it established ignored commercial alternatives or other viable solutions that can meet its needs more efficiently and effectively.

The system could be refined to improve processes and outcomes and reduce burden. But any changes that could undermine the effectiveness of the remedy should be weighed carefully.

Concerns Regarding the Bid Protest System Are Not Based on Data

Concern that incumbents unfairly file bid protests to delay award of new contracts, and that protests unnecessarily delay government programs, drove Congress to investigate the data closely in the mid-2010s. On January 4, 2018, the RAND Corporation published a report entitled "Assessing Bid Protests of U.S. Department of Defense Procurements," which had been commissioned by Congress through the National Defense Authorization Act of 2017. Among its many findings were the following:

- Less than one percent of DoD acquisitions are protested;
- Small businesses protest awards more frequently than large businesses. 53% of protests at GAO were from small businesses, while 58% of protests at the U.S. Court of Federal Claims (COFC) were from small businesses;
- Average time to close a protest was 41 days at GAO and 133 days at COFC; and
- Incumbents were not more likely to protest in general but were more likely to protest task orders. However, the effectiveness rating for incumbent task order protests is approximately 70%, substantially more than the average.[2]

The Report showed that the vast majority of procurements were not protested, resolution was quick, most protests were brought by small businesses, a significant percentage of protests were effective, and while incumbents were more likely to protest task orders, those protests were much more effective than non-incumbent protests. Since 2018, when RAND issued its report, protests have become less frequent, effectiveness rates have increased, and the resolution time for protests at COFC has been reduced. In other words, bid protests have already become less frequent, more effective, and more efficient over the past decade.

Protest Reforms that Increase the Burden to Small Businesses Will Undermine the Bid Protest Process

While the protest process could be refined, some of the proposals to reform the bid protest system would have the effect of limiting or disincentivizing protests, disproportionately

[2] "Task orders" or "delivery orders" are contracts the government issues under a multiple-award contract vehicle. Task orders or delivery orders are typically competed among only contractors holding a multiple-award contract.

impacting small businesses. Such proposals include enhanced pleading standards before a party is permitted to access the record, fee-shifting (i.e., a loser pays system), further limits on task order protests, disgorgement of profits for unsuccessful incumbent awardees that receive bridge contracts while a protest is pending, and additional mechanisms to penalize frivolous protests. Most of these proposals may do more harm than good.

First, the proposals have primarily targeted GAO protests. Making GAO bid protests more difficult will just shift more protests to COFC, which can be slower and is more expensive. The Joint Explanatory Statement accompanying the NDAA for FY 2024 explicitly recognized this issue:

> The House bill contained a provision (sec. 804) that would reestablish a loser pays pilot program to award reimbursement to the Department of Defense for costs incurred from contract award protests denied by the Government Accountability Office (GAO). . . . The House recedes. The conferees note that frivolous protests to Department contracting decisions have the potential to be a burden on the Department, slow acquisition of capabilities, impose additional costs on the taxpayer, and disadvantage small business contractors . . . . However, the committee recognizes that a GAO loser pays pilot could encourage losing bidders to pursue protests at the agency and COFC levels, which may result in a more time-intensive and costly protest process, and thus higher costs and delayed timelines for the government.[3]

Relatedly, some proposals would limit protesters to a single forum. Currently, it is possible for a protester to challenge a procurement at the agency level, then at GAO, and follow with a second-bite (or third-bite) protest at COFC. Whether such protests are common is unclear from the data, and it would be helpful to understand how often this occurs in reality. But in any case, such protests should not cause undue procurement delays.

An agency-level protest does not automatically prevent the agency from awarding or performing the contract (a "stay"), or even delay the deadline for when a protest has to be filed at GAO to trigger a stay.[4] Nor does a protest at COFC automatically delay contract award. Instead, the protester needs to move for a temporary restraining order, which requires demonstrating it is likely to succeed and the government's interests in proceeding with the contract do not outweigh the protesters interests. The government can request a bond as part of the restraining order under Rule 64 of the Rules of the Court of Federal Claims to protect against

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[3] H.R. Conf. Rep. No. 118-301, at 1138 (2023), *reprinted in* 2023 U.S.C.C.A.N. 48, 49.

[4] A stay of award is mandatory under the Competition in Contracting Act ("CICA") for a timely pre-award protest at GAO, and a stay of performance of an awarded contract is mandatory for a protest filed with GAO within 10 days after the date of the contract award or within 5 days after a mandatory, requested debriefing. 31 U.S.C. § 3553. The head of the procuring activity may override the stay of performance with a written finding that performance is in the best interests of the United States, and may override both the stay of performance or award with a written finding that urgent and compelling circumstances that significantly affect interests of the United States do not permit waiting for a decision.

harm to the government, and has discretion to determine the extent of that likely harm. There have not been any suggestions that COFC is abusing its discretion. Any delays currently because of the COFC protest mechanism are because the agency determines that agreeing to a stay is worthwhile. There is no evidence that the additional protest venues regularly or meaningfully delay contract awards.

Additionally, it is critical that there be a higher authority to act if GAO gets it wrong. Even the best judges sometimes get the law or the facts wrong. When hundreds of billions of dollars are on the line every year, and where transparency and fairness are vital to ensure participation in government contracts by small businesses and new market entrants, there must be an appeals process.

If the data are collected and suggest a significant number of second-bite protests slowing down the procurement process, then the remedy may be to urge the Department of Justice to resist voluntary stays more frequently. But the current data does not suggest a need for mandatory forum election.

Second, access to the record is critical for bid protests to work because protests are necessarily based on incomplete knowledge. Contractors cannot know what the agency has done behind closed doors. The record, which contains agency deliberations and findings, reveals whether the protest allegations are accurate. Proceeding without the record is a requirement of clairvoyance on the part of protesters, and limiting access to the record based on a heightened pleading standard will in many instances prevent legitimate issues from being addressed. As GAO recognizes, "too stringent of a pleading standard could have the unintended consequence of harming the federal procurement system by discouraging protests and participation in the federal contracting process, thereby limiting competition." Raising the pleading standard is unnecessary, counterproductive, and would particularly impact small businesses, which account for the majority of protests. Increased burden on small businesses may prevent many of their concerns from being heard at all.

Third, fee shifting could discourage protests, particularly small business protesters. Small businesses are responsible for most protests.[5] For these small businesses, imposition of "loser" fees could be crippling.

Additionally, calculating fees or lost profits would be onerous. The government data as to its internal costs for each protest are unreliable and inconsistent between agencies.[6] Indeed, GAO correctly notes that the calculation of lost profits is complex and laden with definitional concerns that render it impracticable. This is likely why the overwhelming majority (86%) of protest counsel polled as part of GAO's work responding to Section 885, all of whom regularly represent both protesters and awardees, disfavored any fee shifting or lost profits provisions.[7]

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[5] B-423717, Jul. 14, 2025, GAO Response to Section 885 of the FY2025 NDAA, at 26.

[6] *Id.* at 15–23.

[7] https://www.americanbar.org/content/dam/aba/administrative/public_contract_law/comments/2025-0507-aba-pcls-response-gao-data-requests.pdf.

Further, there is no meaningful evidence that incumbents frequently abuse the protest system to retain work through "bridge" contracts while a meritless protest is pending. The RAND report data showed that incumbent protests are not more frequent than protests by non-incumbents, except in the context of task order protests—where incumbent protests were substantially more likely to succeed. Additionally, it was rare for incumbents to receive meaningful bridge contracts. While more data (if collected) may show otherwise, the premise itself is questionable: an extra few months of performance would be unlikely in any context to yield enough profit to justify incurring unrecoverable legal fees that often exceed hundreds of thousands of dollars. Nor would the short-term gain typically justify antagonizing a significant customer.

In short, fee shifting or profit disgorgement are unnecessary, administratively complex, and could have serious negative consequences, potentially delaying resolution of protests and discouraging otherwise meritorious protests.[8]

Fourth, the RAND Report shows that task order protests are more effective than other protests. Limiting task order protests means that agency errors in award of task orders, which involve many billions of dollars, will go uncorrected. As discussed in my recommendations below, this militates in favor of removing or revising the task order protest restrictions, not expanding them.

Fifth, the system already contains mechanisms to penalize truly frivolous protests. Setting aside that protests are expensive, and that the costs are generally unallowable (i.e., the contractor cannot recover the costs of protesting from the government), GAO has the authority to prohibit contractors from filing protests entirely, and has used that power before when appropriate.[9] COFC has the power to impose sanctions, including monetary penalties or other measures to deter misconduct.[10] There is no indication that either GAO or COFC is failing to use those powers. The high effectiveness rate of protests show that most protests involve a true violation and are far from frivolous. Applying a higher bar to filing protests, such as by imposing an automatic bond requirement, would only discourage meritorious protests at the outset, particularly those brought by small businesses that could not bear the cost.

Sixth, there have been proposals to implement binding deadlines for filing and resolving protests. Mandatory deadlines for filing and resolving protests already exist at GAO, and GAO on average decides protests well under the 100 days mandated by law. If the national interest favors continuing performance, then the agency can override the mandatory stay of performance for protests filed at GAO. At COFC, there are fewer firm backstops on either filing or resolving protests, but protests at COFC do not automatically delay contract performance. And there is no meaningful remedy where the government shows the public interest weighs in favor of the

[8] B-401197, *Report to Congress on Bid Protests Involving Defense Procurements* (Apr. 9, 2009), at 12.

[9] *See Latvian Connection LLC–Reconsideration*, B-415043.3, Nov. 29, 2017, 2017 CPD ¶ 354.

[10] Rule 11 of the Rules of the Court of Federal Claims.

contract continuing as awarded. COFC has been deciding cases quickly. A mandatory time limit is unnecessary.

Bid Protest Reforms Should Expand Access to Information and Gather Additional Data to Assess Whether Additional Action is Needed

Based on the available data, there are things Congress can do to improve the protest process without throwing out the baby with the bathwater.

First, as the RAND Report recognized, disappointed offerors are much less likely to protest when the agency conducts a meaningful debriefing explaining why the complaining offeror was not selected for award. Inadequate debriefings are a primary driver for many protests. Contractors who receive thorough debriefings are more likely to conclude the agency engaged in a thorough and fair deliberative process. The enhanced debriefing mandated in the FY2018 NDAA for DoD procurements has had a meaningful impact and limited protests. Requiring enhanced debriefings for both civilian and DoD agencies, at a lower threshold than currently applies, would similarly lower the overall number of protests. Additionally, Congress might go further and consider a mechanism by which contractor counsel is provided access to a baseline subset of the administrative record under a protective order to permit evaluation of whether a protest is appropriate.

Second, Congress should consider expanding the oversight mechanism offered by the protest mechanism in two key areas: Other Transactional Agreements (OTAs) and task order awards.

- **Other Transaction Agreements**. OTAs have effectively served the government's interest in pursuing novel approaches to meet critical needs. OTAs are by definition not procurement contracts, which means they are exempt from burdensome regulatory requirements that can disincentive private sector companies from doing business with the government. However, because OTAs are not procurement contracts, that means it is unclear which forum can hear disputes about OTAs. As more than $18bBillion was spent on OTAs by DoD in 2024 alone, and with use of the mechanism growing significantly, it is important that there be an effective oversight mechanism to ensure OTAs are awarded fairly.

GAO has essentially declined jurisdiction over OTA protests, except for limited challenges to the propriety of using an OTA instead of a standard procurement contract. COFC has taken several different approaches, depending on the reviewing judge, creating a scenario where some OTAs may be under a "jurisdictional blackout" and exempt from oversight. And some OTAs are only considered by district courts under the APA.

For efficiency, transparency, and predictability, Congress should grant GAO jurisdiction over bid protests involving OTAs, clarify that COFC has jurisdiction over all protests involving OTAs, and exclude district courts from reviewing OTA protests (consistent with the present exclusion of district courts from protests of procurement contracts). This will ensure that all market participants, including nontraditional contractors, small businesses, and new market entrants with novel technology, can participate on a level playing field when competing for these important contracts.

- **Task Order Bar**: The Federal Acquisition Streamlining Act ("FASA") restricted task and delivery order protests to GAO, precluding COFC from review these awards. FASA further imposes a monetary threshold for such protests. This has led to a raft of litigation regarding the limits of the bar and when it applies, with some acquisitions left unreviewable. As the United States Court of Appeals for the Federal Circuit has explained, "FASA 'effectively eliminates all judicial review for protests made in connection with a procurement designated as a task order—perhaps even in the event of an agency's egregious, or even criminal, conduct.'" *22nd Century Techs., Inc. v. United State*s, 57 F.4th 993, 999 (Fed. Cir. 2023). Despite current restrictions, task order protests have been more successful than other protests, revealing they may be more fraught with error, reinforcing the need for effective review.

Congress should grant task order jurisdiction to both COFC and GAO. These contracts should not be insulated from oversight or restricted to one forum. The dual forum model works for typical bid protests and there is no salient reason why it would not work effectively for task order protests.

Additionally, the public interest would be best served by substantially reducing, if not eliminating, the thresholds, and at least establishing parity between the thresholds for DoD and civilian orders. These orders should be reviewable. The public deserves insight into the way agencies spend billions of taxpayer dollars annually.

Finally, as GAO observed in its Section 885 Report, there is not enough available data on certain aspects of the protest system. The lack of adequate and accessible data posed a barrier to both the RAND and Acquisition Innovation Research Center (AIRC) studies that Congress commissioned to investigate avenues for bid protest reform. For ten of the fourteen questions that Congress asked RAND to investigate in the FY2017 NDAA, RAND either had no data or only partial data.[11] Congress should accordingly consider requiring GAO, COFC, and procuring agencies to track:

- the number of follow-on protests at COFC that have already been before GAO and their disposition;
- the specifics of corrective action at GAO and COFC, including whether the protester was ultimately awarded the protested contract;
- the number of procurements protested annually by specific protesters; and
- average time to award in the event of a protest, including whether that timing varies depending on the forum for the protest.

The availability of reliable data is critical to make informed decisions about whether and the extent to which any further reforms are advisable.

This concludes my prepared remarks. I am happy to answer any questions.

[11] Mark V. Arena, et al., Assessing Bid Protests of U.S. Department of Defense Procurements: Identifying Issues, Trends, and Drivers (RAND Corp. 2018) (RAND Report), at 3–4.