

*Government Contracting Quick Hit Briefing*

## **Bid Protest Overview and Update**

December 2018



# Bid Protest Overview

- Acquisition laws ensure procurements conducted fairly
- Ability to challenge agency procurement decisions
- Three avenues for an offeror to protest:
  - Agency-level
  - Government Accountability Office (GAO)
  - US Court of Federal Claims



# Agency Protests

## Process and Guidance

- Far less commonly utilized than GAO protests, but worth consideration.
- Written complaint addressed to CO or another designated official requesting corrective action. May request review of the protest at a level above the CO.
- Advantages:
  - Possible quick corrective action where clear errors of fact are evident.
  - Customer may appreciate opportunity to resolve clear errors without incurring the delays created by a GAO protest.
  - Confidentiality – no opportunity to intervene in an agency level protest.
  - Agency has greater flexibility in taking corrective action.
- **Key Disadvantage:** You are asking agency to act as its own watchdog - for more complex protest grounds, may simply provide an opportunity to bulletproof their award.

- Timing mirrors that call for GAO protests:
  - Pre-Award protest alleging defects apparent in the solicitation must be filed before the initial proposal due date.
  - Post-Award protests/other alleged improprieties, within 10 days after the basis for the protest is known or should have been known, or 5 days after requested/required debrief.
- Unsuccessful agency-level protest can be appealed to GAO, must be filed at the GAO within 10 days after the agency's initial adverse action on the agency level protest.
- **DO NOT TOLL THE CLOCK FOR OBTAINING A STAY OF A LATER-FILED GAO PROTEST!** A post-award agency-level protest denied after the ten-day/five-day clock has run (most likely scenario) may still be protested at GAO, but **NO CICA STAY**.

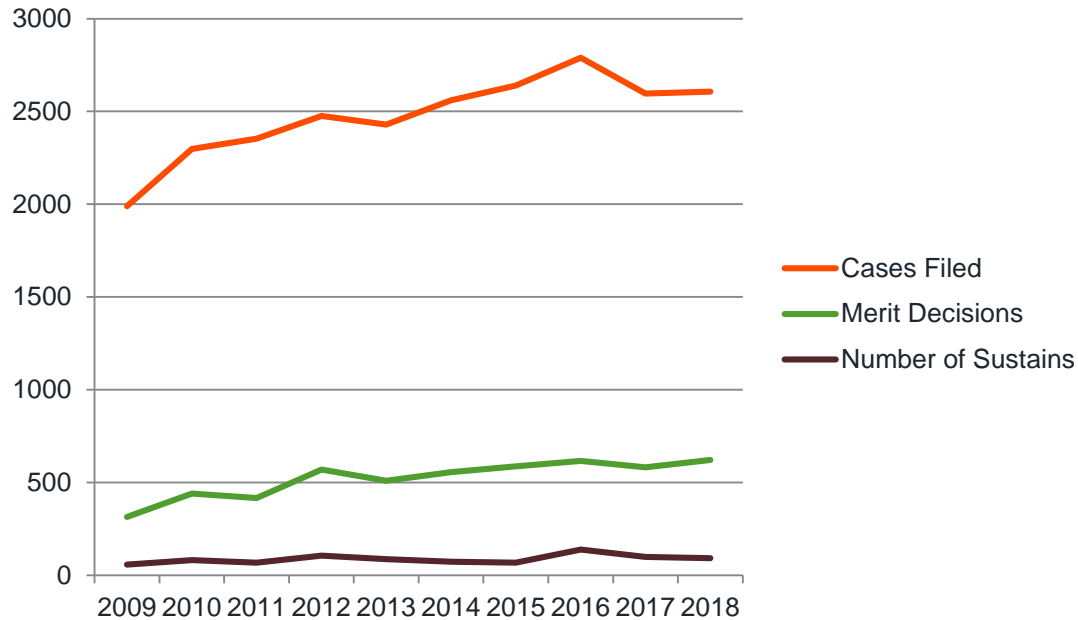


# GAO Protests

## Process and Guidance

- GAO provides independent forum to expeditiously resolve disputes concerning award of federal contracts.
  - GAO handles over 2,600 protests each year
  - Substantial body of law on protest issues
  - <http://www.gao.gov/legal/bids/bidprotest.html>
- GAO Protest Regulations
  - Govern how GAO handles bid protests
  - Impose strict requirements on protesters, agencies, and other interested parties

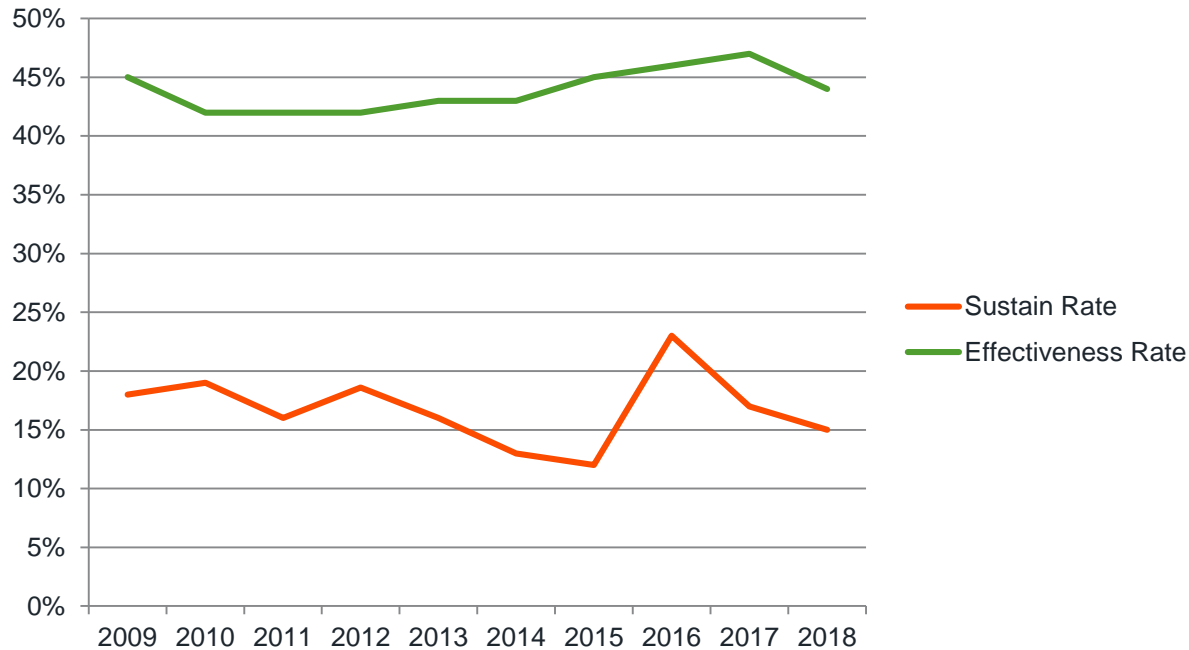
# GAO Filing Trends



Fiscal Year	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Cases Filed	1989	2299	2353	2475	2429	2561	2639	2789	2596	2607
Merit Decisions	315	441	417	570	509	556	587	616	581	622
Number of Sustains	57	82	67	106	87	72	68	139	99	92

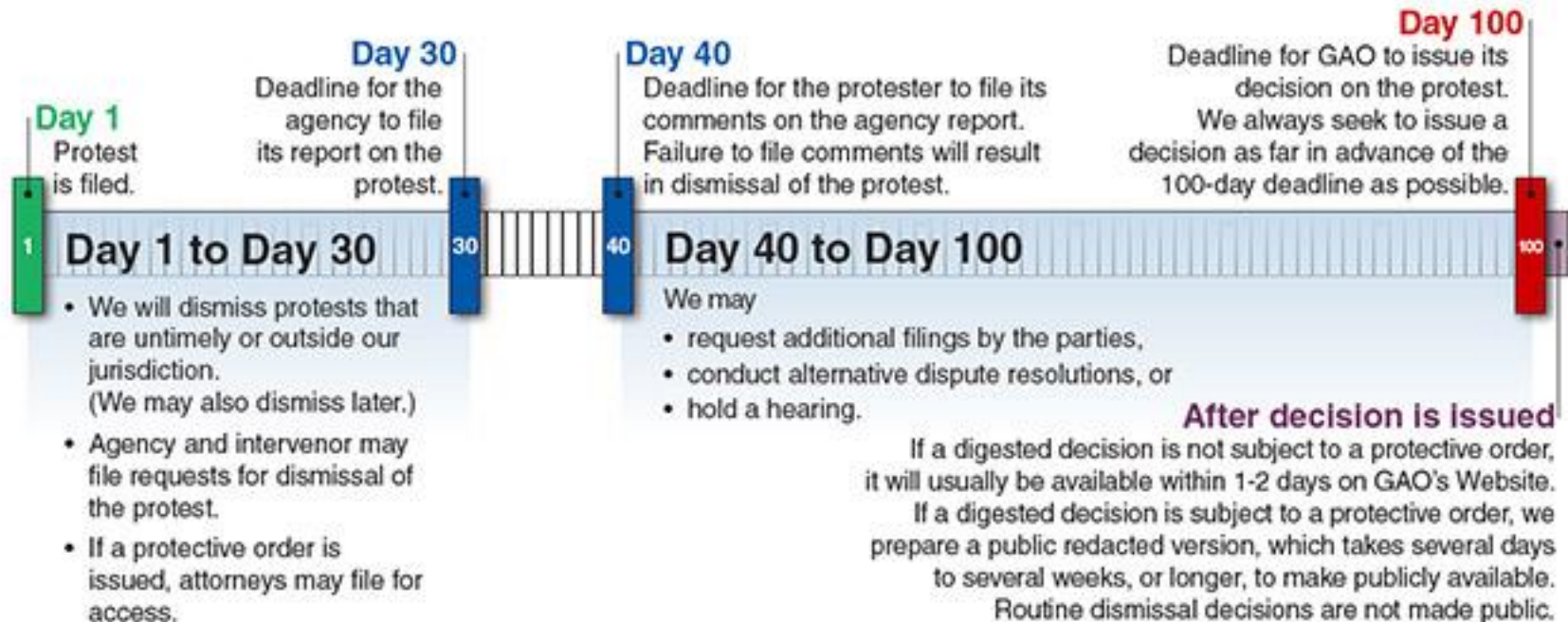


# GAO Outcome Trends



Fiscal Year	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Sustain Rate	18%	19%	16%	19%	16%	13%	12%	23%	17%	15%
Effectiveness Rate	45%	42%	42%	42%	43%	43%	45%	46%	47%	44%

# GAO Bid Protest Timeline



# GAO Protests: Who, What, and When?

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- Who may protest?
- What can be protested?
- What cannot be protested?
- When must a protest be filed?

# Preparing and Filing the Protest

- Written protest letter:
  - Must establish protester is interested party
  - Must establish timeliness
  - Must outline facts and law supporting each protest ground
  - Must specifically request a ruling by the Comptroller General
  - Must state form of relief requested
- Other items to request:
  - Automatic stay of award/performance
  - Protective Order
  - Documents/Agency Record
  - Hearing
- **Electronic Filing – effective May 1, 2018**
  - EPDS (electronic bid protest filing and dissemination system) mandatory
  - \$350 filing fee for new protests

- GAO protest notice to agency can require agency to stay award.
- Automatic stay only if agency receives GAO notice within:
  - 10 days after award, or
  - 5 days after debriefing date offered (only if required and requested).
- Avoid traps for the unwary – is a “debriefing” required?

- Federal Supply Schedule orders of any size may be protested.
- Protesting firm must hold a GSA Schedule, and must have an item meeting an agency's need to be an "interested party" unless protester can argue:
  - Schedule order doesn't meet the ordering agency's actual requirements, or the items ordered are outside the scope of particular Multiple Award Schedule contract.
  - If open-market incidental (non-Schedule) are included, non-Schedule contractors may be able to protest.
- Schedule orders are somewhat less susceptible to a sustained protest because the universe of potential protesters is typically smaller and the ordering process is simplified.

- Some limitations:
  - Agency's decision to use a Schedule acquisition strategy (as opposed to an open-market) is generally not grounds for a protest.
  - Schedule BPAs are not "orders," are not contract actions for most FAR purposes, and generally cannot be protested.
  - GAO has held FSS procurements are not "conducted on the basis of competitive proposals" – debriefing exception to GAO timeliness rules allowing protests to be filed within 10 days of a debriefing does not apply.

## ▪ **Extended Debriefing Requirements:**

As of March 2018, DOD requires COs to provide an opportunity for unsuccessful bidders to submit questions following the debriefing. Unsuccessful bidder must submit additional questions within 2 business days after receiving the debriefing. Procuring agency must respond in writing within 5 business days after receiving the questions. These “Enhanced Debriefing Rights” specify that the agency shall not consider the post-award debriefing to be concluded until the agency delivers its written responses to the unsuccessful offer. Cautionary tales:

- *State Women Corporation*, B-416510, July 12, 2018
  - *Celeris Systems, Inc.*, B-416890, October 11, 2018
- ## ▪ **Dismissal of GAO Protest Where Relevant Protest Later Filed at COFC**
- *Intuitive Research and Technology Corporation*, B-416820, October 11, 2018



# Keys to Successful GAO Protest

Greater Success	Unlikely to Succeed
Failure to follow evaluation criteria	Rating disagreements
Unstated evaluation criteria	Best value disagreement
Unequal treatment	



# US COFC Protests

## Process and Recent Decisions

- Jurisdiction = violation in connection with procurement
  - Improper agency conduct
  - Prejudice
- Commencing a COFC protest
- COFC v. GAO
  - Scope of Review
  - Timeliness
  - Stay of Award
  - Corrective Action
  - Cost and Timetable
- COFC may be the better venue

## Contacts



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# Global Coverage

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