GAO Bid Protests by Small Business: Analysis of Perceived and Reported Outcomes in Federal Contracting

David M. Snyder

University of South Florida

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GAO Bid Protests by Small Business: Analysis of Perceived and Reported Outcomes in Federal Contracting

by

David M. Snyder

A dissertation submitted in partial fulfillment of the requirements for the degree of Doctor of Business Administration
School of Information Systems and Management
Muma College of Business
University of South Florida

Co-Major Professor: T. Grandon Gill, DBA
Co-Major Professor: Joann Farrell Quinn, Ph.D.
Paul J. Solomon, Ph.D.
Matthew T. Mullarkey, Ph.D.
Timothy B. Heath, Ph.D.

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DEDICATION

I dedicate this dissertation to two groups whose inspiration is unwavering. First, my family led by my wife, Tamela J. Snyder, my son, Quay C. Snyder, III, and my daughter, Claire R. Snyder. They all completed their graduate degrees while supporting my doctoral education and research. Secondly, I dedicate this dissertation to all the small businesses, especially those owned and operated by veterans, who strive to build a sustainable business by following the rules that provide both assistance and restrictions. My hope is for this research to inform these dedicated entrepreneurs.
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I am especially grateful to Mr. Ralph O. White, GAO’s Managing Associate General Counsel for Procurement Law, for a lengthy initial interview tailored for his perspective as chief of the GAO protest process and multiple follow-up interviews and correspondence. He provided current comprehensive data on my action research protests, detailed explanations, research literature references, and historical background and illustrative anecdotes. His descriptions provided unique insider insights from many stakeholders’ vantages that were invaluable to better understanding the complex interrelationship between the government’s three branch acquisition professionals as well as the interactions with other industry stakeholders.
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ABSTRACT

The purpose of this research is to better understand GAO bid protest outcomes, whether they are perceived as effective by stakeholders (particularly small businesses), and what implications perceptions of outcomes have for small businesses. The rationale for this research improves my business’s performance, as a small business owner in the U.S. Federal government contracting space and informs other small business practitioners of the practical utility of GAO protests.

The GAO protest system is a well-intended American innovation in accountability of government agencies’ acquisition of supplies and services. The GAO reports protest outcome rates are reflected as moderately effective, at approximately 45%, based on a protester obtaining some form of relief from the agency because of voluntary agency corrective action or GAO sustaining the protest. However, the reported success rate of protest outcomes where the GAO sustains the alleged impropriety and recommends relief is an order of magnitude lower, indicating minimal effective outcomes for protestors. This success or effectiveness rate is negligible for many small business protestors and is perceived as such. The minimal practical effectiveness caused some businesses to believe the GAO protest system has become a façade for fair, independent adjudication of acquisition improprieties. This analysis of how these reported outcomes is perceived by the government contracting community stakeholders, particularly small businesses concerns, is the subject of this paper.
The overall objective of the bid protest system is instilling confidence in the Federal acquisition process, ensuring full and open competition within the guidelines of national policy objective, and providing an accountability venue for contractors. Understanding the stakeholder’s perceptions of these outcomes is the most important element in meeting this objective. The empirical research of stakeholder interviews and protest action research indicates that protest perceptions range across three interactive spectra: the cost-benefit tradeoff, fairness, communications; additionally, they are impacted by a fourth element, emotions. Some stakeholder perceptions tend to reinforce the GAO narrative of moderate effectiveness where the benefits outweigh the costs. However, evidence that small business stakeholders are more attune to the minimal effectiveness of the reported outcomes reinforces the small business perceptions of limited utility. Years of action research by the researcher support the proposition that this accountability façade is real. The appearance of moderate protest success covers up the serious challenges small businesses face in pursuing GAO protests. The research concludes that businesses and, more specifically, small businesses should only rarely consider filing GAO protests.
CHAPTER ONE:

VALUE OR CHALLENGE OF A BID PROTEST: COLEMAN FEDERAL PRISON

To the maximum extent practicable, the Comptroller General shall provide for the inexpensive and expeditious resolution of protests (31 U.S. Code § 3554 (a)(1) Procurement Protest System, Decisions on protests).

Introduction

Tanker Snyder paused for a moment to look out the window of his second-floor office at about 9:00 p.m. on a warm March Tuesday night in Tampa. It had been another hectic day bidding, losing, and occasionally winning, government contracts—not to mention following up on recent bids and proposals. And, of course, determining new bid opportunities for the rest of the week. Knowing that he had another two hours of work to get ready for the next day as he gazed into the night to see the empty parking lot of the 6-story Crown Building. Empty, that is, except for his vehicle. All this left him wondering if the AeroSage business model was evolving into a growing and viable business. Was he leveraging his understanding of the playing field and experience meeting mission-critical government requirements in the structured, transparent government contracting business?

AeroSage LLC is the primary entity Tanker formed over five years ago, first to provide consulting assistance to companies wanting to sell to the government. Recently, the company’s focus shifted to providing products and services from a reliable network of suppliers to meet Federal government requirements. Rather than teaching commercial companies how to fish in the vast government contracting ocean, AeroSage would do the fishing itself. He knew what the
fish needed to sustain them. After all, he had been one in this often-murky ocean. He now had access to some of the best bait there was.

Tanker thought he knew the rules of the government acquisition game was played, particularly in the real world from the strategic perspective he had operated within during his military, hedge fund, and consulting careers. He knew that knowing and following the complex rules would yield success. However, he had experienced several instances where contractors or government contracting officers did not appear to either know the rules or play by them. Similar to the military world, there are avenues to hold rule breakers accountability for improprieties in government contracting. Alleged violations of acquisition laws and regulations could be challenged. These protests would be adjudicated by an appropriate authority. He had been in positions of authority responsible for fulfilling mission-critical requirements, many of which could mean the difference between life or death. Tanker had enforced the rules and adjudicated breaches. What he was wondering about is the tactical rule set of the acquisition protest system. More importantly, Tanker wanted to understand the possible real-world outcomes, if he entered into the bid protest world on this bid.

**Government Acquisition Processes**

The Federal government annually purchased over $350 billion of every type of good or service imaginable from futuristic space vehicles to lawn mowing service in large and small quantities (SBA Government Contracting 101). The process of government purchasing, or contacting was necessarily much different than non-government purchase decisions. Kenney asked the question “why is a contract with the United States so different than a contract with Wal-Mart?” with “[t]he answer can be varied and prolonged, but ultimately lies in the very roots of our nation” (Keeney, 2007, p. 7). Originally adopting the decentralized British system, the
U.S. evolved during a series of procurement scandals--most involving war purchases through proponent reforms during major conflicts from our founding through the Civil War to the current conflicts such as captured in the movie “War Dogs” (Keeney, 2007; and movie). Kenney answers the question that “[t]he basic difference between contracting with Wal-Mart and contracting with the U.S. government is this: when Wal-Mart signs a contract, it is only guarding its own interests. When the United States signs a contract, it is guarding the public’s interest” (Keeney, 2007, p. 18).

Balancing Value, Transparency, and Policy

While both commercial and government contracting had the primary objective of acquiring productive resources at the best value, the government has other often competing objectives including assured effectiveness, promoting transparency and fairness, and implementing legislated socio-economic policy. Federal government acquisitions seek to fulfill “[t]he visions for the Federal Acquisition System is to deliver on a timely basis the best value product or service to the customer, while maintaining the public’s trust and fulfilling public policy objectives” (FAR, 2005, section 1.102). Social and economic policy such as assistance for small, disadvantaged, women, minority, or veteran-owned businesses. Virtually, every government acquisition is measured against the specific policy goals (FAR, 2005; SBA). The compliance with these policy objectives, which many contend cost the government more by limiting competition within these socio-economic small business classes, is an important component of success in federal contracting.

Federal government socio-economic policy is to ensure the “capacity of small business is encouraged and developed” 15 USC Section 12 (a) Small Business Act
It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation. (Small Business Act 2(a))

Laws further subdivides owner’s enterprises into small businesses which are or were disadvantaged because of race, gender, physical location, and economic background or earned benefits through military service.

**Competition in Contracting**

Competition is a foundation of government contracting, just as it is in the broader capitalist economy. Congress codified very detailed competition requirements as directed in the Competition in Contracting Act of 1984 (CICA) (Source: CICA and CRS Competition in Federal Contracting: An Overview of the Legal Requirements). Yet government often restricts competition to accomplish broader economic and social policies and provide for transparency in the expenditure of public funds. The complicated rule set for government procurement is necessary to both ensure fairness and achievement of these policies, as well as the often-competing interest of getting the best value with taxpayer money. There is persistent tension between these guiding principles. As most all taxpayers do, Tanker wants the government to get the best value price in its purchases through full and open competition. As a veteran small business owner, he favors competition limited to small businesses particularly veteran-owned business to accomplish the Congressional intent of the policies. This also provides a competitive advantage by giving small businesses a chance to establish itself in the government market and offset some of the burdens in dealing with the government compliance standards. Restricting
Offerors of bidders to small businesses or categories of small business can be done by setting aside procurements or, in limited cases, sole sourcing purchased to a designated class of businesses. Set-asides, critics claim, reduce competition and increase costs to the government. However, researchers such as Denes show “that small business set-asides do not lead to higher cost of contracted services as long as the pool of bidders is not reduced” (Denes, 1997).

Many commercial vendors, small and large have avoided or “refuse to sell goods and services to the federal government based on the significant additional costs and risks associated with government-unique specifications, auditing requirements and other onerous terms and conditions” (Toomey, Foley & Lardner LLP, & Practical Law Commercial Transactions). The Federal Acquisition Streamlining Act of 1994 (FASA) has made progress in lowering these procurement barriers. The legislation directed the use of commercial off the shelf (COTS) items to the maximum extent possible and simplified procurement procedures including the authorization for new simplified acquisition procedures (SAP) for acquisitions below a prescribed dollar value, currently $150,000. This law incorporated into the FAR shifted the government procurement strategy from lowest price to best value bidding and promoted the use of fixed-price performance-based contracts.

**Contracting Government Requirements**

A government contract is a mutually binding legal agreement for the seller or vendor to furnish supplies or services and for the government agency to pay for them with funds appropriated by Congress (FAR, 2005, section 2.101). A contracting officer (CO or KO) has the authority to obligate the government expenditures by authorizing a contract or contract modification.
The FAR is the primary regulation for use by all Federal Executive agencies their acquisition of supplies and services with money appropriated by Congress (FAR, 2005, Foreword). Each agency also supplements the FAR with their own subordinated regulations and policies, waivers to the FAR, and other regulations used across multiple agencies contained in the Code of Federal Regulations (CFR) which implement public policy such as the Small Business Act or Defense Federal Acquisition Regulation (DFAR) supplement. Despite direction (FAR, 2005, section 1.103) and efforts to minimize administrative costs, the FAR system is very complex. The basis FAR, 48 CFR Volume I, Parts 1-51, and Volume II, Parts 52-53 is 1933 pages in length.

The Federal acquisition process starts with an agency determining a requirement for goods and/or services and planning an acquisition method or contracting plan. If the agency’s contracting officer (CO or KO) determines the appropriate method to purchase the goods or services for the requirement is a contract, the agency issues a solicitation. If the anticipated amount (based on governments independent price estimate) expected amount is greater than $25,000, then the agency posts a solicitation on the government-wide electronic posting Federal Business Opportunities (FedBizOpps) website, available at https://www.fbo.gov. (Halchin, 2006, p. 3). The solicitation is also, or sometimes depending on dollar value, only posted on an agency website or commercial government bid site (e.g. FedBid, FedConnect). The solicitation, at a minimum, must tell prospective offerors what the government wants to buy, instructions for responding to the solicitation, the source selection method that will be used to evaluate offers, the deadline for the submission of bids or proposals, and the small business size category for the acquisition. Most all the solicitations and contracts are required to have the small business size category defined by North American Industry Classification System (NAICS) code for the
industry of the predominate item or service the contract acquires. NAICS code determined by the Department of Labor based on US Census data to describe of 1000 business categories. The Small Business Administration (SBA) assigned either an average annual revenue figure (for service industries) or an average annual total employee count (for manufacturing and supply industries) to determine the threshold at which a business is determined to be “small” in that industry. Protests of the contracting officers’ assignment of a NAICS code with corresponding size standard or challenges to an individual offerors size status are filed with the contracting officer. The contracting officer must forward these protests to the SBA for determination and adjudication of the protest.

**Contract Sausage Making**

Federal contracting is categorized by several type parameters. First, contracts are competed by the issuance of a solicitation which is either a request for quote (RFQ) or request for proposal (RFP). A RFQ, also called an invitation to bid (IFB), invites vendors to bid on specific products or services. It does not obligate the government to buy the item, nor does it obligate the vendor to sell, or even provide a quote for, the product or service. Rather it is a price quote which the government buyer can use to make an offer to purchase the item(s) from the vendor. The vendor must then accept the offer from the government. Technically, the vendor makes the decision to accept the government’s offer from the contractor’s price quote. An RFQ is commonly used for simplified acquisition procedures (SAP) generally under $150,000. These contracts which result from an RFQ are generally for a firm fix price (FFP) based on the lowest price quoted or low price technically acceptable (LPTA) quote, solicitation, or resulting contract. Supplies are commonly purchased, whether under SAP or not, with the lowest prices which meet the specific requirement. In some cases, a brand name or single provider is specified in a
solicitation. This requires a formal justification and authorization (J&A) and review by senior acquisition officials. The federal government has a very high bar for this single available source or brand name because this may limit competition and therefore the best value for the government and ultimately the taxpayers.

A RFP is used for negotiated contracts where the government buyer request proposals or offers (Note: there are also unsolicited offerors where a vendor proposes a novel or improved method of meeting a valid government requirement). The offers are evaluated against the criteria defined in the solicitation to determine, in most cases, the best value to the government. The evaluations that have a subjective judgmental overtone are the source of many protests on best value contracts. These protests question the agencies’ evaluation on several fronts, including whether the criteria was properly articulated to meet a justified requirement and whether all the offerors were evaluated fairly against the solicitation requirements.

**Small Business Programs**

Nearly every government purchase is part of one or more small business programs. This is true whether the acquisition is reserved for small business or a small business category, is scored against the agency small business goaling program, or requires a small business subcontracting plan with specific goal achievement, no matter how large the contract is. The Small Business Act directs that solicitations with an expected value of less than $150,000, the simplified acquisition threshold, shall be reserved for small business. (SBA) This means that agencies must be set aside for a particular small business category if two or more small businesses can be expected to offer at a fair and reasonable price (FAR, 2005; SBA). The types of small business program categories are summarized in Figure 1.
Figure 1.1. Small Business Programs (Source: DoD Office of Small Business Programs, 2012)

These small business programs are essential to the government's support and promotion of the engine of economic growth. Qualification for and compliance with small business programs is often a basis for bid protests. These protests about vendors’ qualifications for small business set-asides are made to the contracting officer, who forwards them to the Small Business Administration (SBA) for adjudication. While a size challenge was not part of a GAO protest, the proper use of acquisition rules for small businesses is a common factor in protests which can be heard by the GAO. This fuel buy is a small business set aside for commercial items using simplified SAP for a low-price firm fixed price bid. Small business program issues underlie this potential protest.
To improve efficiency, promote competition, and expand the opportunities for small business, the government policy directs agencies to use and acquire commercial items to the maximum extent possible. FAR policy says “Agencies shall … [c]onduct market research to determine whether commercial items or non-developmental items are available that could meet the agency’s requirements … acquire commercial items or non-developmental items when they are available to meet the needs of the agency, … [and r]equire prime contractors and subcontractors at all tiers to incorporate, to the maximum extent practicable, commercial items” (FAR 12.101).

**AeroSage’s Reverse Auction Bids**

AeroSage found contracting opportunities from a variety of sources, including several agency and government sites. These ranged from the centralized Federal Business Opportunities (FBO.gov) website to the commercial FedBid auction website, as well as many operated by specific government agencies.

FedBid was a commercial bid and reverse auction service which solicited bids as an agent for the select government agencies in accordance the FedBid terms of service. Several government agencies utilized the FedBid, Inc. reverse auction commercial site to procure commercial supplies using SAP. A reverse auction is essentially a bidding process where suppliers provided automatically decreasing pricing which stops at a minimum level as set by a vendor for the requested goods and services. Each bidder can see electronic notification that their lowest bid is either “Lead” (lowest price within the acceptable price range) or “Lag” (not the lowest bid or not within the acceptable price range). The rank order of the bids and prices are forwarded to the contracting officer for evaluation and then contract award. The contracting officer could also elect to resolicit or cancel the solicitation if, for example, no bids were in the
acceptable price range. The procedures governing the FedBid reverse auction acquisitions are described in Appendix 1.1.

In this procurement for commercial items, the private company, FedBid Inc., identified potential vendors, solicited offers or bids, conducted a reverse auction seeking lowest price, prioritizing the acceptable officers for the contracting officer to evaluate and select a winning vendor to award a contract for commercial items. In this case, FedBid acted on the government behalf to provide the bids to the government agency contracting officer. As always it is the contracting officer who makes the contract award for the obligation of government funds. A protest would challenge the agency contracting officer, not FedBid.

**David “Tanker” Snyder**

Prior to founding AeroSage, David “Tanker” Snyder had spent nearly thirty years in the U.S. Air Force. Over the course of his career, he had risen to progressively more senior positions. His later assignments included installation commander at MacDill Air Force Base in Tampa, Florida and director of strategic planning and programming for a major command and combatant command (COCOM) where he dealt at the strategic level with government acquisition. Earlier in his career, Tanker earned joint MBA and MSE (Systems Engineering) degrees at the University of Pennsylvania’s Wharton School and School of Engineering and Applied Science, preparing him to serve as an instructor and assistant professor of management and operations research at the U.S. Air Force Academy in the Department of Management.

**Military Career**

During the latter half of his military career, Tanker had spent a great deal of time operating at the strategic level, responsible for manning, funding, budgeting, and programming—the military’s term for securing lifecycle funding in the Defense Department’s
and Congress’s current and future year’s budget. His jobs also involved force structure (personnel, weapons system, and base) realignment, and he served as award approving official for hundreds of millions of dollars of operational contracts and programs. He had been aggressive in this command, building a reputation for seeing project small and large earn approval, funding, and execution for senior leadership. He was proud of all that he had completed or set in motion during his just over two-year service at MacDill AFB. There he had charted the course for over $750 million of contacted base infrastructure improvement—even as he had supported the wing’s worldwide mobility mission and operations in Southwest Asia, a turbulent region that included both Iraq and Afghanistan. Tanker had served as the Director of Mobility Forces for the latest wars in the Middle East. He had also served as the chief of staff and a command director in the binational North American Aerospace Defense Command (NORAD) and U.S. Space Command air, space, and missile warning center deep inside Cheyenne Mountain.

Some of the many projects at MacDill where Tanker had led the team to execute included the rebuilding of MacDill’s pier and pavilion, including construction of a state-of-the-art fitness trail, programs, and the world-class Davis Conference Center. This center supported the two combatant commands (COCOMs) headquarterd at MacDill: the regional U.S. Central Command (CENTCOM)—responsible for fighting the wars in Southwest Asia—and the functional U.S. Special Operations Command (SOCOM), coordinating the military’s activities in fighting the global war on terror as well as assisting all the regional combatant commands with special operations within their area of responsibility. The MacDill’s Davis Conference Center also regularly hosted the Air Force senior leadership CORONA conferences, the Air Force equivalent to an annual board of directors and strategic planning meeting.
While his star was still rising, Tanker retired early from his military career. His Wharton relationships gave him a unique opportunity to seamlessly transition at a senior level into the fast-paced, competitive world of Wall Street deal-making. He could even move back to the just completed waterfront condominium his family had purchased in Tampa, while periodically commuting his New York office with one glass wall overlooking Central Park and the other over a vast trading floor. So, the decision to leave the military—a career he had known all his life—had required him to think long and hard. He had come from a military family. His father, a West Point graduate, had been an assault helicopter battalion commander in Vietnam as well as serving in a variety of jobs including assistant professor at the U.S. Military Academy (USMA) at West Point’s Department of Military Psychology and Leadership. While in that position, his father had earned his Ph.D. at New York University Stern School of Business, after which he had held a series of increasingly academic positions, including serving on the faculty of the U.S. Army War College in Carlisle, Pennsylvania, with a sabbatical as assistant to the President of Shippensburg University. After retiring, his father served as Executive Director of the University Center, a consortium of five universities in Harrisburg, Pennsylvania.

From his father’s military career and Tanker’s service in the Air Force, Tanker had a strong sense of duty, responsibility, and accountability. He was comfortable, having achieved a sense of success in the standardized, rule-bound national defense arena, which also rewarded boldness and creativity. Tanker knew that armies succeed and organizations thrive through teamwork. Teamwork that comes from having the welfare, training, and equipping of the unit foremost. Teamwork which relies on accountability that your fellow airmen will fight the way they were trained. He had been ingrained with the proposition that military professionals are creations of government and law (Obligation of Military professionals – Swain) and swear to
“support and defend the Constitution” (oath of office). Tanker was a product of a profession whose members ascribe to what has been described as the “unlimited liability clause” (Hackett see OMP and others). This is the ultimate cost-benefit calculation where you can be asked to give your life in defense of others and this nation.

*Transition to the Private Sector*

The chance to join his Wharton colleagues was not the only reason that the time seemed right for Tanker to jump into the private sector. As a young boy, Tanker had moved twenty-one times before he entered the U.S. Air Force Academy at the age of eighteen. He had lost count of how many times he had moved since then. Feeling that he had served his country, Tanker looked forward to putting down roots. Most importantly, Tanker wanted to build value in the private sector capitalizing on his lifetime experience in the structure of the government. He was ‘bitten by the entrepreneurial bug’ early in a military career which valued risk-taking and innovation, and it was nurtured in graduate school. He was that type of entrepreneur that Gilbert Gonzalez, a colleague in the Doctor of Business Administration (DBA) program that Tanker had enrolled in, described being built on a desire for freedom to control your own destiny, rather than a passion for a better mousetrap. Tanker has led great teams and wanted to build value by harnessing the talents and service of other businesses who could fulfill governments requirements if they could only into the government acquisition system. There are significant bureaucratic, logistical, policy, and regulatory barriers to successfully competing for government business. Tanker could be that navigator who shepherded the better mousetrap makers’ capabilities to the government’s needs. This was a valuable role upon which he could build a profitable business. A business that employed veterans with the values they had shared in the military.
AeroSage

After his stint on Wall Street, Tanker founded the AeroSage Group of companies in Tampa: AeroSage LLC, SageCare Inc., and AeroSage Innovations. Through these companies, he sought to leverage key elements of his military experience. Having been an award approving official, he was very familiar—albeit at the strategic level—with the Federal Acquisition Regulation. Tanker viewed his later career activities to be the foundational source of the competitive advantage of the AeroSage companies. Being a veteran with service-connected disability ratings for a variety of ailments brought on by nearly thirty years of service as a pilot in all aspects of military operations, his companies could qualify to compete in the Service Disabled Veteran Owned Small Business (SDVOSB) class of business.

He had invested the previous five years building these SDVOSB companies, which were verified by the Department of Veterans Affairs (VA). He had started by consulting with larger companies on winning federal contracts. From there, he had progressed to winning actual supply and service contracts as the prime small business contractor. He had done so by teaming with suppliers for a variety of products with whom he had built relationships in the past. On some occasions, he had also sought out partners to bid on government contracts that he had identified.

Business Model

The AeroSage business model is based on the value proposition of providing products and services to federal government agencies through a network of suppliers and partners. As implemented by Tanker, his aim is to provide and build value through identifying government needs, understanding the acquisition process, and effectively fulfilling these requirements with the capabilities of AeroSage’s supplier network. As summarized on the AeroSage webpage
(www.aerosage.com) “We understand the challenges and mission-critical requirements of government customers and what industry must deliver to win.”

AeroSage sought to find opportunities in the vast amount of government public data and by understanding agency needs, solicitation process, contracting rules and laws, invoicing and other aspects of this complicated system. Utilizing the government programs and preferences afforded small businesses and in Tanker’s case, Service-Disabled Veteran Owned Small Businesses (SDVOSB), AeroSage would have access opportunities which vendors may not have access to or have the needed investment in knowledge and certifications. AeroSage would match vetted suppliers with federal contracting opportunities in the vast pool of the Federal government's requirements. Yet, AeroSage would be able to swim in the little pool at shallow end where the big boys were restricted from usually entering. For good and noble reasons, the government created small business policies to restrict competition in several small pools, believing that these smaller groups would graduate into the adult pool or maybe even into the open ocean. Tanker bristles at the notion that veterans are disadvantaged or a special social-economic class. He believes veterans have earned the assistance in building small businesses. This opportunity is earned because, while their contemporaries were learning to be carpenters, chefs, mechanics, salespeople, lawyers, or even starting their businesses, veterans were training to be the best soldier, sailor, airman or marine they could be, which put veterans two to thirty years behind civilian contemporaries in the private sector.

Although he has a significant service-connected disability rating putting his small businesses clearly qualified as a SDVOSB and a VOSB, Tanker believes the distinction between veterans and service-connected disabilities is abnormal and unnecessary. Veterans did not have disabilities; they had abilities fostered in service to the nation that could be brought to the private
sector. While many had impairments, as Tanker thought of service disabilities, all veterans earned the same opportunity and assistance to serve the nation out of uniform in the U.S. free enterprise economy. This assistance not only brings the substantial abilities of veterans to the commercial and entrepreneurial marketplace,

The value proposition of this business evolved from providing consulting assistance to companies growing their Federal government business to a provider of products and capabilities needed by the government agencies. AeroSage has no products, inventory, logistics infrastructure, or a better widget. Tanker’s companies have knowledge and grit to match the capabilities of others with the requirements of government. Tanker would leverage his background to broker commercial capabilities and products where the government has requirements. This was the ultimate arbitrage of his experience—earning a return on fulfilling requirements with capabilities in an inefficient and sometimes distorted government marketplace. He viewed this as a valuable service, not unlike a realtor, insurance agency, brokerage firm or hedge fund. This was continued service to the country, only in the private sector where reward is earned in building wealth, not in earning the next level of command or a glowing citation accompanied by a shiny medal with a colorful ribbon attached. However, like most brokers or arbitragers, margins are generally slim, and the real gain occurs by taking risks to capitalize on market anomalies and knowledge gaps. To evaluate and price the risks, the business must know the rules. By following the government’s rules, he could overcome entry barriers and regulatory hurdles designed to advance policy and create transparency in spending public money.

Many commercial vendors, particularly in the fuel supply market, do not want to deal with government bidding, acquisition, invoicing, compliance issues, and payment issues. This is
particularly true in the fuel dealer business where he saw opportunities. Fuel suppliers usually have ‘NET 10 terms.’ The government will pay within thirty days from submission of an acceptable invoice. The governments invoicing payment system makes it very difficult to submit an acceptable invoice to receive timely payment. Additionally, in the fuel supply industry fuel prices can change dramatically throughout the day at the different terminals. The base reference price is not known until 6:00 p.m. the evening of delivery when the average rack price at one terminal is published. The government wants a firm fixed price for fuel bids a day or two before delivery. So, fuel brokers also have price risk which is factored into their margin pricing, as well as the cost of capital or payment risk on government contracts. Tanker’s business model is that his companies provide an indispensable conduit between commercial suppliers and government agency contract requirements, thereby earning the margin or premium of working with the government.

Challenges

In the military, Tanker had viewed himself in a role as analogous to being an orchestra conductor who led a world-class team of musicians to make a wonderfully accomplished sound. He likened his early jobs as a junior officer to playing first trombone, and then bass. By the time he was operating at the strategic level, it was akin to leading a team to make great “music” while understanding how to make each of the component instruments “play the perfect notes.” But, Tanker recognized that he had relied heavily on the team and a large government staff with subordinates, bosses, colleagues, and teammates. It had been a long time since he had actually operated at the tactical level “playing a solo,” to return to the orchestra analogy. He chuckled to himself as he persisted in his analogy to describe his career remake as a consultant and
government contractor as an orchestra conductor. He conceded that he had almost no musical
talent or affinity, neither had he ever played an instrument nor read a musical note.

Tanker knew how the acquisition processes of the U.S. defense sector operated and how
government programs succeed. What he was learning rapidly, and too often, painfully, were all
the challenges of building a responsible small business including meeting payroll, making
bid/no-bid decisions, pricing bids, and all the government regulations (and opportunities)
imposed on small businesses. What Tanker found to be particularly challenging was working
with the basic entry level government contracting customer to build a small business. After all,
didn’t all the government contracting officers know the Federal Acquisition Regulation (FAR)
and follow these rules? Not exactly, he concluded. They did what it took to get their substantial
inboxes full of requirements to solicit and award contracts for a myriad of different products to
be resolved as quickly as possible and without causing trouble or delay for the agency end user.

The Bid and Award

AeroSage found a short notice opportunity on FedBid\(^1\) reverse auction site for delivering
6,000 gallons of on-road diesel fuel to the Federal Correctional Center (FCC) in Coleman,
Florida. The bid description said the requirement was for “Unleaded Fuel, On-Road, No Dye, No
Sulfur (6,000 gallons) MUST BE ABLE TO DELIVER ON THURSDAY MORNING MARCH 13, 2014 BY 9 a.m.” Coleman was in the immediate vicinity of AeroSage’s first and best fuel
supplier, Adams Oil in Gainesville Florida. Charlie Adams had taught Tanker much about the
fuel business when AeroSage first vetted Adams Oil for a large year-long fuel delivery contract
at the Veterans Affairs Medical Center (VAMC) in Gainesville. The bid was spelled out in the

\(^1\) Changed name to Unison Market Place.
FedBid Buy #594154_02 (the _02 signified that it had been modified two times). AeroSage bid (AS 1014-0120) was calculated in a standard bid calculation sheet Tanker had developed for determining bid prices, costs, and margins. It was the 120th bid AeroSage had made in calendar year 2014 by the March 12, 2014 bid closing.

After securing a vendor and a price, Tanker placed the bid on the FedBid reverse auction site. Despite having to leave for an appointment, stopping in order to log on to FedBid site via mobile Wi-Fi, he had succeeded meeting the deadline of 12:00 noon, as required by the FedBid solicitation. Upon submitting the bid and at the close of bidding, AeroSage was listed as the lowest bidder with the price within the acceptable range. Tanker went back to the appointment, which was followed by a series of other meetings, and returned to the AeroSage office at about 3:30 p.m. to see an email from FedBid saying that they needed him to certify delivery compliance by 5:30 p.m. Tanker confirmed with the supplier and provided his e-mail response to FedBid by 5:00 p.m. It was not until later that evening that Tanker got around to checking his phone messages, when he noticed he had a message recorded just after 1:00 p.m. earlier that day from the contracting officer stating that AeroSage was the apparent award winner, but must provide confirmation, by 2:30 p.m. that afternoon. The message asked if that AeroSage confirm it could meet the delivery time certified in the bid (9:00 a.m. the next morning). After Tanker checked his phone messages, he called the contracting officer at about 6:30 p.m., leaving a message that AeroSage could meet this time and had responded to FedBid before their 5:30 p.m. deadline.

Whether to Protest or Not?

Tanker found himself pondering whether it made sense to file a bid award protest with the Government Accountability Office (GAO). That day he thought that he had won a contract to
provide fuel to a federal agency in a small business set aside simplified acquisition through an online bid site. When the electronic online bid closed at 12:00 noon that day, he could see his bid was listed as “Lead.” These meant that he was the lowest bidder in the acceptable range. Other bidders could only see that their bids were listed as “Lag” meaning that their bid was either not the lowest bid or it was not in the acceptable price range, or possibly both. As part of their role, acting for the government contracting officer, FedBid would always contact the lowest (and near lowest) bidders to confirm their bid conformed to the requirements of the solicitation. Since this was a lowest price technically acceptable bid with a firm fixed price for a commercial item, Tanker knew that there was little to confirm. FedBid would just need to confirm that AeroSage’s bid was correct including the requirement certified in the electronic bid submission the delivery time of 9:00 a.m. the next day. The amounts involved were not large, and the contract’s margins although comfortable, were relatively slim. Moreover, the government customer was likely to have ongoing future requirements for fuel and other supplies. Would such a protest help or hurt his chances for future business? How would this impact his ability to succeed in the fast-paced government reverse bid acquisition process? Should he just drop it and just move on to the next bids? On the other hand, Tanker firmly believed the award represented a violation of the law and/or the Federal Acquisition Regulation (FAR). The protest process was specifically designed to remedy such violations.

While there were three venues for protesting an acquisition impropriety, the most common and commonly referred to generically as a protest, was filing a protest with the GAO. Each protest forum had its own set of rules and someone different possible outcomes. A GAO protest was what Tanker was pondering. He knew the more informal agency protest and the costlier way to seek remedy through the U.S. Court of Federal Claims (COFC or CFC) were not
viable options. Tanker’s plan had always been to build the business on being a responsible contractor with expertise in the complex federal government acquisitions market. For this strategy to succeed, however, agencies needed to be held accountable for following proper acquisition processes. He thought he knew the regulations. He relied on the contracting agency to follow those rules. Tanker thought to himself, “Tell me the rules, we’ll all play by the rules… so that I can compete, win, and build a successful business.”

Underlying the decision, he faced was the fact that this acquisition utilized a commercial reverse auction process. This FedBid reserve auction had yielded some fast-paced bidding opportunities. However, Tanker had recently had some issues with FedBid regarding their role relative to the contracting agency, compliance with the Federal acquisition rules, and pricing/payment of fees for fuel contracts. Therefore, the role of FedBid colored his decision process of how to handle the alleged impropriety, to protest or not, loomed in his mind. Was the commercial FedBid service acting as an agent for the federal government and were they following the acquisition regulations? More importantly, would a GAO protest enhance AeroSage’s growing business model and result in a return on the actions contemplated? Tanker wondered what were his chances of achieving a successful outcome; or even, what is a successful outcome?

The Aftermath

With delivery time scheduled for 9:00 a.m. the next morning, Tanker knew there was no longer time to stop the scheduled delivery the next morning or even speak with the contracting officer about the award as it was after business hours when the request to confirm was received. A GAO protest would probably not stay the award or performance on the contract as required by law (CICA), because the fuel would have most probably already been delivered. Tanker also
understood the critical urgency that the Coleman Prison receive the 6,000 gallons of fuel by the next morning.

The contracting officer had worked hard to fill this short notice requirement with a FedBid reverse auction ‘request for quotes.’ Unfortunately, the contracting officer had also failed to follow their stated rules of fairness or transparency by allowing response through FedBid until 5:30 p.m. that night.

- Would the fuel supplied by AeroSage get delivered?
- Could it still be stopped?
- Did Tanker even want it to be stopped?
- Would AeroSage be compensated for the lost margin?
- Would FedBid and/or the contracting officer be held accountable for failing to follow the rules?
- Would AeroSage win a protest and benefit from the outcome, or would the costs of the protest exceed the benefits?
- What would be both the cost and the likelihood of winning a protest?
- The fundamental business questions of any challenge, legal or administrative: What is the desired outcome? What are the best and the likely gains from the desired outcome? What are the greatest and likely loses from each of the desired outcome, likely outcome, or the worst-case outcome? What is both the present value and long-term value of possible outcomes?

All of these questions, with no definitive answers, weighed on Tanker’s mind after a 12-hour day trying to build a small business. The next morning, an award notification was posted that the
award was made to another vendor for a price that was $2,000 dollars more than AeroSage had quoted. Tanker must decide how to handle and resolve this apparently improper award.

The Decision

Tanker knew what the contracting officer had done in his haste to execute the contract award was not in accordance with the FAR and the solicitation. The fact that AeroSage had the lowest priced technically acceptable bid in the FedBid reverse auction was not in dispute. However, the contract was awarded to another vendor because AeroSage did not return a message in the 45 minutes the contracting officer (CO) gave AeroSage in following the bid closing. It was a requirement to follow the procedures, including the timeline specified for responding. Tanker sensed that the error was a somewhat technical violation of rule to ensure transparency, but realized he offered the government the best price. It seemed the immediate and central decision was should AeroSage initiate a bid protest as outlined in the bid protest regulations. If the fuel was not already delivered, an immediate protest would likely stop performance on this contract award until it was resolved (Bid protest regulations).

What made this particularly challenging was that neither Tanker nor any of his companies had ever gone through the formal bid protest process before. He had researched the applicable Code of Federal Regulations for the and the Government Accountability Office (GAO) (Bid Protest Regulation 4 CFR § 21 Bid Protest Regulations,) as defined in the Federal laws on the Procurement Protest System, Subchapter V of 31 U.S.C. 3551-3556 (see Technical Note). He was well versed in the government systems and rules, and his career flourished as a result. Rules that in his world often meant the difference between life and death, not something as simple as to determine who would be awarded a fuel contract for $30,000. He wondered if it would be helpful to let the contracting officer know of his proficiency with the rules in hopes of
building a relationship with this contracting officer to curry favor by settling the issue between them and avoiding the protest process. It seemed like an easy decision based on the return on investment as the best he could hope for was either the re-competing of the contract or the reimbursement of the bid protest costs, but not for the profit margin on this bid award.

Should AeroSage invest the time and opportunity costs from other bids and contracts to gain an award that would earn a reasonable margin on this winning bid? Additionally, Tanker hoped to build his business model on knowing the government bid and award process and following the acquisition rules particularly as they provided substantial benefits and opportunities to small businesses, including service-disabled veteran-owned small businesses (SDVOSB). He also believed his companies had a responsibility to hold this contracting officer accountable to follow the FAR, at least as Tanker saw it in his reading of the specific bid and applicable clauses. He hypothesized that earning a reputation for his companies of knowing the regulations, expecting contracting officer and agencies to follow the FAR, and challenging alleged violations, AeroSage would gain the trust and respect of the governmental agencies.

Alternatively, Tanker knew that relationships were important in government contracting (or any business) even within the context of ridged, yet complex directives of the FAR. Contracting officers want to find a way to work with vendors they like and can make their job easier. The result of the protest would work against developing a relationship and could even cause the beginning of an adversarial reputation for AeroSage.

It seemed almost a trivial decision from an immediate return on investment standpoint, particularly in the fast-paced FedBid reverse auction bidding process where the AeroSage’s win percentage was near 5%. This made the volume of quotes and repeat opportunities important to
the immediate opportunities. However, the decision loomed large because of the strategic impact on AeroSage’s business model.

Also, Tanker worried if he knew enough about the fuel dealer business that had evolved into a larger portion of his business. Despite his career expertise, did he know enough about the tactical level of government contracting or even the bid protest process which is almost always handled by lawyers? Did Tanker fully understand both the immediate costs of pursuing a protest, as well as the unknown strategic implications? What are the immediate benefits, as well as the long-term return including gaining the first-hand experience into the complex world of bid protests?

Most importantly, Tanker wondered what would be defined as a successful outcome from a protest. How would he and other veteran-owned small businesses perceive success, and how would the outcome be reported? Would the SDVOSB community benefit in their respective pursuits? Would a ‘win’ raise the awareness within the contract community to follow the rules more closely? What is the right decision for AeroSage?

References


Appendix 1.1. FedBid® Government Acquisitions

FedBid Inc. is a private company which earns a fee by online solicitation of vendors capable of providing a government requirement for commercial products. This fee was paid by the vendor when completing the delivery of supplies. It is added to the price the vendor offered to the government. Vendors post their bid prices with the lowest price their offer will go down to, if they are not the current lowest bidder. When the solicitation bidding closes FedBid verifies that the bids meet the requirements forwarded a list sorted by price of bids in the acceptable range. The contracting officer does the evaluation and award.

FedBid Procedures: From FedBid Inc. Terms of Service:

The Web Site provides an Independent Venue for Sellers to offer and sell Commercial Items and for Buyers to post IFBs and purchase Commercial Items from Sellers. FedBid has no control over the quality, safety or legality of the Commercial Items offered and sold, the accuracy of any related content, the ability of Sellers to sell Commercial Items or the actual intent of Buyers to buy Commercial Items. Although FedBid performs limited due diligence to qualify Sellers and Buyers as Subscribers, FedBid does not guarantee nor does it control whether Sellers will complete the sale of Commercial Items they offer or whether Buyers will complete the purchase of Commercial Items for which they have requested Bids. Buyers may submit IFBs on an anonymous basis. Because FedBid does not and cannot control the actions of users of the Web Site, in the event that You have a dispute with one or more users, You agree to release FedBid from any and all claims, demands, and damages (actual, direct, indirect, consequential and punitive) of every kind and nature, known and unknown, suspected and unsuspected, disclosed and undisclosed, arising out of, or in any way connected with, such disputes. You also agree to waive the provisions of any state law limiting or prohibiting a general release.

Bid Process

The Bid Process is as follows: 1) The Buyer posts an IFB; 2) Each Seller reviews the Specifications and either submits or does not submit a Bid (during the Reverse eAuction process, each Seller may submit multiple Bids); 3) If Seller submits a Bid, Seller MUST proactively confirm compliance with all Specifications and be responsive to all Bid Validation or Due Diligence requests; or if Seller chooses not to submit a Bid, Seller may submit a No Bid or not respond; 4) The Buyer reviews Bids, performs Due Diligence, and decides to: i) Cancel the IFB, in which case all participating Sellers will be notified, ii) RePost the IFB with modifications, in which case the Bid Process begins anew, iii) Extend the Buy to allow for more Bids to be submitted; or iv) Select a Bid, in which case the Buyer enters the Authorization Number into the Web Site, and each party receives the other party’s contact Information; and 5) Those Sellers not selected may view the Selected Bid amount and, as permitted by the Buyer, the identity of the Selected Seller. All Sellers submitting Bids on an IFB will compete in the Buy until the Buy process expires as specified in the IFB and as determined by the Web Site system clock. Throughout the bidding process, FedBid will rank the Bids based on Best Price; however, the Buyer maintains the right to use Offline Factors for award decisions. FedBid will provide Sellers with their Bid Status, consisting of: LEAD or LAG; LEAD-Pending Selection or LAG-Pending Selection; Selected or Not Selected; or Cancelled. If two or more equal Bids are submitted, they will be ranked according to time of submission, with the previously submitted equal Bid leading as compared to any subsequently submitted equal Bid. Buys shall take place Monday through Friday between 11 a.m. and 6 p.m., Eastern Time, unless otherwise specified by the Buyer. A Buyer is NEVER obligated to complete the transaction, regardless of the status of the Buy, and a Buyer may select any of the participating Sellers in order to obtain the most advantageous Bid in accordance with their contracting authority and applicable rules and regulations; however, the Selected Seller may not retract or cancel its Selected Bid except in the extraordinary event.

2 Changed name to Unison Market Place.
that the Buyer: (a) materially changes the description and/or quantity of the Commercial Items specified in the IFB, (b) has materially misrepresented the Commercial Items in the IFB, or (c) a system error has occurred on the Web Site creating an error in the Bid(s) or IFB. A Buyer cannot award specific IFB line items to multiple Sellers or otherwise designate more than one Selected Seller per Buy unless specified to the contrary in the IFB. A Buyer cannot solicit or accept Partial Bids in a Reverse eAuction. Non-compliance with FedBid’s Bid Process may subject You to negative ratings from FedBid Subscribers and may lead to suspension or revocation of some or all of Your FedBid access privileges. UNLESS OTHERWISE STATED IN THE IFB, BIDS SUBMITTED BY SELLERS IN RESPONSE TO AN IFB MUST BE IN U.S. DOLLARS AND MUST NOT INCLUDE ANY SALES TAX (STATE, LOCAL OR OTHERWISE) OR ORDER COSTS.

Source: FedBid Inc. Terms of Service
CHAPTER TWO:

GAO BID PROTESTS: ANALYSIS OF REPORTED OUTCOMES AND THE IMPLICATIONS FOR SMALL BUSINESSES

A protest concerning an alleged violation of a procurement statute or regulation shall be decided by the Comptroller General if filed in accordance with this subchapter [Title 31, Subchapter 35] - 31 U.S.C. §3552(a) Procurement Protest System

Abstract

Since the first bid protest decision was published by the Government Accountability Office (GAO) in 1926, the GAO has provided an informal, quasi-legal forum for the resolution of disputes concerning the awards of federal contracts (GAO-18-510SP). GAO considers protests effective when the protesting contractor obtained some form of relief from the agency as a resolution of the disputed improprieties (GAO Bid Protest Annual Reports). Industry analysis of Federal government procurement protests finds GAO reporting a slightly increasing 44% effective rate. These reported outcomes support the GAO narrative that their process provides reasonable opportunity for vendors to achieve some sort of remedy for alleged prejudicial improprieties in the government’s procurement of supplies and services. A protest outcome that sustains the alleged violation is a more important measure of effectiveness since bid protests regulations only require GAO to recommend relief when a protest is sustained. AO data also shows that protest outcomes are relative only to the limited number of protests that are decided on the merits. GAO reports that these outcomes of protests sustained on their merits are in the range of 16% to 21% which conversely means roughly 80% of the decided protests are denied
recommendation of remedy for the protestor and the agency accountability. This finding shows that the relevant effectiveness rate is relatively steady only at near 4% when analyzing comparing sustained protests relative to the total protested allegations of impropriety closed each year. Even so, many protest outcomes that are sustained-fail to provide a meaningful or cost-effective relief for the small business protestor. Therefore, the claimed utility of the current GAO protest system is evasive for many contractors. GAO bid protest outcomes show minimal effectiveness for small business protestors. The costs of bid protests are real, substantial, and sometimes, enduring while the benefits from protests are minimal, especially for the small businesses.

**Introduction**

The Federal government purchases every sort of product or service imaginable through laws implementing the Federal Acquisition Regulation (FAR). Contractors competing for these contracts may protest alleged violations of these rules by the government. A bid protest is a challenge to the award or proposed award of a contract for the procurement of goods and services or a challenge to the terms of a solicitation for such a contract (GAO.gov). The most used venue for seeking adjudication of a protest dispute is with the Government Accountability Office (GAO). Originally titled the General Accounting Office, GAO was renamed the Government Accountability Office in 2004. The change better reflects the modern professional services organization that GAO has become, particularly regarding the evolving bid protest function (https://www.gao.gov/about/what-gao-is/history/).

Over the last decade or so, much Congressional and government interest, study, and legislation has been directed at assessing the bid protest process for Federal procurements. These efforts have been mainly used to determine the outcomes of protests: are they effective in
correcting procurement improprieties and, most notably, do protests unduly delay acquisitions by Federal agencies, especially in Department of Defense (DoD) acquisitions. The GAO primarily uses and highlights the percentage of protest outcomes, which they determine result in the protestor receiving some sort of relief similar to the effectiveness rate (GAO Bid Protest Annual Reports).

The Congressionally directed interest is in seeking to answer the question: Do the overall benefits of identifying and correcting prejudicial violations of procurement rules of the Federal acquisition system exceed the costs. In these studies, costs to the government are viewed primarily in terms of acquisitions delayed or cancelled from the government’s or the procuring agency’s vantage point. Few of the studies have addressed this question from the commercial contractors’ perspective and virtually none have explored the question for small businesses. This lack of attention to small businesses’ concerns is antithetical to national policies, laws, and procurement regulations that seek to promote the sustained participation of small businesses in Federal acquisitions. Therefore, small business protests make up the majority of the GAO protests (RAND 2018).

The national policy, directed by the Small Business Act (Title 15 United States Code (U.S.C.), Public Law 85-536, as amended) and implemented throughout the Federal Acquisition Regulation (FAR), includes an array of mandated preferences for small businesses and subsets of small businesses in various socio-economic categories. The Small Business Administration (SBA) promulgates the FAR regulations for small business assistance programs, which include total and partial small business set-aside contracts, small business goal achievement program, financial assistance, accelerated payment, and mentor-protégé programs. Implementation and execution of these uniquely government-regulated preferences for small businesses is a key part
of our Federal acquisition system. The GAO protest forum offers a vehicle for adjudicating alleged violations of these small business procurement rules as part of the broader process for a contractor to challenge almost all Federal acquisition policies and procedures. While there is increasing interest in determining the outcome effectiveness of protests to the acquisitions system, such as those that warrant Congressionally mandated research from the government’s perspective, there is a dearth of analysis of the effectiveness of GAO protests for small business protestors.

The present industry analysis focuses on the questions of: what are the outcomes of GAO bid protests for small businesses in Federal acquisitions, and are the protest outcomes effective for those small businesses? Are the costs of pursuing GAO bid protests greater than the benefits for small business protestors, particularly from the perspective of Service-Disabled Veteran-Owned Small Businesses (SDVOSB)? Simplified, the research question is: Are reported GAO protest outcomes effective for small business protestors.

**Research Question**

Are reported GAO protests outcomes effective for small business protestors? This paper addresses the research question by reviewing the literature, legislation, seminars, conferences, and research, much of which is from government sponsored sources. The protest data used is from the GAO bid protest annual reports, GAO case reviews, RAND and Congressional Research Service (CRS) quantitative studies. This paper is informed by the outcomes and their implications as perceived through my action research of more than 200 GAO bid protests. While the reported protest outcome data provided by GAO is for all GAO protests, this study analyzed information from the vantage point of SDVOSB small businesses, many of whose situations
involved disputes over the implementation of competition requirements and small business preference procedures.

**Federal Government Procurement of Supplies and Services**

The Federal government spending on contracts for goods and services is approaching $600 billion annually (Snyder 2019) as they purchase every kind of legal service and good imaginable. The contracting process broadly begins with a solicitation, followed by offers or bids, evaluation of the offers, acceptance of an offer(s), award of a contract, and performance of the contract, and payment by the government. Commercial contractors (interchangeable with the terms used by vendors or offerors in this paper,) compete in this unique, potentially lucrative market with the expectation, shared by the public, that the acquisition process is fair, transparent, and competitive in seeking the best value for the government requirements.

All Federal acquisitions are governed not only by laws and a comprehensive system of regulations, but also by the Federal Acquisition Regulation (FAR) and agency supplements to the FAR. For example, the Defense Federal Acquisition Regulation Supplement (DFARS), along with subagency policies and supplements, implements and supplements the FAR for the Defense Department (and National Aeronautics and Space Administration - NASA, Government Services Administration – GSA, and formerly the United States Coast Guard - USCG). The DFARS contains requirements of law, DoD-wide policies, delegations of FAR authorities, deviations from FAR requirements, and policies/procedures that have a significant effect on the public (Federal Regiser). Federal laws are called the “United State Code” (U.S.C). The relevant Federal agencies interpret and implement the U.S.C. through the Code of Federal Regulations (CFR). As supplemented, the FAR is the Federal regulation that governs procurements. The FAR provides principles and rules for agency conduct of procurement. Also, the FAR contains
the rulebook for vendors competing for these government contracts. The FAR is Chapter 1, Title 48 of the CFR.

The Competition in Contracting Act of 1984 (CICA pronounced “Seek-ah”) legislates that Federal agencies shall obtain full and open competition using competitive procedures that are best suited for the circumstances of the procurement (41 U.S.C §253 Competition Requirements). The guiding principles of the procurement system are described in 48 CFR 1.102: *The vision for the Federal Acquisition System is to deliver on a timely basis the best value product or service to the customer, while maintaining the public’s trust and fulfilling public policy objectives.* (FAR 1.102 (a) Statement of guiding principles for the Federal Acquisition System).

Like most commercial procurements, the goal of the Federal procurement system is to timely provide the best value product or service to the customer. However, the Federal government has unique and significant goals of providing this best value to Federal agency customers while maintaining the public’s confidence and trust in the system and fulfilling public policy objectives (48 CFR 1.102). Preeminent among the policy objectives of our free market system is the goal to obtain full and open competition using appropriate competitive procedures in the FAR (41 U.S.C § 3301 and 10 U.S.C. 2304) unless otherwise expressly authorized by statute. An expressly authorizing statute directing an equally important policy objective mandate is supplied by the Small Business Act (Title 15 U.S. Code, 15 U.S.C. 631, et seq., Public Law 85-536, as amended), which directs special programs and preferences for small business concerns. Similar to its other programs, the Small Business Act deems that small businesses set aside preferences and qualify as full and open competition when excluding sources, which are best suited to economic security. As implemented in the FAR, the law directs a policy objective
on equal footing as the full and open competition policy. This legislated policy is summarized in law below:

The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation. (15 U.S.C. § 631 (2)(a) Policy of Congress)

The law and corresponding acquisition regulations provide for several small business assistance programs, including preferences for small business that may seem contrary to the competition requirements. Specifically, small business concerns shall receive any award or contract if such award or contract is, in the determination of the [SBA] Administrator and the contracting agency, in the interest of (A) maintaining or mobilizing the full productive capacity of the United States; (B) war or national defense programs; or (C) assuring that a fair proportion of the total purchases and contracts for goods and services of the Government in each industry category (15 U.S.C. §644). Although the law allows small business set-asides and sole-source contracts at nearly any value, the Small Business Act requires that set aside contracts be exclusively reserved for small business concerns where:

[e]ach contract for the purchase of goods and services that has an anticipated value greater than the micro purchase threshold [currently $10,000], but not greater than the simplified acquisition threshold [currently $250,000] shall be reserved exclusively for small business concerns unless the contracting officer is...
unable to obtain offers from two or more small business concerns that are competitive with market prices and are competitive with regard to the quality and delivery of the goods or services being purchase (15 U.S.C. §644(j)).

The law and corresponding acquisition regulations that provide for these several small business assistance programs, including preferences for small businesses, may seem contrary to the competition requirements.

As authorized by law, the SBA determines that a small business concern, eligible for small business contracting assistance and preference programs, is a business that is independently owned and operated, operates primarily within the United States or makes a significant contribution to the U.S. economy, is not dominant in its field of operation, and is in conformity with specific industry criteria and size standards (13 CFR 121). Small business concerns have subsets of socio-economic categories like small disadvantaged (SDV or 8 (a)), woman-owned, veteran-owned (VOSB), service-disabled veteran-owned (SDVOSB), and Historically Underutilized Business Zone (HUBZone) small business concerns (15 U.C.S § 644).

In addition to SBA small business programs applicable to most all Federal agencies, the Department of Veterans Affairs (VA) has specific legislation (The Veterans Benefits, Health Care, and Information Technology Act of 2006, Public Law 109-461, 38 U.S.C. § 8127 - § 8128), and the Veterans First Program, which mandates a separate, more comprehensive use of set aside and sole-source contracts for VA procurements requiring use of VOSB and SDVOB, if those business are on list of VA verified VOSB/SDVOBs.

These two dominate, but seemingly conflicting policy objectives directing full and open competition and small business preferences and assistance policies create a somewhat uniquely government contracting paradox. Federal procurement law and regulations resolve this apparent contraction by deeming small business set asides and preferences as “full and open competition
after exclusion of sources” (48 CFR Subpart 6.2). To fulfill the statutory requirements relating to small business concerns, contracting officers may set aside solicitations to allow only such business concerns to compete (48 CFR 6.203), by implementing the following policy in CICA Competition requirements law: An executive agency may provide for the procurement of property or services covered by this section using competitive procedures but excluding other than small business concerns in furtherance of sections 638 and 644 of title 15 [Small Business Act]. (10 U.S.C. § 2304(b)(2) & 41 U.S.C. § 253(b)(2), Exclusion of particular source; restriction of solicitation to small business concerns).

The government acquisition system reconciles this enigma, which some contend that set asides undermine purchasing efficiency so as to accomplish social goals. This reconciliation is based on the theory that small business set asides accomplish goals of national security and economic well-being that cannot be realized unless the actual and potential capacity of small business is encouraged and developed (15 U.S.C. § 631). The subset of specific socio-economic small business set asides may also accomplish social priorities. The socio-economic subcategories are based on historically deemed disadvantages, except VOSB/SDVOSB.

For the small business owned by veterans, the favorable treatment and preference is an earned benefit for serving the national defense. Veteran business owners, with or without service-connected disability ratings, do not view themselves as disadvantaged. Rather, they are utilizing the earned benefit, which aids in transition from military service to commercial business. This preference benefit is also compensation for two things: 1) for not having an equal opportunity to build a career in the private sector during military service, and 2) for the presumption that veterans have a greater sense of understanding and meeting critical requirements of government. This VOSB/SDVOSB contracting category has some distinct
differences in law and practice concerning other socio-economic small business contracting rules. These veteran-owned companies are also part of the larger aggregate class of small business concerns in procurements with all the other agencies whose assistance and preference propose to maintain and strengthen the overall economy and national security (U.S.C. § 631).

The implementation of the rules for providing preferential assistance to small businesses in government contracting is a source of many disputes between agencies and contractors (and often between small and large businesses). These disputes generate challenges to businesses protesting improprieties in government procurement. Often, the protest outcomes for small business are the result of allegations of agency impropriety in administering the small business programs in procurements. These set aside solicitations do not have a direct analog to the traditional commercial understanding of full and open competition. Rather, these small business acquisitions are governed by a somewhat fluid, counter-intuitive rule set, which is not always well understood, implemented, or supported by agency contracting officers. More than half the GAO protests are by small businesses; many deal with disputes about the small business program. With the VA having a separate VOSB/SDVOSB program, the protests and the outcomes are often more specific to the VOSB/SDVOSB contracting section of the program. The need for study of protest outcomes from the point of view of VOSB/SDVOSB stakeholders, which are part of the broader small business protest outcomes, is a purpose of this research.

**Protesting Alleged Violations of Acquisition Laws and Regulations**

To ensure that agencies fulfill their vision in the expenditure of public funds, it is necessary to provide the government and contractors methods of resolving disputes involving allegations of improper actions that violate law or regulations. Hence, there is a need for a bid protest system to ensure that the best value, public confidence, and public policy achievement are
policed for government purchases. The public policy objectives of ensuring that small businesses receive a fair portion of government contracts must be balanced with many of the other objectives, such as maximizing competition and ensuring best value for the government. Otherwise, there may be friction that can be the source of protests by small businesses.

My research is colored by the lens of small businesses, particularly those within SDVOSB, who is looking to ensure agency fairness, integrity, and compliance with the goal for small businesses’ support and growth. The bid protest system is critical to small business participation in the Federal market, for that system protects the advantageous programs afforded small business as described above. Critics of small business programs assume that these programs cost the government more and increase the risk of performance. While this may initially be true in some cases, the long-term enhancement and sustainment of the small business backbone of the American free-enterprise system outweighs these costs and risks (48 CFR Subpart 19.2). Recent research finds that small businesses “have lower transaction costs derived from lower perceived risk of receiving a bid protest and via more efficient source selection processes. Contrary to common bias, the performance level of small businesses is no less than that of large business. Thus, small businesses engender lower transaction costs for correcting supplier performance” (Hawkins 2018).

Small businesses are the genesis of much innovation, are usually more agile, and often can provide cost saving benefits because of their lower risk and transaction costs, lower overhead, simplified acquisition procedures, and fewer regulatory and reporting requirements. However, most small businesses lack the knowledge, experience, and resources of financial, regulatory, and legal assistance to operate successfully within the complex bureaucratic laws and rules to compete in the Federal marketplace. Many struggle to sustain success. Sustained small
business success requires the ability to navigate the somewhat unique government contracting rules and ensure compliance with these laws and rules of the small business, its competitors, and the multiple agencies involved. This compliance is essential to ensure full, fair, and open competition within the policy guardrails legislated by Congress and representing the public as described above. Hence, the need for an “inexpensive and expeditious” (31 U.S.C. §3554) process to resolve disputes about the compliance with these government contracting mandates that seek policy directed competition requirements and transparency. Using the GAO venue is an American creation, although several other countries and the World Trade Organization have considered systems modelled from the GAO protest system (White Interview). The GAO protest system provides, or at least attempts to provide, this adjudication option, which may be more suited for small businesses.

Policing, resolving, adjudicating, and correcting improprieties in the purchases made by government agencies is accomplished by the multi-tiered Federal government acquisition protest process. The design of this process includes informal, internal agency, administrative, and judicial proceedings. These systems are governed by regulations, law, precedent setting GAO decisions, SBA determinations and appeals, and court ruling.

**Types of Protest**

Several types of bid protests offer somewhat different venues, rules, methods, authorities, and possible outcomes. These different types are protests with the individual agency to the contracting officer or protest reviews above the contracting officer authorized by Presidential Executive Order 12979; protests with the GAO; small business protests with the U.S. Small Business Administration (SBA); and protests filed with the United States Court of Federal Claims (CFC) and Federal appellate courts. Sometimes, each venue has competing, overlapping
advantages. Such disadvantages make the timing and choice of forum for protest a critical. Each type or venue is influenced by its specific government authority and the separation of powers weighs heavily on the process and the outcome or remedies available for protest resolution. Agency protests (including E.O. 12979 protests) and small business protests are filed with the executive branch agency as well as conducted and remedied by the agency involved. GAO protests are conducted by the legislative branch. The GAO is an office of Congress that can only provide recommendations to the executive agency to remedy the protested impropriety. The Federal COFC and appellate court system support the traditional Judicial Branch adjudication and remedy resolutions. A summary of the basic types of protest described below are outlined in Appendix 2.1, with further discussion included.

*Agency Protests*

Agency protests are addressed internally by the contracting agency. Informal protests or concerns are raised by an offeror in discussion with the contracting officer regarding aspects of the acquisition. Often, the source of concerns likely to be protested by the contracting office are the posting of a solicitation and pre-award or post-award notifications and debriefings. The FAR directs the required content of a solicitation and a requested or required notification and debriefing (FAR 15.505/15.506). Generally, notifications and debriefings are required for negotiated contracts and for those using small business set asides or other small business programs.

A formal agency protest is a timely filed written objection to a solicitation, award, or termination of a contract (48 CFR 33.103, 4 CFR § 21). The agency protest is filed with and ruled on by the contracting officer, rather than the GAO. Protests filed directly to the Agency are not decided on by a neutral party and often, are less successful. However, they trigger an often-
useful automatic stay of contract performance in accordance with the Competition in Contracting Act (CICA) of 1984. This stay of performance is an important factor in a business’s, small or large, decision on how to protest a bid. This tool is particularly useful in an Agency protest, where the contractor has limited leverage, other than the possibility of escalation to a GAO protest.

Additionally, Presidential Executive Order 12797 (E.O. 12797) directs that Agencies also “provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests… including alternate dispute resolution (ADR)” and “a review, at a level above the contracting officer.” If timely filed, these E.O.12979 agency protests can trigger an often-useful automatic stay of contract performance in accordance with the Competition in Contracting Act (CICA) of 1984. This CICA stay is also available in protests with the GAO. This stay of performance ruling is an important factor in any business’s decision on how to protest a bid. The Presidential Executive Order is a particularly useful tool in an Agency protest, where the contractor has limited leverage, other than the possibility of escalation to a GAO protest.

**GAO Protests**

GAO protests, the focus of this research, are general thought of as bid protests. Congress intended and directed that the GAO “shall provide for the inexpensive and expeditious resolution of protests” (31 U.S.C. §3554). The components of this bid protest system are defined in Title 31 U.S.C. Chapter 35, Subchapter V – PROCUREMENT PROTEST SYSTEM. Protests are filed with the GAO in accordance with the bid protest regulation (4 CFR § 21), implementing the Bid Protest System statute (31 U.S.C §3551-§3556). In deciding bid protests, GAO considers whether federal agencies have complied with statutes and regulations controlling government procurements, whether the alleged violation is materially prejudicial to the protest, and whether
the violation is filed timely, with the required content, using the new Electronic Protest Docketing System (EPDS).

Small Business Size Protests with the SBA

Although not covered as part of this research dissertation, there is a protest venue and grounds that are vitally important to small business concerns of all socio-economic categories. These protests of small business size issues are heard by the U.S. Small Business Administration (SBA). Such protests involve alleged violations of the Small Business Act, implementing SBA regulations, or FAR clauses related to small business programs. An interested party or contracting officer can protest the following general type of protests (4 CFR § 21) with the SBA that are excluded from GAO consideration:

- **Size Status Protests** – challenges to offeror’s eligibility for a small business program based on the determination of size in a particular designated industry.

- **North American Industry Classification System (NAICS) Industry Classification** – argues impropriety in designating the single-industry classification used to determine size standard for that procurement.

- **Responsibility Determination** – challenges the determination of capability of a small business to perform on a proposed contract.

- **Compliance with Limitations on Subcontracting** – challenges the procurer’s determination about the owner’s ability to perform a service(s) or produce a product(s) with own employees or employees of a similarly situated small business.

- **Non-manufacturing Rule (NMR) Compliance** – a subset of compliance protests with the limits on subcontracting where a small business must procure a product that it did/does
not manufacture for a domestic small business manufacturer unless through a waiver by the SBA or an exemption in regulation.

Small business protests can be filed and are ruled on with strict timeliness criteria similar those of the GAO protest. To avoid time traveling, the determination is generally made by the SBA Area Office Director (from the SBA regional office where the challenged small business is located). Timely appeals of SBA rules are made by filing before an administrative judge in the SBA’s Office of Hearing and Appeals (OHA). Then, these appeals can be challenged or appealed in Federal court. SBA hears challenges to a small business size status of an offeror(s) for a specific solicitation. The GAO adjudicates challenges to the conduct of the protested acquisitions for alleged violations by the agency.

**U.S. Court of Federal Claims Protests**

Judicially adjudicated protests and claims against a Federal agency are primarily heard by the U.S. Court of Federal Claims (CFC) and follow its rules and procedures. Important distinctions of filing a protest with the CFC are as follows: the protestor must be represented by a lawyer admitted to the CFC, the court hears the case de nova or with a fresh look, there are different timeliness criteria, and there is no automatic CICA stay of performance of the contract. However, a protestor can file for an injunction to stop performance. Unsuccessful GAO protests can be filed with the COFC.

Appeals to CFC ruling can be appealed to the U.S. Court of Appeals, and eventually to the Supreme Court of the United States. A (series of) protest(s) that began as GAO protests became a landmark Supreme Court ruling favoring the SDVOSB protestor in *Kingdomware Technologies, Inc. v. United States, No. 14-916 (2016)*. This case involved a VA SDVOSB protest of the VA’s violations of the Veterans First Program requirements to set aside a contract.
for the VA using the GSA schedule. The VA claimed that set asides for VA procurements using GSA-assisted acquisition only applied if the VA had not achieved its SDVOSB goals.

Other cases involving the VA include several Kingdomware protests. GAO sustained several Kingdomware and Kingdomware-related protests, recommending that the VA set-aside requirements be applied to this and all contracts supporting the VA, regardless of being assisted by other agencies. The VA did not agree, nor did it comply with the GAO decision and recommended relief. As required, GAO reported the VA’s disregard for the recommended relief to Congress in the annual bid protest report. Then, GAO stopped hearing and dismissed several protests related to the same issue of compliance with the VA SDVOSB set-aside program because their recommended corrective action would not be followed, making a GAO protest academic. Then when the protest was filed in CFC, the GAO could also refuse cases that were subject to current or past litigation. The case went to the Appeals Court and to the Supreme court, which, resulted in a unanimous 8-0 in favor of Kingdomware in June 2016.

**GAO Protest Venue**

The Bid Protest System statute directs the current procedures for a “protest concerning an alleged violation of a procurement statute or regulation [whereby the case] shall be decided by the Comptroller General if filed in accordance with this subchapter [31 U.S.C §3551-§3556]” (31 U.S.C. §3552 (a)). The GAO provides the following overview of the GAO bid protest industry:

For more than 90 years, GAO has provided an objective, independent, and impartial forum for the resolution of disputes concerning the awards of federal contracts. Over the years, the decisions of the Comptroller General of the United States, the head of GAO, in bid protest cases have resulted in a uniform body of law applicable to the procurement process upon which the Congress, the courts, agencies, and the public rely. - Bid Protests at GAO: A Descriptive Guide (Tenth Edition, 2018; GAO-18-510SP, May 1, 2018).
Protests filed with the GAO are limited to Federal government procurements. These must be protested to the GAO in accordance with the bid protest statute (31 U.S.C §3551-§3556), the bid protest regulation (4 CFR § 21), FAR (Part 33), and the specific agencies’ policies and annex to the FAR, including as reported by the GAO in their annual fiscal year. A bid protest is an adjudicative process conducted by the GAO’s Office of General Counsel, Procurement Law Control Group. Technically, a GAO protest decision is decided and signed by the GAO General Counsel but is adjudicated by a GAO hearing attorney who writes the decision under the supervision of the two co-Managing Associate General Counsels for Procurement Law. I recommend that the reader supplement this baseline note with the Congressional Research Service (CRS) 2018 updated analysis of protest process, Gordon’s research on the governments’ cost-benefit analysis of GAO protest (Gordon, 2013) and recent developments in the GAO’s protest guide shown below.

![Figure 2.1. Bid Protests at GAO: A Descriptive Guide (10th edition, 2018)](image)

This guide incorporates the 2018 changes requiring electronic filing through the GAO’s Electronic Protest Docketing System (EPDS) and payment of a $350 filing fee. These changes appear to have some impact on the reported outcomes as well as perception of the outcomes by researchers and protestors.
Timeliness is an essential threshold to meet and can be a significant hurdle for small businesses trying to understand the requirements, putting together a competitive bid, and ensuring they adhere to the rules that may provide competitive advantage. There are strict timelines for filing, processing, and deciding a GAO protest; it is all challenging to protestors, particularly small business owners more comfortable with informal, expeditious processes.

The protest timeline influences the conduct of the protest and the review of the protests (White Interview). The timeline is driven by the statutory requirements to resolve protests within 100 days (Bid protest rules also provide for GAO resolution of suitable protests in a 65 day express option rule on allegations, acquisition, and improprieties). The GAO timeline also covers recommendation of relief, if warranted, and an annual report on protest trends and specific instances of agency failure to follow recommendations. Except for government shutdowns, GAO has not failed to meet the 100-day process timeline shown in Figure 2.2, below.

Figure 2.2. Timeline of GAO Bid Protest Process (Source: GAO, Our Bid Protest Process, https://www.gao.gov/legal/bid-protests)
A timely GAO protest, whether filed originally, supplementally, or following an Agency protest, must meet the original timeliness requirements discussed above (4 CFR § 21.1).

Generally, an Agency or GAO protest must be filed:

not later than 10 days after the basis of protest is known or should have been known (whichever is earlier), with the exception of protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required. In such cases, with respect to any protest basis which is known or should have been known either before or as a result of the debriefing, the initial protest shall not be filed before the debriefing date offered to the protestor, but shall be filed not later than 10 days after the date on which the debriefing is held (4 CFR § 21.4(b))

This paper focuses on the second venue for bid-protests, the GAO, the more familiar, common bid-protest vehicle. A GAO protest is an administrative review process with no mandatory enforcement power. This type of protest is considered to be quasi-judicial primarily because of its statutory procedural process, the stay of contract award, and timely filed protests with the GAO (or with the Agency under E.O. 12979). The “CICA stay” provision was added to the GAO protest in 1984, when the current rules were codified in CICA, and in 1995 for E.O. 12979 agency protests. This stay provision is an important tool the protestors must use and some would say abuse to force resolution of protests or extend an incumbent’s performance and revenue. The CICA stay provision is one of the more contentious aspects of the protest process, protest outcomes, and stakeholder motivations. The award and performance stay period can be used by contractors who are incumbent for an existing service contract when a delay in award of a new contract to a competitor may provide additional performance and funding to this incumbent through contract extension or emergency contract until the new contract award can be made while protest is adjudicated. The protest CICA stay provision is one area of concern by agencies, especially DoD, because this protest provision can be abused or cause undue delay in
awarding a contract for needed requirements. However, the bid protest law and regulations authorize a “CICA stay override” when an agency justifies urgent or compelling needs.

Possible GAO Protest Outcomes

The GAO reports three basic protest outcomes: sustaining the prejudicial impropriety, denying the protestor’s challenge, or dismissing the protest for mootness or procedural and/or statutory defects. In the last several years, more protest decisions announce or publish the decision a part of, or as a combination of, all three outcomes. However, the outcomes are reported as only one of the three outcome types. GAO reports these decisions as sustained in part, denied in part, and/or dismissed in the one category of the highest level decision, with “sustain” being the highest and “dismiss” being the lowest (White, Interview). The reported GAO protest outcomes, which are the focus of this research, are further described as:

- **Sustained** – Outcome decided on the merits where GAO upholds the protested allegation of impropriety. This outcome usually is due to violations of statute or regulation, unreasonable action, or judgment by agency or protested party. GAO recommends relief and possible payment of costs in such cases.

- **Denied** – Outcome decided on the merits, where GAO rules against the protesting party. This outcome is usually due to an inability to find a material violation of acquisition laws or regulations, or the agency acted reasonably or in deference to authority (of contracting officer or the agency or another government agency).

- **Dismissed** – Outcome withheld. GAO does not rule on the merits of the protest; rather, adjudication is terminated based on procedural or statutory flaw(s). This outcome is usually due to untimeliness, lack of standing or interested party, clear substantive deficiency, failure to state grounds for protest, legal insufficiency, failure to respond, no
protestable propriety, protest jurisdiction superseded, no relief possible, or technicality. These types of dismissals do not provide any form of relief recommendation. However, dismissal also can be based on corrective action taken by the agency prior to decision, making the allegation moot or academic. GAO usually considers this approach to provide the protestor with some element of relief if the relief is based on corrective action taken by the agency. Another subset of dismissed protests is: Withdrawn. This outcome often results when the protestor cancels the protest often due to corrective action taken by the agency, alternate dispute resolution, new information, or protestor agrees with or understands the agency’s action. Withdrawn protests usually are also considered to provide some form of relief, unless the withdrawal is due to the protestor realizing s/he is unlikely to prevail on the merits.

There are other variations of GAO protest outcomes, some of which are contained in the reports and may skew the outcome data. These include:

- Supplement or Amended Protest – a new, subsequent protest to the same acquisition timely filed with 10 days of actual or constructive knowledge of new grounds for protest. An example would be: provision of new information in the agency report. Each new ground of protest must independently satisfy GAO’s timeliness and filing requirements. Supplemental protests are listed under the same B-number but with the next subsequent decimal.

- Protest Reconsideration – an interested party files a timely request for reconsideration by GAO, often with a new GAO hearing officer. Such a filing usually is due to the hearing officer’s errors of fact or law or to the appearance of new facts that were not known and could not have been known at the time of the protest. The Protest Reconsideration filing
is reported as another protest with the same B-number but a different decimal. The party requesting reconsideration must show that his/her prior decision contains errors of either fact or law, or the party must present information not previously considered that warrants reversal or modification of the decision (4 CFR § 21.14). Reconsiderations are administrative reviews, like judicial appeals, that decide and report the outcome under the three outcome categories; Dismissed, Denied, Sustained. Technically, a sustained reconsideration could be sustained because there was procedural error(s) in law and/or regulation, and the underlying protested impropriety may be re-adjudicated.

- Cost Reimbursement Request Protest – If GAO determines that a solicitation for a contract or a proposed award or if the award of a contract does not comply with a statute or regulation, the GAO may recommend the Federal agency conducting the procurement pay to an appropriate interested party the costs of filing and pursuing the protest, including reasonable attorneys' fees and consultant- and expert-witness fees; even costs for bid and proposal preparation may be recommended (31 U.S.C. §3554 ). The protestor may also request through a subsequent, timely protest filing that GAO recommend repayment of costs, if the protest is sustained or (the more likely case) the agency took corrective action for the protested impropriety with unnecessary delay. Payment of the protestor’s costs is usually considered if the agency took the corrective action after the 30-day due date for the required agency report. This protest is a new protest under the existing B-number but with the next decimal. The new protest will have its own outcome. There are cost-reimbursement limitations to the issue sustained or corrected as well as limits on amounts that protestors who are not small business concerns may be paid.

When cost reimbursement is recommended by GAO and the agency and the protestor
cannot agree on an amount the government will pay, then the protestors may timely file a new protest asking for a cost determination.

Relief Recommendation Possible from GAO

If a protest is sustained or, in some cases, corrective action is taken that is not sufficient, then the GAO can recommend relief. Since GAO is part of the legislative branch of Congress, it may only recommend actions to the Executive branch agencies. The concerned agency must report to GAO any recommended relief they do not provide. Next, the Executive branch agency’s report is submitted to Congress by GAO, along with the GAO’s annual report. The bid-protest law and regulations provide for the GAO possible relief recommendations in 4 CFR § 21.8 Remedies:

(a) If GAO determines that a solicitation, cancellation of a solicitation, termination of a contract, proposed award, or award does not comply with statute or regulation, it shall recommend that the agency implement any combination of the following remedies:

(i) Refrain from exercising options under the contract;

(ii) Terminate the contract;

(iii) Recompete the contract;

(iv) Issue a new solicitation;

(v) Award a contract consistent with statute and regulation; or

(vi) Such other recommendation(s) as GAO determines necessary to promote compliance.

(b) In determining the appropriate recommendation(s), GAO shall, except as specified in paragraph (c) of this section, consider all circumstances surrounding
the procurement or proposed procurement including the seriousness of the procurement deficiency, the degree of prejudice to other parties or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement, and the impact of the recommendation(s) on the agency’s mission.

(c) If the head of the procuring activity determines that performance of the contract notwithstanding a pending protest is in the government’s best interest, GAO shall make its recommendation(s) under paragraph (a) of this section without regard to any cost or disruption from terminating, recompeting, or rewarding the contract.

(d) If GAO determines that a solicitation, proposed award, or award does not comply with statute or regulation, it may recommend that the agency pay the protestor the costs of:

(1) Filing and pursuing the protest, including attorneys’ fees and consultant and expert witness fees; and

(2) Bid and proposal preparation.

(e) If the agency decides to take corrective action in response to a protest, GAO may recommend that the agency pay the protestor the reasonable costs of filing and pursuing the protest, including attorneys’ fees and consultant and expert witness fees. The protestor shall file any request that GAO recommend that costs be paid within 15 days of the date on which the protestor learned (or should have learned, if that is earlier) that GAO had closed the protest based on the agency’s decision to take corrective action. The protestor shall furnish a copy of its request
to the agency, which may file a response within 15 days after receipt of the request, with a copy furnished to the protestor.

(f)(1) If GAO recommends that the agency pay the protestor the costs of filing and pursuing the protest and/or of bid or proposal preparation, the protestor and the agency shall attempt to reach agreement on the amount of costs. The protestor shall file its claim for costs, detailing and certifying the time expended and costs incurred, with the agency within 60 days after receipt of GAO’s recommendation that the agency pay the protestor its costs. Failure to file the claim within that time may result in forfeiture of the protestor’s right to recover its costs.

(f)(1) If GAO recommends that the agency pay the protestor the costs of filing and pursuing the protest and/or of bid or proposal preparation, the protestor and the agency shall attempt to reach agreement on the amount of costs. The protestor shall file its claim for costs, detailing and certifying the time expended and costs incurred, with the agency within 60 days after receipt of GAO’s recommendation that the agency pay the protestor its costs. Failure to file the claim within that time may result in forfeiture of the protestor’s right to recover its costs.

(2) The agency shall issue a decision on the claim for costs as soon as practicable after the claim is filed. If the protestor and the agency cannot reach agreement within a reasonable time, GAO may, upon request of the protestor, recommend the amount of costs the agency should pay in accordance with 31 U.S.C. 3554(c). In such cases, GAO may also recommend that the agency pay the protestor the costs of pursuing the claim for costs before GAO.
(3) The agency shall notify GAO within 60 days after GAO recommends the amount of costs the agency should pay the protestor of the action taken by the agency in response to the recommendation.

It is important to reiterate that GAO can only recommend relief. The agency has no statutory requirement to follow the GAO recommendation. However, the repercussion for not following the recommended relief is risking being reported in the annual report or potentially blemishing the agency’s relationship with the Congressional committees and staff who oversee the agency (White Interview). While the above-recommended relief options in the protest regulation may seem substantial, many protestors, including this researcher, believe there is rarely meaningful actual corrective action recommended or taken by the Agency. Common relief, such as the agency’s cancelling the requirement or accomplishing the evaluation, are often considered inadequate or viewed as a “do over” for the agency, which provides little benefit to the protestor, particularly the small business owner. The relief offered in sustained protest outcomes is an area where additional research may be needed to more clearly define the outcomes of bid protests and the ultimate success or effectiveness of those protests. If the GAO has unreported quantitative data on the specific relief recommended, it would be difficult to track the ultimate relief or action recommended (White Interview). Further study of the actual remedy taken will help illuminate the ultimate protest outcomes, their measures of effectiveness, and the protestors’ perceptions of the outcomes.

The Industry

The goal of successful government contractors is to win and successfully perform contracts for goods and/or services provided, within the contractor’s capabilities, at a profit, to sustain and grow the business. As described above, Government acquisitions are governed by
complex and extensive laws, regulations, agency-regulation supplements, policies, rules, interim rules, protest decisions, and court decisions. A good, working knowledge of the laws, rules, and venues for seeking relief for the agency acquisition improprieties is essential for a successful government contractor. This required knowledge is particularly true for small businesses that can be advantaged by those laws and policies that encourage small business participation. Bid protests provide tools for contractors to challenge an agency’s potential errors that are detrimental to the contractor, thereby limiting fair and open competition. Small businesses that are in compliance with the laws, including those giving preferences to some socio-economic categories of small businesses, deserve access to the accountability safeguards of the unique GAO bid protest process, which is intended to give contractors, the public, and taxpayers confidence in the government contracting industry.

The outcomes of GAO protests and how they are reported are the focus of this paper. Specifically, the researcher looks to assess whether the GAO provides the needed level of effectiveness for contractors and is the necessary accountability within government agencies. GAO describes an effective protest outcome as one in which the protestor receives some sort of relief. An effective protest by commercial vendors’ participation in the protest system is an outcome where the benefits, most notably profitable sustainability, ultimately outweigh the costs imposed. The accountability of government in its procurements helps maintain a consistent and fair playing field, ensuring full competition in the government marketplace. Protest outcomes and how they are reported are key measures of effectiveness for contractors as well as accountability for the government in the fair application of procurement rules, including small business preferences.
The industry for this research is protests filed with the GAO by contractors seeking remedy for violations of acquisition laws and regulations. The reported outcomes from GAO protests are studied from the perspective of SDVOSB small business protestors. However, as discussed below, subsequent research compares the stakeholder’s perceptions of the outcomes in pursuing effectiveness and accountability.

**Stakeholders**

A stakeholder is a party that has an interest in the industry and can affect or be affected by the outcome of a decision or action by another stakeholder (Chen, 2020). To analyze the bid protest reported outcomes, it is essential to understand what the bid protest system is intended to accomplish, enforce, improve, or at least correct. The GAO protest system is the legislative branch’s oversight of public procurement policy and processes by executive agencies. The GAO aims “to deliver on a timely basis the best value product or service to the [government] customer, while maintaining the public's trust and fulfilling public policy objectives” (48 CFR § 1.102 Statement of guiding principles for FAR). An example is the promotion of competition and encouraging and developing the actual and potential capacity of small businesses. Like many government ecosystems, there are complex and somewhat obscured or subtle interactions among stakeholders.

The GAO bid protests lean heavily on the unique interactions of stakeholders in the legislative, executive, and judicial branches of our Federal government while respecting the interests of the public, taxpayers, public policy, and commercial companies. Companies have their own set of internal stakeholders, including investors, employees, customers, and suppliers. The various stakeholder interests often do not align. As the 2018 RAND study of protests within the Department of Defense (DoD) found, tension exists between the agencies’ need to move
forward with procurements and the companies’ need for information about how a contract award
decision was made. In fact, the interests of the most visible stakeholder, the government agency
and the protesting company, are often in direct conflict in seeking resolution of allegations of
impropriety in government acquisitions. Government contractors are the protagonists, and the
executive agencies are the antagonists in this struggle to expeditiously fulfill agency
requirements while providing full and open competition. In such cases, the GAO serves as a
referee to ensure that the rules set in law and the agencies’ rules are followed.

The Public and Congress

The ultimate stakeholders in government acquisitions are the U.S. taxpayers and the
general public, all of whom want to have confidence that public money is being spent efficiently
and effectively with full and open competition under our free enterprise system. Americans
desire consistent legislated policies, such as assistance to small businesses, to strengthen our
industrial base and overall economic security. Our representatives in Congress are proxies for
the taxpayers; they provide direction to the GAO and proper laws for the executive agencies to
implement. Congress is an important stakeholder in ensuring the executive agencies follow the
laws in the acquisitions of goods and services; those laws must build trust, ensure competition
leading to best value, and achieve policy objectives.

Government Accountability Office

The GAO is the legislature’s administrative organization that evaluates, adjudicates,
recommends, and reports on agencies’ conduct during the procurement of supplies and services.
More broadly, the GAO scrutinizes the government’s (primarily the executive branches’)implemenation of law by using oversight and the power of the purse. The Constitutional
separations of power give an important distinction for the GAO stakeholders, even though the
GAO technically has neither executive nor judicial authority over agencies’ acquisitions. Rather, GAO only makes recommendations to the agencies and files reports on protest outcomes. The GAO reports to Congress about agencies not following recommendations (such reports are sent primarily through four Congressional committees (GAO Annual Bid Protest Report to Congress, 31 U.S.C. §3554). The GAO stakeholders’ power, while statutorily directed, is politically-based and derived from GAO’s relationships with executive agencies through the respective Congressional committees (White, Interview).

The political interaction between two branches of the Federal government may have some impact on the GAO’s bid protest mission to provide an objective, independent, and impartial forum for the resolution of disputes concerning alleged agency improprieties. Possibly, discussion between the two branches of government may sometimes prove detrimental to interested offerors of Federal contracts (GAO-18-510SP, 2018). While the stated primary objective of the GAO bid protests is to resolve alleged violation of a procurement statute or regulation in Federal acquisitions (31 U.S.C. §3552), the overall purpose, as the GAO’s name highlights, is accountability. The GAO’s interest is to ensure accountability that the executive agencies comply with the law to ensure full, fair, open competition for contractors and the fulfillment of policy objectives for the public. As with many bureaucratic government organizations in a political environment where implementation of policy and law is disputed and regulated, the GAO can be influenced by growth of the administrative state and social trends, such as regulatory capture. These factors can influence outcomes and/or the reporting of outcomes.
Federal Judicial System

The Court of Federal Claims (CFC) and the entire Federal judicial system have a stake in the bid protest, including the process, documentation, and outcomes. While the CFC venue has primary jurisdiction over suits against the Federal government for claims and violations of acquisition laws and regulations, the CFC decides a case “de novo,” or a new adjudication, by the judicial venue. The Court’s new trial starts with and relies on documents contained in the administrative record of the acquisition under dispute. The federal judiciary has interest in the outcomes of GAO protest decisions because it can inform the courts of legislature’s view of the acquisition laws and rules. The judicial branch venue, CFC, is a formal process following the Federal court procedures. This formality and “de novo” review may create the impression of a more objective adjudication of law than the informal administrative resolution of protest disputes by the GAO; however, they are non-binding and subject to pressures from regular contracts with the agencies and the Congressional oversight staff. The judiciary can also be subject to sway by political influences and activism, particularly on the interpretation of laws set by the legislature, implemented by executive agencies, and reviewed by the GAO. Additionally, the courts influence the GAO protest dispute resolutions, which can be reviewed all the way to the Supreme Court for binding decisions. CFC rulings have binding precedence on the GAO administrative decisions.

Executive Agencies

The entity “Federal agency” is defined as any executive department or independent establishment in the executive branch, including any wholly owned government corporation and any establishment in the legislative or judicial branch, except the Senate, the House of Representatives, and the Architect of the Capitol (4 CFR § 21.0 (c)). These executive agencies,
and their respective acquisition organizations and contracting officers are essential stakeholders trying to follow policy restrictions to efficiently purchase items to meet their users’ requirements. Often, contracting officers (the agency decision authority for each acquisition) are concerned about the risks from bid protests of increased costs to settle a terminated contract(s), time delay to the mission, embarrassment/shame, increase in workload to resolve the protest, career repercussions for making a mistake or omission that caused a bid protest (Hawkins 2018).

While the agencies are important stakeholders prominently on one side of the protest dispute seesaw, on the other side are also key counter stakeholders: the contractors competing to make money for providing quality supplies and/or services to the Federal government. Meanwhile, the agencies and their legal staffs have a big stake in the outcome of GAO protests, as they set the tone and, in many cases, set informal precedent or basis for future GAO protests. Agencies are also concerned about conduct and rulings in agency protests, including E.O. 12979 agency protests. The administrative record of a procurement includes all the protest documentation and required agency acquisition reporting that must be maintained by the agency. The agency’s interest is dominated by a desire to acquire the services or items required by their agency to accomplish their mission without undue delay. An agency’s alleged violations of procurement rules are subject to accountability by GAO when potential non-binding recommendation of corrective action is considered accountability.

**Government Contractors and Offerors**

The commercial contractors, also referred to as vendors and offerors, that compete for government contracts are key stakeholders in the GAO protest research. This reality is particularly true for small business concerns with limited financial and legal resources who are especially interested in the inexpensive, expeditious resolution of protests by an organization
outside of the executive agency. The contractor’s interest in government acquisitions is to win contracts with which they can profitably fulfill government agencies’ requirements for goods and services. The agency is the contractor’s customer whom they seek to please by providing quality performance of contracts. Responsible government contractors view bid protests as a business decision with short and long-term costs and benefits if the outcome leads to a positive return on investment. While the protested’s decision to protest is a tactical choice to win a specific contract, it is more importantly a strategic decision that colors his/her relationship with the contractor’s government customers.

A protest is a challenge to the contractor’s customer, the government agency, for alleged unfairness in the acquisition that the contractor seeks to win. The government contractors’ interest is primarily within the business cost-benefit tradeoff. Antagonizing one customer with an allegation of impropriety may result in delay, even briefly, of a procurement, which would have a substantial long and short-term detrimental impact on the vendor’s business and financial viability. For example, I have seen protests that have been sustained or dismissed for corrective action for which the protestor never receives the purported benefit of the corrective action or remedy and is never again able to do business with, or win a contract from, that agency. In some cases, a single protest outcome can cause the small business’ major revenue stream to be negated or ceased all together, which is particularly true for small businesses with limited resources, often pro se protestors, who are not able to spread the animosity created over the broader organization or other divisions. Large contractors, particularly in the defense market, have multiple divisions that can have billion-dollar contracts with multiple agencies, so a protest on a major procurement is considered just part of business with that division. In such cases, one protest outcome is simply a blip on the large company’s business radar.
In addition to being able to weather protest setbacks and costs, there is an important fissure in this research among the contractor-stakeholder group. This fissure concerns small businesses and large businesses. Many small business protests are challenges to an agency’s conduct concerning small business programs: some agencies do not avoid set-aside contracts for small businesses supporting large contractors. Many times, I have experienced a large business or a non-VOSB/SDVOSB small business seeks to protect its revenue, market share, and relationships with an agency. Another tactic of some agencies is limiting suppliers for dealing with small businesses to prevent small business from being able to meet the requirements.

RAND (RAND 2018) and GAO (White Interview) find that more than half of the GAO protests are by small businesses. Many of these GAO protestors make accusations of favoritism, feeling that bid winners are large businesses with whom the agency has been working. Another tactic of agencies is to pit a sub-category of small business (e.g., SDVOSB) against another small business for similar reasons. Kingdomware and its related cases are instructive because it appears the VA did not want to follow the law to set aside requirements for VOSB/VOSB to open the solicitation to a bigger pool of established small businesses or a large business. Examining the outcome data from a SDVOSB’s perspective, where large businesses and even small businesses are distinct subsets of the commercial contractor/vendor/offeror stakeholder groups, the interests of the different sets of contractors can be different and even conflicting. Although the reported protest outcome data are quantifiable, the measures of effectiveness analysis are influenced by the role of the stakeholder. GAO protest outcome data is reported using metrics from the perspective of the GAO; conversely, the present study factors in the experience and action research of a SDVOSB stakeholder.
**Government Contracting Community**

In addition to the public, Congress, the courts, executive agencies, and the vendors/protestors, the government contracting community (referred to collectively as “GovCon”) is another broad subset of stakeholders. The GovCon community is the business ecosystem that builds up, represents, advises, supports, litigates, and counsels in the government protest area. This community includes the consultants, government contracting companies, government lawyers, private lawyers, corporate counsels, and government firms dealing with contracting, legal compliance and accounting firms, the media, and private/non-profit government watchdogs. With other stakeholders, it is clear that the bid-protest system has created a significant GovCon body of stakeholders dependent on the bid protest system to help with challenges to government contracting. The GovCon community may be generally united in support of the present system’s source of their livelihood, but the members can still have different views of protest outcomes.

**Stakeholder Balance**

In its 2009 report to Congress, the GAO addressed concerns about the impact of protests on defense procurement. The report articulated an important balance among stakeholders. The report reads,

CICA’s 1984 changes to GAO’s bid protest forum confirmed and strengthened GAO’s long-standing role as a quasi-judicial forum for objective, independent, and impartial resolution of disputes concerning the award of federal contracts. At the heart of the law’s bid protest provisions is a balancing act that attempts to ensure that procurements can proceed without undue disruption, while also providing a mechanism for holding agencies accountable, and protecting the rights of aggrieved offerors to fair treatment by the government. (GAO B-401197, 2009)

The GAO goal to provide “the inexpensive and expeditious resolution of protests” (31 U.S.C §3554) seeks a balance between agency stakeholders and the contractors. As in most conflict
resolution schemes, the misalignment of stakeholders’ interests creates scrutiny of reported outcomes, their practical implications, and the corresponding perceptions of the outcomes. The present analysis provides illumination of the outcomes as reported by the GAO. First, I discuss the SDVOSB protestor’s interests followed by attention to small businesses and finally, contractors.

Method

One question this paper endeavors to analyze is: What are the reported outcomes for GAO protests and how effective are those outcomes for protestors, particularly small business SDVOSB contractors. The foundation of the research methodology I used is a literature review of protest outcome reports and analyses. What I view as the authoritative articulations of GAO protest outcomes are Daniel L. Gordon’s 2013 research paper for the American Bar Association’s and The George Washington University’s “Bid Protests: The Costs are Real, But the Benefits Outweigh Them.” Gordon is the Associate Dean for Government Procurement Law Studies at The George Washington University Law School and the former Administrator for Federal Procurement Policy. Prior to his nomination to the Administrator position by President Obama, Dean Gordon worked in the Office of General Counsel of the Government Accountability Office where, for several years, he led GAO’s bid protest office. Gordon’s paper is a powerful articulation of the implications and meaning of reported outcomes. He makes the case that the costs of these reports, particularly to the Federal agencies, are significant. He and Ralph White also make a strong defense of the real benefits to the Federal acquisition processes. My research from the vantage point of a frequent small business protestor indicates that the benefits to the protestor are negligible and the costs, including over the long-term, are substantial, particularly for SDVOSB protestors.
The issues in the Gordon paper were supported by the Congressional Research Office’s report, “2013 GAO Bid Protests: Trends and Analysis,” which provided Congress with background on the GAO bid-protest process. That report analyzed (1) trends in bid protests filed with GAO, (2) the impact bid protests have in delaying contracts, (3) reasons companies protest, (4) the most common grounds for GAO to sustain a protest, and (5) trends in bid protests filed against DOD. More recently, Congress directed in the “National Defense Authorization Act (NDAA) for Fiscal Year 2017, December 23, 2016. Section 885”, a definitive plan requiring “comprehensive study on the prevalence and impact of bid protests on Department of Defense acquisitions.” The paper demanded “the systematic collection and analysis of information on bid protests and their associated contracting outcomes. [Congress] directed that the study take into account related input from DoD acquisition professionals.” The research questions analyzed in that research, published in 2018, included: What are the outcomes of bid protests? This quantitative industry analysis of GAO protest outcomes also drew from data published by the GAO in bid protest annual reports and research reports by the 2019 RAND, Section 809 Panel, other CRS reports, and the GAO. In addition, I participated in a variety of protest-focused meetings, such as a full day hearing at GAO; a protest conference at CFC with the Chief Judge; an 809 Panel review meeting; conferences of the VA, SBA, and other agency small business conferences, and numerous meetings with protest-specific legal professionals.

My interest in this question began in 2014 with personal experience as a SDVOSB who sought relief from what I view as frequent systemic improprieties in VA small business acquisitions. Research informed and educated me on the laws and rules of government contracting, particularly SDVOSB program contracting and the same activity for the GAO process. My background as a government official tasked with performing critical missions
(often involving government contracting) and my 12 years as a veteran owner of a small business competing exclusively in the Federal government market gives me insight into the motives of the key stakeholders; this experience enhances my analysis of the outcomes for the agencies and small business contractors. My action research as the protestor in more than 200 GAO protests also provides empirical evidence of all the different protest outcomes.

The source of data used in the present industry analysis relies on data from GAO’s required annual report to Congress from the 2002 fiscal year (FY 2002) when quantitative outcome data was first published by GAO. GAO continues to publish such data to the present (FY 2019 is the year for which the tabular data is compiled). The tabular data from each annual report is consolidated with the other years’ data, which is helpful in looking for trends.

Bid Protest Annual Reports: These are GAO’s annual reports dating to 1995. As required by the Competition in Contracting Act of 1984, 31 U.S.C. § 3554(e)(2), the Comptroller General reports annually to Congress on federal agencies that do not fully implement a recommendation made by GAO in connection with a bid protest decided the prior fiscal year. – GAO Bid Protest Annual Reports

To understand how the outcome data is reported and categorized, I first conducted a structured interview, then I had months of phone and e-mail correspondence with Mr. Ralph O. White, Managing Associate General Counsel for Procurement Law, GAO, to clarify what and how GAO protests are reported so that I might analyze where, how, and why GAO protest outcomes are reported as well as the broader issues of stakeholder interests, protest historical context, protest reform efforts, and how one manages the bid protest system processes, procedures, and reporting of outcomes.

I have experience with all the possible protest outcomes--from sustain, deny, and dismiss to dismiss for corrective action and withdrawal--by participating in reconsiderations, alternate dispute resolution (ADR), and hearings. My experiences and personal empirical data provide
meaningful context for, and understanding of, the protest outcomes and their implications. This detailed understanding of the costs, procedural hurdles, legal barriers, and evasive benefits to small business protestors provides invaluable insight into what the reported outcomes really mean to a SDVOSB small business protestor.

Also, I gained research insight and understanding on protests through multiple conferences, webinars, and interactions with government organizations, small businesses, lawyers, contracting officers, and others in the GovCon industry. All this research, discussion, and personal experience informed my research and helped to form my conclusions.

Analysis

The data analyzed from GAO outcomes, aggregated from each year’s GAO annual bid protest reports to Congress, is summarized in Figure 3 (on page 80). This is the same reported data used in nearly all the studies of protests outcomes, although different time frames and sources were consulted, including Gordon, RAND, CRS, and Panel 809 Report. The data with green background are derived from my research calculations to determine relevant outcome metrics obscured in the GAO annual report data.

Overall Protest Filings

The data from the last two decades of GAO protests show an increase of protests filed from 2002 through 2019, peaking in 2016 at 2789. The last decade of FY 2010-2019 shows an average of approximately 2490 cases filed and cases closed, which represents an increase from the average of approximately 1450 cases filed/closed in the previous decade. RAND reports that protest filings approximately doubled in the period FY 2008 and FY 2016 (Rand, 2018). The increased filing at the end of last decade into the beginning of this decade spurred efforts by agencies and congressional staffs to identify “frivolous” and frequent protests and reduce
protests that were viewed as delaying critical acquisitions (White Interview). Many government agencies, particularly the Department of Defense (DoD), view the protest process as hindering efficient acquisitions (GAO, B-40119, 2009). Many reviews of, and adjustments to, the bid protest system law and FAR were aimed at addressing concerns dominated by senior defense and veteran’s administration officials. Some of these efforts throughout the last decade include: the limitations of jurisdiction of GAO, such as for delivery and task order contracts under larger, indefinite, quantity-indefinite delivery (IDIQ) contracts; establishment of 809 Panel (Section 809 Panel, 2019) and report; and the RAND Corporation study (RAND, 2018).

Gordon and RAND find that while the number of protests has increased slightly over the past decades, the percentage of the acquisitions protested remains relatively low, between 0.3-0.9%. RAND concluded the overall percentage of DoD contracts protested was very small—less than 0.3 percent. This finding means that more than 99.5% of all acquisitions were not subject to protests. When the number of protests per billion-dollar contracts’ value remained below 0.3% (RAND, 2018), the number of protests as a burden on the agency’s acquisitions was very small, relative to the number of procurements and the dollar value of all the procurements. Conversely, the burden on each contractor who protests an acquisition is substantial, especially for small business concerns with disproportionate burdens, such as opportunity costs on effort and time not spent on the main line of business, protest workload, customer relationship deterioration, and the cost of legal advice.

**GAO Outcome Effectiveness Metric**

This industry analysis of the Federal government procurement protest outcomes finds that, while GAO reported relatively steady average of 37% effectiveness rate in the 2002-2009 decade, it increased only slightly to a 44% effective rate in the 2010-2019 decade. The GAO
measure of effectiveness rate is defined by the GAO’s (argueably subjective) assessment, which is based on a protestor obtaining some form of relief from the agency, as reported to GAO, either resulting from voluntary agency corrective action from a dismissal or GAO sustaining the protest. These reported outcomes support the GAO narrative that the process provides a reasonable opportunity for protesting, based on a protestor obtaining some form of relief from the agency. The sustained rate of 16% to 21% seems small, relative to the protest outcomes from which the protestor received some sort of relief for their efforts to endure the hurdles of a timely protest.

As a small business protestor, I believe that even the overly generous one-in-five sustain rate is inadequate to justify protestors’ costs and time expended enduring the many protest hurdles to achieve even this elevated success rate. The analysis identifies the flaw in the outcome effectiveness rate: the flaw includes all protests where GAO determined to offer some form of relief, but it also includes dismissed protests, more than half (51.6 % average over last decade) of which are deemed “effective.” For example, in 2019, there were 587 merit decisions (77 sustained and 510 denied) of 2,200 protests closed, which indicates that 1,613 protests were dismissed. This 2019 dismissal rate is 73.3% of closed protest dismissed. A dismissal rate of nearly ¾ of all protests closed is surprising for an informal, expeditious, inexpensive protest-resolution process. Of the 1,613 protests dismissed that year, the GAO reported (through research calculation) that 891 protest outcomes were categorized as the protestor receiving some relief, implying that 55.24% of the dismissed protest outcomes were effective by offering some relief, which means that only 77 of the 2,200 protest outcomes were sustained by the GAO, equal to a 3.5% sustain, effectiveness, or success rate. In over 200+ action research protests of my own, as a SDVOSB, I have almost never received meaningful relief from a dismissal outcome,
nor have I encountered meaningful relief in my review or research of other dismissed protest outcomes. Even in the cases where the protestor withdraws the protest because the agency agreed to some corrective action, the actual corrective action was never made, was reneged, or was merely a faux corrective action by agency protest counsels—all of which, at best, resulted in more work, after expending effort and lost opportunity cost on protesting, only to have the protestor recompete, be reevaluated or resolicited at some unknown time in the future.

It is likewise deceptive to use the less-than 4% sustain rate for effectiveness because of the way protests are numbered or counted. For example, one protest (B-412940) counted for 18 sustains of the 139 rules sustained by the GAO (Bosco, 2017), with one protest representing 13% of that year’s sustained or effective protest outcomes based on a single, improper acquisition. This outcome is not uncommon as supplemental, intervenor, reconsideration, cost reimbursement, and cost-amount protests concerning the same acquisition can lead to multiple sustained protest data points for a single solicitation. This inequity further disguises the sustain rate as an effectiveness metric.

As noted above, when the small number of sustained protest outcomes is added to the “effective” dismissed rate, the GAO effectiveness yields the 43.8% average over the last decade, calculating to or approximating 45% effectiveness (suggesting that the protestor received some form of relief) rate. The practical effectiveness rate is less than 4% of all the protests filed that were sustained if one counts all the sustained protests outcomes as giving meaningful relief. My empirical research indicates that most sustained protests do not provide significant relief, particularly to small business concerns. Rather, they simply offer an opportunity for more work in redoing the offer or inviting another round of protests even for seeking cost reimbursement. For the sake of statistical clarity, I concede that all the sustained protests could be reasonably
reported as effective from the government’s perspective, but not any or most dismissed protests, which leaves a miniscule 4% rate at which an agency procurement impropriety was validated, therefore “effective” in holding the agency accountable and providing some form of often limited remedy to the protestors. Effectiveness or success is in the eye of the beholder, but the beholder in bid protest outcomes, at least in this industry analysis by a SDVOSB protestor, is all protesting contractors, especially small businesses.

**Protests’ Ineffectiveness Rate**

The inverse of the GAO-reported effectiveness metric is the ineffectiveness rate from the perspective of the protestor. If effectiveness is generously measured at roughly 45%, where there is some sort of merit outcome, then there is a 55% ineffectiveness rate for protestors who do not even get a liberally described decision offering the protestor meaningful relief. Nearly half the time, protests fail to get heard for some procedural deficiency, and they are dismissed without any relief. My action research informs me that there are substantial procedural hurdles where agency lawyers are trained on what I describe as “gimmicks” to dismiss GAO protests for any one of a variety of procedural flaws. -Even some corrective action gimmicks get a dismissal. This informal, quasi-judicial protest system has, or at least implements, strict technical requirements that are antithetical to the informal nature that makes the dismissal challenge likely.

Some requirements have been added recently to limit protests, particularly by small businesses, such as the $350 filing fee requirement, which I call the “small business protest deterrent nuisance fee.” Nonetheless, the implementing law and GAO rulemaking claim this fee recovers the costs of EPDS docketing system implementation. Other corrective efforts include studies, such as by RAND, GAO, CRS, and Section 809 Panel, that may recommend changes, like increasing the GAO filing fee, eliminating protests for acquisitions below some threshold
($100K - $250K), excluding task/delivery order contracts below a threshold, narrowing and complicating the timeliness rules, etc. The reported outcomes indicate that over half of the protests are not decided on the merits. This paper does not allow for a detailed discussion of all the procedural challenges protestors face in the time-sensitive process of submitting and winning government contracts.

**Protestor Successful Outcomes**

The GAO reports the effectiveness rate based on a protestor obtaining some form of relief from the agency, either as a result of voluntary agency corrective action or GAO sustaining the protest (GAO Reports). However, as shown in Figure 2.3, the calculated Protestor’s Sustain Rate derived from the number of sustains as a percentage of the experience leads to an assessment that the actual measure of successful or effective outcomes for protestors tops at a 4% overall sustain rate. As discussed above, this number represents a more meaningful top limit of effectiveness rate, especially for small businesses.

Actual SDVOSB small business success rates from my research and other articles is closer to 1%. My protests resulted in 42 denied, 176 dismissed, 13 withdrawn (dismissed), 7 open with no decision (but all were unsuccessful), and only 2 protests sustained. The generous interpretation of my action research of 237 protests resulted in only 2 sustains, or a less than 1% (.84%) sustains rate. This percentage assumes that the actual sustains were successful outcomes. While the researcher’s 1% sustain rate relative to the 4% GAO reported sustain rate may not be meaningful because my 1% sustain rate is not an independent event and is achieved, or more accurately not achieved, by the same researcher. Nearly all these protests involved challenges to the SDVOSB set-aside and preference rules. Additionally, these protests are skewed toward small business protests involving supply contracts with low dollar values (under a simplified
acquisition threshold). In two sustained protests, the solicitation was cancelled and not known to be resolicited or the contract had already been performed, so the protestor was given the only relief available: to ask for reimbursement for sustained protest costs, which presented additional timeline hurdles to prevail in a new protest requiring documentation of the cost under strict rules for small businesses. Both of my sustained protests were ultimately unsuccessful, resulting in long and short-term net losses.

**Prevalent Reasons for Sustained Protest Outcomes**

This analysis relies on effective or successful protest outcomes, especially for small businesses being no greater than the protests that were sustained relative to the total protests closed. Insight into the reasons for sustaining rulings illuminates the common improprieties that were corrected, sustained, and considered effective outcomes. Recently, the most prevalent reasons reported, as required, to Congress for sustaining protests were: (1) unreasonable technical evaluation; (2) inadequate documentation of the record; (3) flawed selection decision; (4) unequal treatment; and (5) unreasonable cost or price evaluation (GAO Bid Protest Annual Report to Congress for Fiscal Year 2019). The GAO describes these reasons as common for sustainment consistent year to year with just the relative order shifting. Clearly, there are consistently common prejudicial flaws in the government acquisition process (White Interview), which may indicate that changes in rules or law may be able to correct or mitigate the acquisition procedures that most commonly have agency improprieties.

**Implications from Recent Studies**

The major studies, such as Gordon, CRS, RAND, GAO, and the Panel 809 Report, used the same GAO reported outcome data of their specific timeframe. This research confirmed that the GAO reported outcome data showed a slight increase from the last decade to a relatively
steady rate, approximately 45% effectiveness rate. The RAND study of DoD protest outcomes provided several observations specific to GAO protests relevant to this research question about reported outcomes and effectiveness for small business protestors (RAND 2018). The data RAND reviewed pointed to several GAO-specific observations:

- The stability of the bid protest effectiveness rate over time — despite the increase in protest numbers—suggests that firms are not likely to protest without merit.
- Small-business protests are less likely to be effective and more likely to be dismissed for legal insufficiency.
- Protest filing peaks at the end of the fiscal year.
- Task-order protests have a slightly higher effectiveness rate than other types of protests.
- There are measurable differences between the services and defense agencies, but overall, DoD services and agencies have a slightly lower effectiveness rate than non-DoD agencies.
- The largest DoD contractors have slightly higher sustained and effectiveness rates, but these differences are diminishing with time.
- Cases in which legal counsel is required (i.e., a protective order was issued by GAO) have higher effectiveness and sustained rates.
- DoD uses stay overrides infrequently. A CICA stay override occurs when an agency overrides the automatic hold of execution (award or performance) during a protest at GAO.
- The number of protestors and protest actions tends to grow with a contract’s value.

This finding supports the analysis of effective protest outcomes being relatively stable at slightly below and small businesses protestors are less likely to be successful or effective. The
present research and other research note that the distinction in analysis of outcomes are those outcomes decided on the merits of the alleged legal or regulatory impropriety. GAO data categorizes all protests that are denied or sustained as merit-based decisions while those otherwise dismissed are not.

Another key analytical delineation concerns outcomes that offer the protestor some form of relief. Protests that are sustained are categorized as the protestor relieving some form of relief. But, the remedy recommended is often of little or no benefit to the protestor. Typically, the remedy involves redoing the evaluation or the solicitation, which usually does not provide meaningful relief. “Redone” outcomes mean a termination of the acquisition; it is akin to a “Get Out of Jail Free” card or only allows for a redo on the specific flaw where the agency selects the “corrective action” they take. While GAO is authorized to make a recommendation or combination of recommendations, including any recommendation GAO “determines to be necessary to promote compliance with procurement statutes and regulations” (31 U.S.C. §3554), their ruling is only a recommendation. Conversely, if the agency does not accept the recommendation, the GAO must report so in its annual report to Congress. The natural bureaucratic and pollical pressure to not alienate an executive agency (especially if it may mean more work to report the agency for not following the recommendation) is to offer the minimal corrective action remedy. Therefore, the GAO corrective actions appear to be minimal, giving the agency every chance to redo the questionable action. It is extremely rare, and my research has not provided an example where the GAO sustained a protest with the recommendation to “award a contract consistent with the requirements of such statute and regulation” (31 U.S.C. §3554). Even sustained protests often do not result in meaningful relief or benefit to the protestor.
The categorizing of the outcome as providing the protestor some form of relief is even more contentious in the third type of protest outcome, the dismissal. The outcome reporting of relief is a subjective GAO determination not annotated in the data other than being aggregated and imbedded in GAO effectiveness rate. The present analysis shows the majority of the reported outcome data when a protest is dismissed for a variety of reasons, including withdrawal or alternate dispute resolution (ADR). The GAO includes this offer of relief in its report on the effectiveness rate percentage. GAO may use a predictive outcome form of ADR to encourage the protestor to withdraw, or the agency may take corrective action to avoid a decision on the merits. These cases are examples of GAO’s (I believe incorrect) determination that the protest was effective with some form of relief granted. -GAO may predictively foreshadow a decision prompting dismissal for withdrawal or corrective action, which makes effective relief even more evasive for the protestor. My research relies in large part on the reported dismissed outcomes that GAO considers offering relief and are therefore effective. When determining these outcomes by extracting this data from the reports, my research shows the obscuring of the “effective” dismissal reported outcomes to be counted in the effectiveness rate. This industry analysis research indicates that calling these, and counting these, dismissals in the effectiveness rate is a significant contributor to what is an incorrect effectiveness rate.

**Protest Effectiveness for Small Business**

Industry analysis of the Federal government procurement protests questions GAO’s reports of a slightly increasing 44-45% effective rate with the protestor obtaining some form of relief from the agency for all protest. It seems that these reported outcomes support the GAO narrative that its protest process provides reasonable opportunity for vendors to achieve accountability for alleged prejudicial improprieties in the government’s procurement of supplies
and services. However, if up to 45% of protests are effective, at a minimum, 55% of the time protests are ineffective, based on not getting a loosely described merit decision, (i.e., the protest was dismissed for a procedural flaw). GAO reports that outcomes of protests sustained on the merits are in the range of 16% to 21% for all protestors. However, this is only a percentage of the reported outcomes where GAO considers the protestor receiving some sort of relief recommendation.

Small business, and I would argue VOSB/SDVOSB protestors as well, receive a much smaller amount of sustained protests (RAND 2018). GAO’s outcome success rate is misleading because I and other small business protestors have rarely received any minimal relief from a dismissed protest. Very few, if any, protest outcomes that are dismissed as a result of voluntary corrective action provide meaningful relief to small business protestors. As an example, when I withdrew my dismissed protests because the agency promised corrective action, they did not follow through with meaningful corrective action.

I also believe, as my action research indicates, that a significant portion, at least half, of the sustained protest outcomes result in minimal, practical, effective relief. My action research from over 200 protests and an extensive literature review indicates that effective relief is below 1%. This low effectiveness rate is reinforced with interviews from protest stakeholders and some of the literature research. This low rate for protesting vendors leads to the conclusion that the claimed utility of the current GAO protest system is evasive for many contractors. The costs of bid protests are real and substantial; the benefits, as expressed in a practical effectiveness rate of 4% or less, dwarf these costs, especially for the small businesses who supposedly are the main beneficiaries of the acquisition’s adjudication.
Figure 2.3. GAO Protest Outcome Data, 2002 - 2019

Outcomes of What Does Not Happen

A potentially important, unreported outcome is what Gordon and White believe is one major benefit of the protest process: “things that don't happen because people in the agency...
know that if they did that, someone would file a protest. It is all the stuff that does not happen because you have a right to complain” (White Interview). Agencies know that the bid protest vehicle is available to vendors to seek accountability, and accountability can be reported in public protest decisions and to Congress in annual reports in certain cases. White and his predecessor as Managing General Counsel of GAO bid protest team, Dan Gordon, describe the “private attorney general” concept of bid protests, where the prejudiced contractors can raise an issue of potential impropriety. If a protestor does not pursue accountability or the impropriety is not prejudicially material, then the potentially improper actions by the agency go uncorrected. While this outcome may be a real and important successful one that is not reported in the GAO outcome data, the cost of being subject to a “private attorney general’s” arguments is born by the protestor, particularly the lower resourced small business-owner. The reported outcomes data shows clearly that the protestor receives negligible success or gain in pursuing this accountability. The benefit is to the government acquisition process as a whole or to future vendors who do not have to protest an impropriety that does not happen (Gordon, White). This intangible benefit to the collective government vendors is hard to quantify, yet the costs to the protestor are real and quantifiable.

Outcomes of What Happens

While I agree with White and Gordon that some unreported outcomes of agency improprieties do not happen because of the GAO protest system, I conclude that a much bigger set of outcomes do happen, such as dismissal or even protests not being filed, because of the agency efforts to “protest proof” acquisitions or make procedural traps to gain dismissal. One of the government conferences I attended had a session for contracting officers on reducing protests. The speaker told us about a tactic of calling procedures by different names, which
serves to change the protest rules. Any impropriety that does not happen because of the visibility of protest system and outcomes is more than offset by things that do happen. The fact that more than three quarters of the outcomes are dismissals, as shown by the merit decision subtracted from the total cases closed, indicates that the system is gamed by agencies to garner dismissal outcomes. I have also experienced GAO hearing officers who appear to be looking to dismiss or dispose of a protest, perhaps to minimize their workload, prevent agonizing a government agency, keep from pushing the all-important 100-day decision threshold, or keep from recommending corrective action that may not be followed, resulting in subsequent report to Congress or CFC litigation.

In summary, the GAO reports an approximate 44% effective rate in the current decade of likely relief favorable to protesting vendors. This moderate, less than 50%, effectiveness rate gives a distorted picture of outcome effectiveness, particularly from the outcome impact on small businesses. Over half of the dismissed protests are included with all the sustained protests as “effective” because they claim to offer some sort of relief. A closer examination of protests reported as sustaining the vendor’s allegation of impropriety in the acquisition shows that only 4% of the protest’s allegations are sustained. Although it is not an independent data set, my extensive action experiential research of 237 protests by the small business researcher indicates a negligible (< 1%) sustainment for successful outcomes from my dependent protest empirical data.

The experiential analysis of those sustained protests indicated that actual meaningful relief for small business protestors is near non-existent. The cost of accountability in the Federal procurement process is disproportionally borne by protestors acting as a “private attorney general.” Yet, the benefits from effective or successful outcomes for the protestor(s), primarily
small businesses, are negligible while the benefits to the government are real, as Gordon concluded. The costs are real for the government and the agencies too, but the body of study reviewed indicates that the benefits to the government--in terms of accountability, improprieties that do not happen, corrected violation, and confidence and trust garnered--are substantial and outweigh the costs. I do not necessarily dispute this argument; however, my research indicates that the benefits of, or effectiveness of, small business protest outcomes is negligible at no greater that 4%.

Conclusions

This study concludes that reported protests outcomes based on the GAO determination of protestors receiving some sort of relief are relatively steady at less than the time for all protestors. However, a closer examination of GAO reported data shows that only 4% of the protests filed result in a sustainment decision with recommended corrective action. This 4% success rate is a better metric for effectiveness of all protest outcomes. However, the 4% rate more accurately represents the maximum effectiveness rate for small business protestors. In fact, for many small business protestors and more so from the perspective of SDVOSB protestors, this minimal 4% success rate should be roughly halved because often, the sustain recommended relief is not implemented or does not provide practical relief (the definition of success). These success or effectiveness rates are consistent with other recent quantitative analysis of protest outcomes, although those studies do not provide a small business protestor’s perspective.

In GAO protests, the small business protestor faces steep odds, for the substantial costs are borne by the small business protestor while the benefit as well as some of the costs to the agencies accrue to the procurement system as a whole. The protestor bears the burden of being a “private attorney general,” yet s/he receives virtually no, or miniscule, benefit.
I conclude that the reported outcome effectiveness of vendors participating in GAO bid protest processes is virtually non-existent, and that favorable long- and short-term cost benefit tradeoffs are elusive. Based on these reported outcomes, I believe contractors, particularly small businesses, should not file GAO protests except in specific rare cases where there is a tactical advantage, such as an extension of incumbent contract or a gain in important business intelligence on competitors, evaluation standards, and/or solicitation requirements. These tactical, and even the strategic, protest decisions are more applicable to large-business protestors. These conclusions call for an analysis of the perceptions of GAO protestors, particularly for small-business protestors, to determine if protest outcomes actually support the objectives of the GAO protest process to ensure full, fair, and open competition and to hold agencies accountable to follow their rules.

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Appendix 2.1. Summary of Protest Types

Table 2.1 Types of Protests

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CHAPTER THREE:

THE ACCOUNTABILITY FAÇADE: PERCEIVED GAO PROTEST OUTCOMES FOR SMALL BUSINESSES

“The role of GAO is to dispose of protest based on the information in the case” (GAO Attorney 2018 Telephone Conference)

Abstract

The GAO protest system is a well-intentioned American innovation in accountability in government agency acquisitions of supplies and services. The GAO reports that bid protests achieve a moderately effective outcome level of approximately 45% when measured in terms of voluntary agency corrective actions or GAO decisions to sustain protests. However, the GAO reports that bid protests achieve a minimally effective outcome level when measured in terms of GAO decisions to sustain alleged improprieties and recommend relief. This effectiveness rate is negligible for many small business protestors and is perceived as such. The minimal practical effectiveness of the GAO protest system has caused some businesses to see the system as a façade of fair, independent adjudication of acquisition improprieties. This analysis of perceptions of these reported outcomes held by stakeholders within the government contracting community, particularly small business concerns, is the subject of this paper. The overall objectives of the bid protest system are to instill confidence in the federal acquisition process, to ensure full and open competition within the guidelines of national policy objectives, and to provide an accountability venue for contractors. To meet these objectives, an understanding of stakeholder perceptions of reported outcomes is essential. Empirical research of stakeholder interviews and protest action
indicates that protest perceptions range across three interactive spectra: cost-benefit tradeoff, fairness, and communications. These spectra are impacted by a fourth element: emotions. Some stakeholder perceptions tend to reinforce the GAO narrative of moderate effectiveness, which implies that the benefits outweigh the costs. However, evidence that small business stakeholders are more attuned to GAO-reported outcomes of minimal effectiveness reinforces perceptions of limited utility. Years of action research supports the proposition that the accountability façade is real. The appearance of moderate protest success obscures the serious challenges small businesses face when pursuing GAO protests. The research concludes that small businesses should only rarely consider filing GAO protests.

**Introduction**

The purpose of this paper is to examine the outcomes of Government Accountability Office (GAO) protests, which are by far the most used protest venue in U.S. federal government purchasing. There has long been a question of a difference between the effectiveness statistics reported by the GAO and the perceptions of participants in the protest process. This paper analyzes the protest process outcomes and interviews to assess whether these perceptions differ from what the protest process purports to deliver for small businesses in particular.

The GAO offers the protest venue for challenging a federal agency with an alleged violation of a procurement statute or regulation. These GAO bid protests are said to provide accountability and advance the transparency, fairness, and integrity of the procurement system for over $550 billion in goods and services annually required by the federal government while potentially offering successful protestors some form of relief (CRS, 2018). This quasi-judicial venue is part of congressional oversight of executive agency acquisitions to ensure full and open competition consistent with policy objectives, such as supporting small business participation. If
a protest of an alleged violation is sustained, the GAO can recommend an array of corrective actions to provide remedy for the aggrieved protesting contractor. The GAO reports a 45% effectiveness rate of protests that provide some form of relief to protestors, with approximately 20% of the protested allegations decided on merit sustained in the protest decision outcomes (RAND 2018, Murray 2017, Snyder, 2020). This reported rate supports the GAO claims that protest outcomes support effectiveness and utility for the protest system. Previous research concludes that the practical effectiveness rate is lower than 4%, indicating that protesting contractors, especially small businesses, receive minimal benefit (Snyder, 2020).

These outcomes reported to the GAO bid protest system stakeholders are essential to boost confidence in and increase the use of GAO protests. GAO protests are often the only viable venue for challenging agencies with alleged violations of acquisition laws and rules for small businesses. However, stakeholder perceptions of these protest outcomes are also critical to the viability and utility of and participation in the GAO protest system. The stakeholders have a variety of often conflicting interests in this accountability regime. They also have markedly different perspectives on the protest process and the outcomes of that process. This research focuses primarily on small business protestors’ perceptions of GAO-reported bid protest outcomes and the key factors influencing those perceptions.

**Research Question**

Specifically, this research answers the question: How do stakeholders in the federal government contracting process, particularly small business contractors, perceive the bid protest outcomes reported by the GAO that claim a moderate effectiveness rate?
U.S. Federal Government Purchasing and the GAO

The system for acquisition of goods and services by the federal government is simultaneously massive, diverse, and complex. Contractors who operate and compete in the government contracting industry rely on understanding the complex rules and have a compelling interest in agencies’ compliance with these rules to ensure full and fair competition within the statutory policy framework of the government.

The more than one-half trillion dollar annual procurements of goods and services by the U.S. government are directed by a variety of statues and are implemented through the Federal Acquisition Regulation (FAR). The Competition in Contracting Act (CICA, pronounced “Seek-ah”) legislates through a collection of laws that federal agencies shall obtain full and open competition using competitive procedures that are best suited for the circumstances of the procurement. The GAO bid protest forum is the most used venue for adjudicating alleged violations of federal acquisition laws and regulations committed by executive agencies. The competition and small business preference requirements are the source of many of the procurement impropriety protests. More than half of GAO protests are filed by small businesses (RAND 2018, White Interview). The reported outcomes of the protested violations are represented by the GAO as measures of effectiveness of the GAO system in resolving conduct disputes regarding federal acquisitions. Perceptions of these outcomes held by the most common protestors, small business concerns, are significant for a practical understanding of the effectiveness of bid protests. The key factors influencing these perceptions of small business stakeholders provide insight into the recommended utility of using GAO bid protests for effective resolution of small business challenges of agency improprieties.
GAO Protest System Stakeholders

To analyze the perceptions of bid protest outcomes, it is essential to understand what the bid protest system is intended to accomplish, enforce, or at least correct. The GAO protest system is the legislative branch’s oversight of public procurement policy and processes by executive agencies “to deliver on a timely basis the best value product or service to the [government] customer, while maintaining the public’s trust and fulfilling public policy objectives” (48 CFR § 1.102 Statement of guiding principles for FAR), such as the promotion of competition and encouraging and developing the actual and potential capacity of small business. Like many government ecosystems, the GAO protest system is complex with somewhat obscure or subtle interactions among stakeholders. GAO bid protests lean heavily on the unique interactions of stakeholders in the legislative, executive, and judicial branches of the U.S. federal government combined with interests of the public, taxpayers, public policy, and commercial companies. These contracting companies have their own set of internal stakeholders, including investors, employees, customers, and suppliers. The various stakeholder interests often do not align. As the 2018 RAND study of protests within the Department of Defense (DoD) found, tension exists between the agencies’ need to move forward with procurements and the companies’ need for information on how a contract award decision was made. In fact, the interests of these most visible stakeholders, the government agency and the protesting company, are often in direct conflict when seeking resolution of allegations of impropriety in government acquisitions. Government contractors are the protagonists and the executive agencies are the antagonists in this struggle to expeditiously fulfill agency requirements while providing full and open competition within the small business preference policy, and the GAO serves as the referee to ensure that the laws and the agencies’ rules are followed.
The stakeholders identified in Snyder’s earlier industry analysis are used for this research. The ultimate stakeholders are the U.S. taxpayers who want confidence that public money is being spent efficiently and effectively with full competition under our free enterprise system, consistent with legislated policies. Congress is an important stakeholder, ensuring that agencies follow the law in the acquisitions of goods and services while building trust, promoting competition resulting in overall value, and ensuring that policy objectives are achieved. The GAO is Congress’s administrative organization that evaluates, adjudicates, recommends, and reports on agencies’ conduct concerning the procurement of supplies and services and more broadly on the government’s (primarily the executive branch’s) implementation of law through oversight and power of the purse. The Court of Federal Claims (CFC) and the entire federal judicial system have a stake in the bid protest outcomes as well as in its process and documentation. The U.S. agencies are prominent stakeholders on one side of protest disputes, seeking to efficiently acquire goods and services for their agencies’ needs. The contractors who compete to provide every type of supplies and services to the federal government for profit are the key counter stakeholders on the other side of protested acquisitions. The government contracting community of practitioners (GovCon) are also stakeholders. The GovCon community consists of organizations and individuals involved in representing, advising, supporting, litigating, and counseling in the government protest area. These include consultants, government contracting companies, government lawyers, private lawyers, corporate counsels, government contracting legal compliance and accounting firms, the media, and private/non-profit government watchdogs.
GAO Bid Protests

Enforcing and adjudicating challenges to the fair application of acquisition laws and rules is the purpose of the bid protest system. It is intended to ensure full and fair competition while promoting policy objectives. Among these policy objectives, the small business preference programs are prominent. The bid protest system is “absolutely critical to the continued maintenance of private- and public-sector confidence in the integrity of the U.S. federal acquisition system” (Kim, 2020). As Ralston states, bid protests enhance the integrity and transparency of the federal procurement process by providing prospective offerors with an effective tool to challenge terms an agency has included in the solicitations and by providing disappointed bidders with an opportunity to challenge contract awards to determine whether the agency’s actions conform to procurement laws and regulations and solicitation terms (Ralston, 2017).

Simply described, a bid protest is a challenge that asks the question: Is the government agency following their own rules correctly in the procurement? If not, did that impropriety prejudice the protestor?

However, like most government programs, the GAO bid protest system is associated with a multitude of exceptions, qualifiers, and pitfalls. The protested impropriety must be filed in a timely manner by an interested party, an actual or prospective bidder with a likelihood of award, alleging materially prejudicial violations of laws, agency regulations, or the terms of a specific solicitation. A protestor must also demonstrate competitive prejudice, or the GAO cannot sustain the protest even if there is a violation of law or regulation.

There are three primary forums for protests of agency violations of procurement laws: 1) agency protests, documented protests filed with the agency, 2) commonly used and referenced
protests filed with the GAO, and 3) bid protests filed in the CFC. This research addresses only the protests filed with the GAO, which are 25 times more common than CFC protests and have their own set of rules.

The CICA bid protest statute states that the GAO shall provide a decision on a protest concerning an alleged violation of a procurement statute or regulation in the solicitation, award, or termination of an agency acquisition in an inexpensive and expeditious (statutorily less than 100 days or in some cases 65 days) process. These protests filed with the GAO are decided by one of approximately 40 hearing attorneys in the Procurement Law Control Group within the GAO Office of General Counsel following the FAR, 4 CFR §21. The protest decisions fall within one or a combination of decisions from which the highest level determines the outcome. The three protest decision outcomes are described:

- **Sustained** – Outcome decided on the merits of the bid wherein the GAO upholds the protested allegation of impropriety. This decision usually is due to violations of statue or regulation or an unreasonable action or judgment by the agency or protested party, and the GAO recommends relief and possible payment of costs.

- **Denied** – Outcome decided on the merits of the bid wherein the GAO rules against the protesting party. This decision usually is due to an inability to find a material violation of acquisition laws or regulations, the agency acting in a reasonable manner, or in deference to the authority of the contracting officer or the agency or another government agency.

- **Dismissed** – Outcome wherein the GAO does not rule on the merits of the protest; rather adjudication is terminated based on procedural or statutory flaw(s). This usually is due to untimeliness, a lack of standing or an interested party, clear substantive deficiency, failure to state grounds for protest, legal insufficiency, failure to respond, no protestable
impropriety, protest jurisdiction superseded, no relief possible, or a technicality. These types of dismissals do not provide for any form of relief recommendation. However, dismissal can be based on corrective action taken by the agency prior to a decision, which makes the allegation moot or academic. The GAO usually presumes that a dismissal provides the protestor with some element of relief if it is based on corrective action taken by the agency.

- **Withdrawn** is an alternative to the three decision-based outcomes wherein the protestor cancels the protest, often due to corrective action taken by the agency, an alternate dispute resolution, new information, or the protestor’s agreement with or understanding of the agency’s action. Withdrawn protests usually are considered to provide some form of relief unless the withdrawal is due to the protestor realizing that the protest is unlikely to prevail on its own merits.

If the GAO sustains the protest, the ruling may recommend relief for the protestor. As part of the legislative branch oversight function, the GAO can only recommend remedies to the agency. If the agency elects not to implement the relief, the only real recourse is for the head of the procuring agency responsible for that contract to report the failure to the GAO. The GAO can then report this failure to Congress in the GAO annual bid protest report to congressional committees.

The CICA bid protest law authorizes recommended remedies or corrective action for the contracting agency to implement any one or combinations of the following relief recommendations:

- Issue a new or revised solicitation.
- Recompete the contract.
• Award the contract.
• Terminate the contract.
• Pay the protestor direct protest costs within these limits:
  o Costs of filing and pursuing only the sustained protest grounds, including attorney and consultant fees limited to $150 per hour for all but small businesses
  o Cost of bid and proposal preparation when no other substantial relief is possible, such as when the contract has already been performed or there is no reasonable opportunity to recompete the contract.
• Any other relief the GAO determines necessary to promote compliance with acquisition laws and regulations applicable to the procurement.

The recommended relief or remedies are the only real benefit a protestor can hope to receive from a successful or effective protest. These recommendations often fall short of providing practical relief to protestors, particularly to small businesses, and rarely provide benefits that offset the real and intangible costs. Even if the protestor receives a recommendation for some form of relief, it is only a recommendation, one that usually requires more expense and effort such as resubmitting a bid or reconsidering a new solicitation, and ultimately the agency can elect not to implement or even superficially implement the recommendation.

The GAO bid process exclusively provides a potential benefit: the statutory “CICA stay” of award or performance until the GAO protest is decided. This is primarily used to temporarily benefit incumbent contractors, who usually do not represent small businesses, to extend performance on the existing contract or grant a bridge contract to the incumbent. However, even the CICA stay can be overridden by an agency’s urgent and compelling interest justification. The
GAO also does not administer or enforce the CICA stay, so a violation of the stay does not offer any grounds for further protest. The recommendation(s) of relief are the only tangible benefits that a protestor can hope to receive to offset the costs of protesting other than the recommendation of payment of costs for only the sustained protest grounds, which is nearly impossible to obtain.

**Reported GAO Protest Outcomes**

The GAO announces protest decisions on the GAO’s Electron Protest Docketing System (EPDS) and in published and unpublished ruling summaries. The reported outcome is documented internally in the GAO database. If the agency fails to implement the recommended remedy, the head of the procuring activity responsible for that contract shall report such failure to the GAO. The GAO is then required to conduct a comprehensive review of the pertinent procurement, including the circumstances of the failure of the federal agency to implement the GAO recommendation. A summary of this data is sent to applicable congressional committees and published on the GAO website in the GAO Bid Protest Annual Report to Congress for each fiscal year (FY). The annual report or letter to Congress is statutorily required to provide a summary of each incident in which a federal agency does not fully implement a recommendation, describe each incident in which a final decision in a protest is not rendered within 100 days of submission, and include a summary of the most prevalent grounds for sustaining protests during the preceding year. Since 2002, the annual report also includes a tabular summary of the protest outcome data in categories determined by the GAO as shown in Figure 3.1 below with the researcher’s calculated data highlighted in green. These GAO-reported outcomes include a representation of the annual change in number, type, and effectiveness of protests for the benefit of Congress, GovCon, contractors, and the public. This research examines
the perceptions of these reported outcomes and factors that influence these perceptions, particularly for small business contractors.

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<tbody>
<tr>
<td>Cases Filed</td>
<td>2198</td>
<td>2607</td>
<td>2596</td>
<td>2789</td>
<td>2639</td>
<td>2561</td>
<td>2429</td>
<td>2,475</td>
<td>2,353</td>
<td>2,299</td>
<td>1,989</td>
<td>1,652</td>
<td>1,411</td>
<td>1,327</td>
<td>1,356</td>
<td>1,485</td>
<td>1,352</td>
<td>1,204</td>
</tr>
<tr>
<td>% Change from Previous FY</td>
<td>-1%</td>
<td>&lt;1%</td>
<td>-7%</td>
<td>6%</td>
<td>3%</td>
<td>5%</td>
<td>-2%</td>
<td>5%</td>
<td>2%</td>
<td>16%</td>
<td>20%</td>
<td>17%</td>
<td>6%</td>
<td>-2%</td>
<td>-9%</td>
<td>10%</td>
<td>12%</td>
<td>5%</td>
</tr>
<tr>
<td>Cases Closed</td>
<td>2200</td>
<td>2642</td>
<td>2672</td>
<td>2734</td>
<td>2647</td>
<td>2458</td>
<td>2538</td>
<td>2495</td>
<td>2,292</td>
<td>2,226</td>
<td>1,920</td>
<td>1,582</td>
<td>1,394</td>
<td>1,274</td>
<td>1,341</td>
<td>1,405</td>
<td>1,244</td>
<td>1,133</td>
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<tr>
<td>Merit (Sustain + Deny) Decisions</td>
<td>587</td>
<td>622</td>
<td>581</td>
<td>616</td>
<td>587</td>
<td>556</td>
<td>509</td>
<td>570</td>
<td>417</td>
<td>441</td>
<td>315</td>
<td>291</td>
<td>335</td>
<td>249</td>
<td>306</td>
<td>365</td>
<td>290</td>
<td>256</td>
</tr>
<tr>
<td>Number of Sustains</td>
<td>77</td>
<td>92</td>
<td>99</td>
<td>139</td>
<td>68</td>
<td>72</td>
<td>87</td>
<td>106</td>
<td>67</td>
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<td>57</td>
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<td>72</td>
<td>71</td>
<td>75</td>
<td>50</td>
<td>41</td>
</tr>
<tr>
<td>Number of Denies</td>
<td>510</td>
<td>530</td>
<td>482</td>
<td>477</td>
<td>519</td>
<td>484</td>
<td>422</td>
<td>464</td>
<td>350</td>
<td>359</td>
<td>258</td>
<td>231</td>
<td>244</td>
<td>177</td>
<td>235</td>
<td>290</td>
<td>240</td>
<td>215</td>
</tr>
<tr>
<td>Number of Dismissed</td>
<td>1613</td>
<td>2020</td>
<td>2091</td>
<td>2118</td>
<td>2060</td>
<td>1902</td>
<td>2029</td>
<td>1925</td>
<td>1875</td>
<td>1785</td>
<td>1605</td>
<td>1291</td>
<td>1059</td>
<td>1029</td>
<td>1035</td>
<td>1040</td>
<td>954</td>
<td>877</td>
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<tr>
<td>Sustain Rate</td>
<td>13%</td>
<td>15%</td>
<td>17%</td>
<td>22.56%</td>
<td>12%</td>
<td>13%</td>
<td>17%</td>
<td>18.6%</td>
<td>16%</td>
<td>19%</td>
<td>18%</td>
<td>21%</td>
<td>27%</td>
<td>29%</td>
<td>23%</td>
<td>21%</td>
<td>17%</td>
<td>16%</td>
</tr>
<tr>
<td>Calculated Sustain Rate</td>
<td>13.12%</td>
<td>14.79%</td>
<td>17.04%</td>
<td>22.56%</td>
<td>11.9%</td>
<td>12.9%</td>
<td>17.0%</td>
<td>18.6%</td>
<td>16.0%</td>
<td>18.5%</td>
<td>18.1%</td>
<td>20.6%</td>
<td>27.1%</td>
<td>28.9%</td>
<td>23.2%</td>
<td>20.5%</td>
<td>17.2%</td>
<td>16.0%</td>
</tr>
<tr>
<td>Protestors Sustain Rate</td>
<td>3.50%</td>
<td>3.48%</td>
<td>3.71%</td>
<td>5.08%</td>
<td>2.57%</td>
<td>2.93%</td>
<td>3.43%</td>
<td>4.25%</td>
<td>2.92%</td>
<td>3.66%</td>
<td>2.97%</td>
<td>3.79%</td>
<td>6.53%</td>
<td>5.65%</td>
<td>5.29%</td>
<td>5.34%</td>
<td>4.92%</td>
<td>3.62%</td>
</tr>
<tr>
<td>Effectiveness Rate</td>
<td>44%</td>
<td>44%</td>
<td>47%</td>
<td>46%</td>
<td>45%</td>
<td>43%</td>
<td>43%</td>
<td>42%</td>
<td>42%</td>
<td>42%</td>
<td>45%</td>
<td>42%</td>
<td>38%</td>
<td>39%</td>
<td>37%</td>
<td>34%</td>
<td>33%</td>
<td></td>
</tr>
<tr>
<td>Dissmissed But Some Relief</td>
<td>891</td>
<td>1070</td>
<td>1157</td>
<td>1119</td>
<td>1123</td>
<td>985</td>
<td>1004</td>
<td>942</td>
<td>896</td>
<td>853</td>
<td>807</td>
<td>604</td>
<td>439</td>
<td>425</td>
<td>425</td>
<td>403</td>
<td>361</td>
<td>333</td>
</tr>
<tr>
<td>Rate of Relief of Dismissed</td>
<td>55.24%</td>
<td>52.99%</td>
<td>55.32%</td>
<td>52.82%</td>
<td>54.52%</td>
<td>51.76%</td>
<td>49.50%</td>
<td>48.93%</td>
<td>47.77%</td>
<td>47.78%</td>
<td>50.28%</td>
<td>46.82%</td>
<td>41.43%</td>
<td>41.45%</td>
<td>41.08%</td>
<td>38.72%</td>
<td>37.79%</td>
<td>37.96%</td>
</tr>
<tr>
<td>ADR (cases used)</td>
<td>40</td>
<td>86</td>
<td>81</td>
<td>69</td>
<td>103</td>
<td>96</td>
<td>145</td>
<td>106</td>
<td>140</td>
<td>159</td>
<td>149</td>
<td>78</td>
<td>62</td>
<td>91</td>
<td>103</td>
<td>123</td>
<td>120</td>
<td>145</td>
</tr>
<tr>
<td>ADR Success Rate</td>
<td>90%</td>
<td>77%</td>
<td>90%</td>
<td>84%</td>
<td>70%</td>
<td>83%</td>
<td>86%</td>
<td>80%</td>
<td>82%</td>
<td>80%</td>
<td>93%</td>
<td>78%</td>
<td>85%</td>
<td>96%</td>
<td>91%</td>
<td>91%</td>
<td>92%</td>
<td>84%</td>
</tr>
<tr>
<td>Hearings Cases</td>
<td>21</td>
<td>5</td>
<td>17</td>
<td>27</td>
<td>31</td>
<td>42</td>
<td>31</td>
<td>56</td>
<td>46</td>
<td>61</td>
<td>65</td>
<td>32</td>
<td>41</td>
<td>51</td>
<td>41</td>
<td>56</td>
<td>74</td>
<td>23</td>
</tr>
<tr>
<td>Hearings %</td>
<td>2.00%</td>
<td>0.51%</td>
<td>1.70%</td>
<td>2.51%</td>
<td>3.10%</td>
<td>4.70%</td>
<td>3.36%</td>
<td>6.17%</td>
<td>8.00%</td>
<td>10.00%</td>
<td>12.00%</td>
<td>6.00%</td>
<td>8.00%</td>
<td>11.00%</td>
<td>8.00%</td>
<td>9.00%</td>
<td>13.00%</td>
<td>5.00%</td>
</tr>
</tbody>
</table>

1. All entries in this chart are counted in terms of the docket numbers (“B” numbers) assigned by our office, not the number of procurements challenged. Where a protester files a supplemental protest or multiple parties protest the same procurement action, multiple iterations of the same “B” number are assigned (i.e., .2, .3).
2. Each of these is deemed a separate case for purposes of this chart. Cases include protests, cost claims, and requests for reconsideration.
3. From the prior fiscal year as provided by GAO in parathetical text of report. Note: Fiscal Year is from October 1, previous calendar year to September 30, that calendar year.
4. Of the 2,744 cases closed in FY 2016, 373 are attributable to GAO’s jurisdiction over task or delivery orders placed under indefinite-delivery/indefinite-quantity contracts.
5. Of the 2,672 cases closed in FY 2017, 256 are attributable to GAO’s jurisdiction over task or delivery orders placed under indefinite-delivery/indefinite-quantity contracts.
6. Of the 2,642 cases closed in FY 2018, 256 are attributable to GAO’s jurisdiction over task or delivery orders placed under indefinite-delivery/indefinite-quantity contracts.
7. Of the 2,700 cases closed in FY 2019, 373 are attributable to GAO’s jurisdiction over task or delivery orders placed under indefinite-delivery/indefinite-quantity contracts.
8. Based on a protestor obtaining some form of relief from the agency, as reported to GAO, either as a result of voluntary agency corrective action or GAO sustaining the protest.
10. Percentage of cases resolved without a formal GAO decision after ADR.
11. Percentage of fully developed cases in which GAO conducted a hearing, not all fully-developed cases result in a merit decision.
12. From the prior fiscal year as calculated by researcher from GAO tabular data. Note: Fiscal Year is from October 1, previous calendar year to September 30, that calendar year.
13. Percentage of sustained protests reported by GAO from the total number of cases closed reported by GAO as calculated by the researcher.
14. Percentage of some relief of dismissed protests as assessed by GAO from the total number of cases dismissed reported by GAO as calculated by the researcher.


Figure 3.1. GAO Reported Protest Outcomes, 2002 - 2019

The reported GAO data is a tabulated summary showing:

- the annual number of protests filed.
- the percent change in protests filed.
- the number of protests closed.

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• the number of protests decided on merits.
• the number of protests sustained.
• the rate of sustained protests relative to only the number of protests decided on merits.
• the effectiveness rate of the percentage of all protests sustained or dismissed with some form of relief.
• the number and percentage of hearings from fully developed protest cases.
• the number of cases using alternate dispute resolution (ADR).
• the percentage of ADR cases that successfully resulted in resolution without a decision (i.e., withdrawn or dismissed for agency corrective action).

These reported outcomes create the perception that the protest process is moderately successful and beneficial to the acquisition system and specifically to protestors. However, this perception is deceptive in part because the effectiveness rate, sustain rate, and ADR success rate measurements use questionable denominators or numerators in the success metric calculations. The researched calculated data highlighted in green determines the number and percentage of sustained protests. The researcher also deduced the number of dismissed protests that the GAO considers having received a form of relief. The hidden number makes up the bulk of the protests that the GAO reports in the effectiveness rate.

Summarizing the representative data from recent fiscal year 2020, we see:

• Of the 2137 protests closed, GAO reports 51% that we calculated as 968 protests outcomes (1006 dismissed plus 84 sustained) are rated “effective,” where the GAO determined the protestor received some form of relief.
• Of the 2137 protest closed, only 545 were decided on the merits, or approximately 26% of the all the protests closed.

• Of the 545 merit decisions, only 84 were the protests sustained or approximately 15% of the merit decisions.

• Of the 2137 protests closed, only 84 were sustained for a nominal 3.93% sustained effectiveness rate as calculated by the researcher.

• A sustained protest outcome indicates the allegation of violations of acquisition laws or regulations were confirmed by the GAO, resulting in some offer of relief to the protestors.

A longitudinal view of the data aggregated by the two decades, where data is available, the decade mean is calculated as shown in Figure 3.2. The key protest outcome mean metric for each decade, there is nearly 70% increase in protests from the 2000s decade to the recent 2010s decade. On average, the GAO reported an effectiveness rate of nearly 45%, increased from 38%, where GAO subjectively determined some form of relief was received by the protestors. However, the mean GAO reported sustain rate (from only those protests with merit decision) decreased to 17.78% from 21.16%. The key metric highlighted with red text and not reported by GAO is the actual sustain rate (from all protests filed) of 3.58% over the last decade, a decrease of 23% from 4.54% the previous decade.
Figure 3.2. GAO Protest Outcome Mean Metrics by Decade

Summarizing, the GAO reports and researchers universally use an effectiveness or success rate based on outcomes wherein the protestor potentially received some form of relief as determined by the GAO. In the most recent decade, the average of protest outcomes based on those standards is 44.7%. The GAO-reported protest outcomes paint this picture of a moderate effectiveness or success rate for slightly less than half of the protestors. This level of success or effectiveness is not realized by protestors. The level of confidence and participation in the protest system is, however, dependent on stakeholders’ perceptions of protest effectiveness outcomes.

This analysis finds the overall rate of sustained protest outcomes deceased by nearly a quarter to 3.58% in the current decade from 4.54% in the previous decade. This minimal “effectiveness” rate of total protests sustained is inconsequential to contractors’ writ large because this rate represents the times when a protestor is effective in obtaining a ruling that sustains a prejudicial violation of acquisition laws or regulations in a particular procurement. This data is not widely known because the GAO reports a much higher subjective “efficiency” rate while an individual contractor is primarily concerned with their specific protest. The individual vendor measures success on that protested procurement impropriety, not the aggregate sustain rate. Perception of effectiveness depends on each individual protest outcome.
The reported outcomes may be skewed to benefit the federal acquisition system by creating the impression of moderately favorable effectiveness outcomes and thus, accountability. However, many small business concerns perceive the protest system as minimally effective, as the previous research has shown that these reported outcomes create false perceptions of accountability (Snyder 2020). While small business concerns make up more than half of the GAO bid protests filed, small business perceptions of the bid protest outcomes and its ultimate utility are underrepresented in the current research literature.

RAND concluded, in part from trends in bid protest outcomes, that federal agencies [the Department of Defense in the recent congressionally directed study] and the private sector have differing views on the bid protest process (RAND 2018). The business problem this empirical research addresses is the stakeholders’ perceptions of the reported outcomes and whether those perceptions support the GAO’s reported outcome of moderate effectiveness in correcting improprieties in acquisition procedures. The empirical and action research has a primary emphasis on small business protestors’ perceptions of the reported protest outcomes. The research also explores the salient factors that influence these stakeholder perceptions. The role of and interaction among these perceptions are important to the viability of the system and its perceived effectiveness.

**Review of Research**

Since the GAO protest system’s infancy in 1926 (GAO Descriptive Guide), there has been considerable debate and substantial research on the process, effectiveness, costs, and benefits of protests. Nearly all the research assumes that the effectiveness rate reported by the GAO is a valid measure of success or effectiveness. While stakeholders have different perspectives, much of the research has been aimed at the two competing perceptions of
effectiveness. The first is that the quasi-judicial GAO protest process provides real benefits to contractors and public confidence in the acquisition process that are greater than the very real costs. The former chief of the GAO’s protest system and perhaps the godfather of GAO protests, Dan Gordon, published a seminal research report articulating this view, as summarized in the title: “Bid Protests: The Costs are Real, But the Benefits Outweigh Them” (Gordon 2013).

Contrasting this view is the perception that the GAO protest costs to the federal acquisition system outweigh the benefits by delaying acquisitions, using resources, and being somewhat redundant to the judicial protest process. Many agencies, most notably the DoD, have pushed this concern, prompting much of the congressional interest and research. Limited research has focused on the perceptions of protest outcomes and the elements influencing the contractor perceptions, particularly for small businesses.

Congress mandated two important studies by RAND and the Section 809 Panel Report that partially addressed these perceptions of bid protest outcomes and the cost effectiveness of the process. RAND concluded that federal agencies (in this report, the DoD) and the private sector have differing views on the bid protest process. Government agencies are concerned that the process incentivizes protests, potentially preventing timely awarding of contracts for agency requirements, while the private sector (vendors) view protest as a means to hold the government accountable for providing information about how acquisition decisions are made (RAND 2018).

The study examined trends in bid protests and their effectiveness rate. The RAND study specifically addressed “Stakeholder Perspectives on the Bid Protest System,” concluding: “Perspectives on the bid protest system varied greatly between DoD personnel and the private sector. DoD personnel expressed a general dissatisfaction with the current bid protest system. The prevailing thought was that contractors have an unfair advantage in the contracting process
by potentially impeding timely awards with bid protests. They asserted that the federal government allowed too many ‘weak’ allegations in a protest and that contractors had too much time to protest, delaying procurements. In contrast, private-sector representatives strongly supported the bid protest system because they viewed it as providing transparency to the contracting process and holding the government accountable for following the law and its own solicitation procedures.”

Much of past research focuses on the effectiveness and efficiency of the GAO bid protest system and its outcomes, while a limited amount of practitioner literature focuses on stakeholder perceptions of the protest system. Most of the literature on perceptions of protest outcomes aggregates the “perceptions from trade associations and private law firms of the impact that bid protests have on their corporate [vendor] decision making” (RAND 2018). This research expands the discussion on stakeholder perspectives of GAO bid protest outcomes and factors that influence these perceptions, with emphasis on protesting small business stakeholders.

The literature review and previous papers provide the largely accepted data which support the GAO reports of a moderate effectiveness rate of about 45% for all protests, offering what the GAO determines is some form of relief. RAND and other research conclude that private sector contractor perceptions of bid protest outcomes and the cost effectiveness of the process differ from the perceptions of the government and other GovCon stakeholders.

While most of the literature accepts the moderate effectiveness reported by the GAO due to the determination of meaningful relief obtained, this data is based on opaque determinations generally only known by the GAO. The current analysis of perceptions generally revolves around the both the real and unintended costs relative to this moderate effectiveness rate
reported. Much of the reported effectiveness is a result of corrective action from some sort of dismissal.

Recently, Canayaz et al.’s research concluded that even vendors who receive some form of relief in their protest outcomes suffer negative impact on future government contracts. The study also concludes that the common government agency perception that protests unduly delay procurements is inaccurate. The paper summarizes:

Firms that successfully protest a government agency’s conduct or terms of a procurement contract observe a reduction in future business opportunities with the government. These firms receive fewer and less valuable government contracts, face more contract cancellations, and experience significant reductions in sales growth and employee growth. Despite widespread belief, successful bid protesters do not delay government procurement due to lengthy dispute resolutions. (Canayaz et al., 2021)

The Canayaz study also accepts the assertion that corrective action assumes that a protest is successful for the protestor in the short-term. However, the study identified long-term detrimental impacts on successful protestors. Their conclusion supports this paper’s contention that even if a protest is reported as having an effective outcome, that outcome is rarely, if ever successful, for the protestor.

My analysis of the industry reveals that even short-term effectiveness of protest outcomes is extremely low and rarely successful for small businesses. The overall sustain rate is a much better measure of effective success, particularly for small businesses. Truly effective protest outcomes are minimal at an upper limit of 3.5-4%, especially since even the minimally efficient sustained protest outcomes are often not successful for the small business protestor. The question this paper explores is How do stakeholder perspectives of outcomes vary from reported outcomes. This research assesses the perceptions of protest outcomes and the factors that have the most influence on those perceptions.
The Protocol

This outcome perspective research builds on empirical research on participating in small business GAO protests with literature reviews, coded interviews with GovCon protest participants, analysis of GAO annual reports, and more detailed interviews with small business protestors and GAO bid protest leadership. The primary research source for obtaining bid protest stakeholder perceptions is the 13 coded (one interview transcript is unavailable and therefore not coded or used) and an uncoded structured interviews with protest stakeholders. The interview questions were designed as a research framework from a literature review, protest experience, and extended dialogue with fellow small business colleagues and GovCon professionals. The interviewees were not explicitly provided with research data such as the GAO-reported outcomes on the moderate reported effectiveness rate or the calculated 4% sustained effectiveness rate before or during the interviews. The interview protocol was designed to elicit the interviewees’ perceptions of outcomes, the effectiveness of those outcomes, and the important factors influencing the outcomes. The coded interviews utilized the questionnaire in Appendix A, given to interviewees ahead of time, to stimulate a more free-flowing discussion wherein key concepts are coded. Most of the structured interviews were conducted over a three-month period in 2017, but the unstructured follow-up interviews and protest experience continued through 2020. The interviews were recorded, transcribed, and coded by key phrases and concepts from the transcript as informed by the more thorough context of the interview discussion. The key factors influencing the protest outcome perspectives identified in the coded interviews and research literature were assessed along the spectra to conceptualize their interaction with major stakeholders, particularly small businesses.
The individuals interviewed were initially selected for their accessibility and willingness to take at least an hour to discuss their views of the protest system. They are highly experienced and knowledgeable of GAO protests, particularly of current vested stakeholders. The study sought a balance among the three major stakeholder groups: government agency contracting officials, GovCon lawyers, and experienced vendors that are primarily small businesses. The majority of the small business interviewees are CEOs, and two of the small business executives also have experience in large businesses. Most of the agency stakeholders interviewed have experience in multiple agencies and/or with vendors. The legal stakeholders have extensive experience with small businesses, and several have experience representing large businesses. The overview of the stakeholders’ backgrounds and a key reason for selecting them is listed in Figure 3.3 below.

The 14 interviews plus the one of the 15 not available for coding, were conducted with groups of three major types of stakeholders: small business federal contractors (5), U.S. government contracting agencies (4), and protest/contracting lawyers (6). While only small business contractors were interviewed, several of the contractors had experience with large business contractors as did several of the government agency representatives and all the lawyers. This experience provided insight into the perceptions of contractors that were other than small business in a particular category. This is a representative group of the major stakeholders regarding protest perceptions because it includes experienced and invested participants, many involved in small businesses yet experienced with large businesses and government agencies. Several of the interviewees are renowned for their expertise in protests. Another important criterion was the ability of the interviewees to explain the concepts and factors that influence protest outcome perceptions along with the ability to articulate these perception factors from
other perspectives. Though numerically small, the 14 interviews were sufficient to ascertain a meaningful representation of outcome perceptions and key factors that impact stakeholder perceptions. The interviews reinforced much of the protest concepts, perceptions, and factors from previous interviews.

<table>
<thead>
<tr>
<th>Role</th>
<th>Reason Selected</th>
<th>Category</th>
</tr>
</thead>
<tbody>
<tr>
<td>CEO SDB 8a govcon</td>
<td>Extensive protest experience</td>
<td>Small Business</td>
</tr>
<tr>
<td>CCO SDVOSB govcon</td>
<td>Protest experience as protester and protested</td>
<td>Small Business</td>
</tr>
<tr>
<td>Govcon Executive</td>
<td>Detailed knowledge of procurement rules</td>
<td>Small Business</td>
</tr>
<tr>
<td>CEO SDVOSB govcon</td>
<td>Balanced protest experience</td>
<td>Small Business</td>
</tr>
<tr>
<td>SB CEO and Consultant</td>
<td>Renown serial protestor</td>
<td>Small Business</td>
</tr>
<tr>
<td>SBA BD and former CO</td>
<td>Both CO and regulator experience</td>
<td>Agency</td>
</tr>
<tr>
<td>Senior contracting officer</td>
<td>Agency contracting executive</td>
<td>Agency</td>
</tr>
<tr>
<td>Reserve CO, Former active CO</td>
<td>Experience on both sides</td>
<td>Agency</td>
</tr>
<tr>
<td>GAO Associate Managing General Counsel</td>
<td>Global government expert and experience in large law firm</td>
<td>Agency</td>
</tr>
<tr>
<td>Partner, Practice Chair</td>
<td>Extensive protest experience and as JAG</td>
<td>Legal</td>
</tr>
<tr>
<td>Partner</td>
<td>Practicing partner on both sides</td>
<td>Legal</td>
</tr>
<tr>
<td>Lead Protest Lawyer</td>
<td>Prolific protest consultant and lawyer</td>
<td>Legal</td>
</tr>
<tr>
<td>Partner, Practice Chair</td>
<td>Firm practice chair</td>
<td>Legal</td>
</tr>
<tr>
<td>Partner</td>
<td>Current protest case experience</td>
<td>Legal</td>
</tr>
<tr>
<td>Associate</td>
<td>Fresh perspective</td>
<td>Legal</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td></td>
<td><strong>15</strong></td>
</tr>
</tbody>
</table>

**Figure 3.3.** Interviewed Stakeholders
The interviews were conducted, when able, in the interviewee’s office or work location. An outline of the interview questions was provided prior to the interviews. More than half of the interviews were conducted over the phone or webinar. Interviews were recorded and transcribed by an independent transcription web site. The give and take in the interviews allowed for a more detailed, nuanced understanding of factors and interviewees’ perceptions of others. The findings of protest outcome perceptions are derived from the interviews as informed by the research literature review, the action research experience, participation in GovCon seminars, and in-depth discussions with GAO officials, GovCon attorneys, and some other small business protestors. Initially the interview outcome perception findings were not explicitly quantified. Rather, the major factor themes influencing perceptions emerged.

When initiating the research coding protocol, the transcripts were reviewed several times to capture major themes before they were coded by highlighting the key perceptions, the influencing factors, the measure of protest outcome success/effectiveness, the interviewees perceptions, their take from other perspectives, and a major theme of the interview. The key phases that identified the influencing factors were compiled in a list organized by major categories or themes. The key interview phrases describe a more detailed perception or explanation/perception of a factor. The organization and existence of key elements was influenced by the focus of the interview questions and the further exploration of these concepts in follow-up questions, which is based on the researcher’s experience and action research. This experience gave me invaluable insights into the bid protest process, the long and short-term costs, the legal tactics, and principles used, the implications of reported outcomes, and the perceptions of outcomes as well as the interaction of the key perception elements.
Initially, the recordings and transcripts were reviewed several times for a broad understanding of significant discussions on major elements reflecting the interviewed stakeholders’ perceptions of reported outcomes and overall effectiveness as described by that stakeholder. Additionally, the interview records further informed the view of the protest process and how the outcomes are reported. The interviews were then “open-coded,” a rigorous procedure involving line by line scrutiny of each transcript to identify fragments of text and/or discussion of key concepts. This coding identified 939 phrase or discussion fragments and 35 key concepts identified in the transcript margins. The open-coded highlighted phrases were then manually sorted to group similar or reoccurring phases or discussion fragments into six broad areas by common dominate themes. The major coded phrase or discussion fragments were manually listed in these six identified general categories. The transcripts were re-read to further consolidate narrower four major themes considering the duplication and overlap between these concepts. For example, the fairness and accountability categories were combined into one of the four themes because of the commonality between the two. In fact, this process identified that accountability was viewed as the positive extreme on the fairness spectrum. Then, the coded transcripts were reviewed for meaningful discussions of the four concepts or themes and for each interviewees’ measure or meaning of success or effective outcome. Each interview transcript was then identified for the stakeholders’ respective positive or negative perceptions of the outcome effectiveness perception.

The interviews were tabulated, indicating for each interview a positive or negative description of where these theme factors influenced the actual outcome of protests, the perception of outcomes, and/or the perception of protest success/effectiveness. Many of the interviews had both negative and position perceptions on or of the protest outcome as the
interviewer discussed the theme in more detail. Some of the themes were not meaningfully
discussed in a positive or negative perspective. The tabular values for these are blank.

The researcher then quantified the overall perception by assigning a value on a 0-5 scale of each interviewee’s aggregate subjective view of the effectiveness of the bid protest system. These values are averaged for the total and for each of the three major classes of stakeholders, as seen in Table 4.1. Additionally, the general description the interviewees conveyed on what constitutes success or effectiveness from their perspective as well as a predominant theme of the interview are recorded. Finally, the findings briefly include a relevant note about each interview.

The interview findings are organized into the major themes. The interviews were then reassessed to inform the researcher of how the major factors or themes influenced outcome perceptions, including perceptions of success/utility/effectiveness, and how these factors interact in the complex environment of government contracting protesting. Government contracting is a consuming, intense human endeavor fueled by many influences and motivations. Protesting government acquisitions is probably an order of greater magnitude. Understanding the influence of these factors on perceptions of protesting, protest outcomes, and their interaction from different perspectives is an important aid for understanding how the protest outcomes are perceived.

Findings

Effectiveness Perceptions

The empirical research followed the protocol described above to document stakeholder perceptions and concepts and themes that interact to create these perceptions. I evaluated each interview for overall perception of effectiveness for that stakeholder on 0-5 scale with 5 indicating very effective or highly successful. Although effective protest outcomes are generally
measured by levels of confidence that rules were followed, leading to a fair acquisition, the perception of success is in the eyes of the beholder or stakeholder. Therefore, it is important to note what each interviewee considers a significant measure of success. Figure 3.4 summarizes the individual effectiveness scores, measures of effectiveness and perception theme summary. Figure 3.5 provides the average effectiveness score for each major stakeholder group and the summary of the findings by stakeholder category.

<table>
<thead>
<tr>
<th>Role</th>
<th>Category</th>
<th>Perception of Effectiveness</th>
<th>Measure of Success or Effectiveness</th>
<th>Theme</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>CEO SDB 8a govcon</td>
<td>Small Business</td>
<td>2</td>
<td>Long term business and relationship</td>
<td>Branding and small business risks</td>
<td>Opportunity costs main focus</td>
</tr>
<tr>
<td>CCO SDVOSB govcon</td>
<td>Small Business</td>
<td>1</td>
<td>Depends on strategic benefit</td>
<td>Cost burden of protesting</td>
<td>Damaged business relationships</td>
</tr>
<tr>
<td>Govcon Executive</td>
<td>Small Business</td>
<td>2</td>
<td>Mitigating issue is minimized</td>
<td>Business decision with limited accountability</td>
<td>Importance of communications with agency</td>
</tr>
<tr>
<td>CEO SDVOSB govcon</td>
<td>Small Business</td>
<td>1</td>
<td>Winning the contract</td>
<td>Cost-benefit tradeoff</td>
<td>Costs main importance more than complexity</td>
</tr>
<tr>
<td>SB CEO and Consultant</td>
<td>Small Business</td>
<td>0</td>
<td>Government Accountability</td>
<td>Accountability at any cost</td>
<td>Serial protestor one year bar</td>
</tr>
<tr>
<td>SBA BD and former CO</td>
<td>Agency</td>
<td></td>
<td></td>
<td></td>
<td>Unable to locate interview transcript</td>
</tr>
<tr>
<td>Senior contracting officer</td>
<td>Agency</td>
<td>3</td>
<td>Depends</td>
<td>Equitably playing field between government and vendor</td>
<td>Corrective action/benefit/cost unknown</td>
</tr>
<tr>
<td>Reserve CO, Former active CO</td>
<td>Agency</td>
<td>4</td>
<td>Protest upheld (sustained) or denied</td>
<td>Win award or best value for owners, 2nd/3rd order impact</td>
<td>Each protest is unique</td>
</tr>
<tr>
<td>GAO Associate Managing General Counsel</td>
<td>Agency</td>
<td>5</td>
<td>Things that don’t happen</td>
<td>Private attorney general, legislature recommends to agency</td>
<td>Expert and defender of system</td>
</tr>
<tr>
<td>Partner, Practice Chair</td>
<td>Legal</td>
<td>4</td>
<td>Call attention to agency improper conduct</td>
<td>Correcting unfairly treated clients</td>
<td>Have educated counsel on other side to minimize costs</td>
</tr>
<tr>
<td>Partner</td>
<td>Legal</td>
<td>3</td>
<td>Compete on a level playing field</td>
<td>Compressed time to manage client expectations</td>
<td>Noted low likelihood of success</td>
</tr>
<tr>
<td>Lead Protest Lawyer</td>
<td>Legal</td>
<td>5</td>
<td>Corrective action</td>
<td>Protest to correct errors</td>
<td>Not question of fairness, but strength of argument</td>
</tr>
<tr>
<td>Partner, Practice Chair</td>
<td>Legal</td>
<td>5</td>
<td>Client gets a fair chance</td>
<td>Quasi-legal unequal treatment venue</td>
<td>Example of more bidders</td>
</tr>
<tr>
<td>Partner</td>
<td>Legal</td>
<td>5</td>
<td>Agency review action</td>
<td>Strategic use of protests</td>
<td>Importance of timeliness</td>
</tr>
<tr>
<td>Associate</td>
<td>Legal</td>
<td>4</td>
<td>Reported outcome</td>
<td>Strategic use of protests</td>
<td>Importance of timeliness</td>
</tr>
</tbody>
</table>

15 3.14

**Figure 3.4.** Perceptions, Effectiveness, and Theme
Figure 3.5. Effectiveness Perception Scores and Summary

Figure 3.4 shows that the average assigned value for the relative perception of effectiveness is just over three on a 0-5 scale. The interviewed stakeholders on average perceived that the outcome success rate is slightly higher than the moderate effectiveness rate reported by the GAO. This suggests the overall perception is in line with the claimed effectiveness rate. The 1.20 average of the small business protest executives seen in Figure 3.5 indicates that these stakeholders have a considerably lower perception of effectiveness, roughly corresponding to a 20% perceived success/effectiveness rate. This is significantly below the moderate 45% outcome effectiveness rate reported by the GAO; however, it is above the 3.5-4% sustain rate that marks the upper end of the realistic small business protest success. Small business stakeholders are, therefore, more attuned to the minimal effectiveness of the reported outcomes, reinforcing the small business perceptions of limited utility.

The research literature describes government agencies, in particular the DoD contracting officers, and contracting officers perceive protest outcomes as often delaying the award and performance of contracts needed to meet mission requirements. They perceive that protests are too frequent, can be frivolous, may be micromanaged, and constitute unwarranted infringement of the agencies and contracting officers’ authority. Consequently, they surmise that the burdens (costs) outweigh the benefits, and therefore the protests are ineffective. However, our research
shows that agency stakeholders have a 4.00 average effectiveness perspective value, suggesting they think the effectiveness, success, and therefore the utility of protest outcomes is higher than the GAO-reported moderate effectiveness rate. This figure may be skewed by the makeup of this small sample of agency stakeholders because it includes GAO leadership as well as SBA official and former contracting officers.

The legal stakeholders scored the highest at 4.33 on the effectiveness perspective score. This is understandable since these lawyers’ careers are vested in the bid protest system and in the effective resolution of bid protests. This score may also be partly explained by the fact that many of the lawyers have represented large companies that are the subject of a protest. Additionally, some of the lawyers implied that in some cases a denial or dismissal may be an effective outcome.

*Measures of Success and Significant Interview Themes*

The findings in Figures 3.4 also list a summary phrase of each interview’s key measure of success. For example, one small business CEO stated the key measure of success is building long-term business relationships. Another small business CEO conveyed the main measure of success is mitigating or minimizing the damage from the specific contracting action in dispute. Seeking to understand or at least identify each interviewee’s definition of success aids in assessing that stakeholder’s perception of protest effectiveness. The measure of success based on “things that don’t happen” because agencies want to avoid protests is a case in which effectiveness is not directly reflected in the findings. However, this key measure provides invaluable increased understanding of stakeholder perceptions. It provides an interesting and notable insight into perceptions of effectiveness not captured in the data.
The catalog of key themes helps summarize the different perceptions in the human interactions of bid protests. Protests involve social interaction such as exchange, competition, conflict, cooperation, and accommodation. Protest interactions, and to a larger extent government contracting, involve these human exchanges that are influenced by emotion. These themes inform the analysis of outcome perceptions. Some of the most interesting insights are not directly reflected in the findings. The GAO leadership interview theme describing the “private attorney general” theme is one example of this.

Factors Influencing Protest Outcome Perceptions

The interviews identified four major elements factoring into the perceptions of GAO protests and measures of success. The four elements are:

• Cost-Benefit: the cost-benefit tradeoff considerations in participating in a GAO protest.

• Fairness and Accountability: the impact and consideration of GAO protests offering accountability and fairness in the protests and/or the U.S. federal acquisition system.

• Communications: the utility of protests stakeholders effectively communicating with other stakeholders or protest parties.

• Emotions: the impact of stakeholder human emotions on the participation in and/or outcome perception of GAO protests.

The interview coding identified phrases and comments in the major elements. Many of the comments, phrases, and discussions identified in the research apply to multiple elements and conceptually describe perceptions of the interaction and interrelationship between the elements. Figure 3.6 below indicates interviews in which each of the key element concepts were
meaningfully discussed in terms of whether each element has a positive or negative influence on the perception of protest outcomes and/or the usefulness of participating in GAO protests. The “X” indicators in the positive or negative columns of each element identify whether that element was meaningfully articulated once or any number of times in the interview in a favorable or unfavorable light. Many of the interviews registered both positive and negative discussions/multiple discussions of a particular element. This finding is the often the result of probing follow-up questions that explored the interviewees’ perceptions of the conceptional element. Figure 3.6 also lists the predominant measure of protest success that each interviewee described. Additionally, the interview figure describes a dominant theme of the interview, as well as key notes from the researcher when coding the interview. This tabular data is qualitative. It is only quantitative in that it provides for the compilation of the number of interviewees in general and the number of interviewees in each category that did or did not significantly describe any of the four protest elements as having a favorable, unfavorable, or no impact on the interviewee’s perception of protest outcomes and/or the participation in GAO protests.

Many of the comments, phrases, and discussions identified in the research apply to multiple elements and conceptually describe perceptions of the interaction and interrelationship between the elements.
Figure 3.6. Interview Elements and Theme Discussion Summary

The interviewed stakeholders described perceptions of protest outcomes in terms of the key elements and those elements’ interactions in favorable, unfavorable, both, or neither spectrum of degree. These descriptions provide a qualitative conceptual framework to understand GAO protestors’ perceptions of the reported outcomes to answer, or at least clarify the research question: How do stakeholders in the federal government contracting process, particularly small business contractors, perceive the GAO-reported bid protest outcomes that claim a moderate effectiveness rate? The answer is: It depends. In most complex human endeavors, especially those involving an individual’s or even an organization’s livelihood, the perception is dependent on the perspective.
As the old fable says, “Where you stand depends on where you sit.” Some of the stakeholder descriptions may seem to be contradictory, but they show a complex interaction based on perspective. The meaningful protest outcome perceptions describe the stakeholders’ perspective concept. Appendix B provides excerpts organized by each of the four major themes from the transcripts to support the findings of complex interactions of positive and negative perceptions of key elements in the GAO protest bid environment. The comments also provide insight and understanding of the complexities of the various elements. A few notable excerpts are listed here:

- People protest for a couple of reasons. They protest, and historically they protested, I believe, when they honestly felt that they were not treated fairly.
- Being a small business, people didn't want to spend the money, or[they wanted to spend] very little, to protest.
- The number of protests that are actually successful…lately it's been two to four percent, and it's never really much more.
- A lot of long-term intangible [protests]cost, yeah, because you're going to get the [agency] upset.
- What [is] called private attorneys general… such that you incentivize someone to identify waste is spawned in a government contract and you do that by rewarding them for having done it.
- The best purposes of having a protest run are all the things that don't happen because people in the agency know that if they did that someone would file a protest. It's all the stuff that doesn't happen because you have a right to complain.
- The reason that we don't protest a whole lot other than the financial burden associated with it, is that the ability to win some of the small business protests, we think, isn't
worth the effort to the potential negative repercussions of the small business in the space.

• Showing them why and how they weren't mistreated, why and how the offer selected was a better offer than theirs, and to show them that if they pursue a protest, they won't win... that's a type of communicating.

• I'm a vendor; it's not my job to enforce the code of federal regulations.

• The process itself represents compromise between a lot of different and competing interests in the procurement system. We have a system that needs to be as fair as possible and allow for the thorough adjudication of protests wherever possible. It also exists in a world where the government must procure certain goods and services by a certain time.

• Both sides of it [protest] got very subjective and emotional.

The findings roughly quantify the outcomes perceptions of major stakeholders. The more significant qualitative contribution these findings make to the field is the provision of greater insight into the perceptions, factors influencing these perceptions, and the interaction of some of these factors to inform the answer to the complex research question: How do stakeholders in the federal government contracting process, particularly small business contractors, perceive the GAO-reported bid protest outcomes that claim a moderate effectiveness rate?

Discussion

The research reveals in the 3.14 average rating that most of the interviewees generally think GAO bid protest outcomes have a moderate level (20%-50%+) of effectiveness. This perception is especially true for government, GovCon, and protest bar stakeholders whose livelihood is dependent on a robust and useful bid protest process. It is important to note that
these stakeholders vested in the system do not necessarily equate effective outcomes with successful outcomes. The GAO staff and leadership interviewees naturally appear to perceive bid protest outcomes as effective since many are participating in government contracting oversight careers. The contractor or protestor stakeholder interviewees also generally think the protest system is a moderately effective tool to be utilized in a narrow manner to achieve tactical success in specific instances and that success is based on individual circumstances. White, an interviewee, modeled this factor by commenting that when he meets with private sector business, he asks how many have protested and whether they believe it was effective. He reports that most have filed protests and think bid protests are a fair and effective tool. However, when he asks the same group of contractors if they have had any of their awards protested by another contractor, they disparage the bid protest as unwarranted, somewhat unfair, delaying the provision of needed goods and serves, and ineffective (R. White, personal communications, May 3, 2019).

Most of the stakeholders interviewed measure success or system effectiveness as a cost-benefit tradeoff, whether they are contractors, protestors, and their legal advisers, who view bid protests as a business decision, or they are government, agency, and GovCon stakeholders who tend to view effectiveness based on the cost-benefit tradeoff to the federal acquisition system, the confidence in the system, or the agencies’ ability to efficiently acquire goods and services for needed requirements. However, some small business interviewees perceive the protest system and individual protests as unsuccessful and therefore ineffective because the overriding motivation and goal is accountability. These interviewees often are pro se protestors who view the protest as a business endeavor they most often pursue to ensure government agency accountability for the legislated preferences that small businesses rely on to sustain growth,
experience, capability, and performance records. This accountability is consistent with the GAO’s name, Government Accountability Office, and its mission statements.

For the most part, the protest system does not offer meaningful effective relief or effectively rectify specific improprieties nor systemic improprieties such as gaming acquisitions to make them “protest proof.” Many small business stakeholders perceive most outcomes as ineffective and unsuccessful not only because they did not achieve accountability, but more importantly because the tangible and intangible costs exceeded any minimal benefit received. The protest outcome perceptions are derived from the research and summarized as follows:

• The GAO, GovCon attorneys, and practitioners perceive bid protest outcomes as moderately effective in adjudicating alleged violations of acquisition laws and regulations, believing the benefits to the acquisition system outweigh the costs.

• Surprisingly, government agencies, or at least the interview sample, perceive bid protests as effective. With a 4.00 average effectiveness perception assessment value, these agency stakeholders conveyed that the effectiveness or success rating is above the GAO-reported moderate effectiveness. The significance of this difference from the literature in which protests are perceived as a burden is diminished by the small sample size and nature of the agency officials as senior leadership personnel.

• Government contractors perceive protests as useful tools to achieve tactical and occasionally strategic goals. While the protest outcomes provide limited effectiveness and the costs often exceed the minimal tangible benefits, they are viewed by this demographic as a necessary part of government contracting and a tool whose use should be minimized.
Small business contractors, particularly those from certain socio-economic subcategories like SDVOSB, perceive outcomes as ineffective with substantial costs and minimal benefits but feel they may play an important role in agency accountable to follow the unique policy objectives such as small business preferences. The high number of dismissed protests and the small number of sustained protest outcomes demonstrate negligible effectiveness. However, protests provide opportunity to identify improprieties that disadvantage small businesses despite the negligible success or effectiveness rate.

These outcome perceptions highlight the role of the main factors that influence perceptions. This research finds that there are four major areas that influence stakeholder perceptions of bid protest outcomes. These elements interact to influence stakeholders’ perceptions of various stakeholder outcomes and thus influence contractor decisions to participate or file protests. The research also indicates that stakeholders who are invested in the GAO protest system, such as agencies, protest bar lawyers, contracting officers, government protest adjudicators, and many large contractors that are supported by outside counsel, perceive outcomes as moderately effective at adjudicating improprieties. Since no large businesses are directly represented in the research interview cohort, the perceptions of large businesses were extrapolated from protest bar interviewees who represent large business, the literature review, interviews with contracting officers, and discussions with GAO leadership. The small businesses that are represented in the interview cohort are more likely to perceive the protest outcomes as minimally effective. The perceptions of outcome effectiveness are influenced, in slightly different ways for different stakeholders, by the key factors identified in the interview coding.
Key Factors Influencing Outcome Perspectives

The researcher coded the interviews based on key phrases and concepts. These coded phrases were grouped into major perception categories as shown in Figure 3.5. These key outcome perception themes are aligned along three axes: cost-benefit tradeoff, fairness and accountability, and communications. Clouding and in some cases illuminating or overlaying these basic perception themes is the role of emotions in procurement protests. The most significant factor is the cost-benefit tradeoff, whether it is a business decision, system effectiveness measure, or a program oversight accountability outcome.

Elements influencing or coloring the perceptions of protest outcomes are:

- **Cost-Benefit Tradeoff** – the business decision that the return on investment in a particular action to protest or not protest is the primary measure of outcome effectiveness. The acquisition system effectiveness outcomes are dependent on the trade-off. Both the short- and long-term benefits should outweigh the costs to the stakeholder.

- **Fairness and Accountability** – the degree to which the protest and the protest system provide “an objective, independent, and impartial forum for the resolution of disputes concerning the awards of federal contracts” (GAO Descriptive Guide 2018), or a level of fairness. Accountability, one of the primary objectives of the GAO bid protest system, is on the extreme end of the fairness spectrum and relates to achieving identification, adjudication, and correction of alleged violations of acquisition laws and regulations by government agencies.

- **Communications** – the level to which bid protests, the protest system, procurement regulations and the government acquisitions process aid in articulating stakeholder messages. Communications include contractors learning more about the requirements,
communicating with the agency, marketing their capability with the agency, and learning about industry capability.

In this competitive bid protest environment, emotions interact with the other factors and can weigh heavily on perceptions of successful outcomes. Some basic emotions (Ortony and Turner, 1990) that appeared both implicitly and explicitly in the interviews include anger, aversion, courage, contempt, disgust, distress, dejection, desire, despair, fear, guilt, interest, shame, envy, fear, and hope. The element that overlays or influences the other three perception elements, particularly for small businesses, is:

- Emotions or the Emotional Cloud – building a business, winning a contract, making a profit, challenging authority, timely fulfilling a requirement, enforcing rules, litigating disputes, adjudicating disputes, and correcting improprieties are all human endeavors where emotions impact both actions and perceptions of outcomes. The three protest spectra are heavily influenced by the various emotional factors of different stakeholders. The bid protest system and corresponding perceptions exist in an emotional cloud environment that influences the outcome perceptions.

Protests by small businesses can be especially emotional because they may often be a proposition about the company, or at least the company’s business model. Contracting officer and agency counsel interviewees also viewed emotional influences as a challenge to their authority, judgement, and professional reputation. Generally, GovCon legal stakeholders believed that successful protests defined by fair resolutions are largely defined and better argued as devoid of emotion. However, they acknowledge the influence of these human emotions on the success of a protest and perceptions of the outcome.
These findings provide a conceptual framework for better understanding the different stakeholder perspectives and the operative elements or themes having most influence on these perceptions.

Outcome Effectiveness Perceptions

On average, the stakeholder interviews indicated that the outcome perceptions were consistent with the reported outcomes, providing moderate effectiveness. Notably, the small business interviewees, in accordance with my action research, generally perceived that GAO bid protests are marginally effective as represented by the overall low sustain rate and the frequent lack of meaningful relief. This small business perception finding is significant, given that slightly more than half of GAO protests involve small businesses (Gordon, 2013; RAND, 2018). That demographic is understandable since small businesses with limited resources favor using the quasi-judicial “expeditious and inexpensive” (31 U.S.C §3554) protest venue that does not require legal representation. However, the RAND study found that GAO protests from contractors with attorneys are more successful or effective in gaining some form of relief.

The findings confirm my expectations that most major stakeholders are invested in the bid protest system and believe the GAO representations of the bid protest system’s moderate effectiveness and utility with a positive rate of return. Most of the recent research and literature is aimed at marginal modifications to improve the acquisition process by eliminating or minimizing what are considered “frivolous” protests to expedite the acquisition of needed supplies and service. While some agencies and congressional committee staffers believe there are some frivolous protests that need curbing, interviewee White believes there is no such thing as a frivolous protest because it would require accessing the protestor’s thoughts and implying motive.
The experiential action research confirms my view that regulatory capture and bureaucratic inertia encourage the GAO to “dispose of” protests through dismissal outcomes primarily based on procedural or technical irregularities. In fact, during a hearing one GAO hearing attorney stated, “The role of GAO is to dispose of protest based on the information in the case” (April 9, 2018, B-41588). This sentiment is perceived as consistent with the attitude of many hearing officers and especially agency counsels who seem to seek out procedural and technical tactics or gimmicks to dismiss or dispose of a protest. There are numerous, confusing, and short duration timelines that result in protests, particularly by small businesses or per se protestors whose protests are dismissed or disposed of for timeliness. Another common tactic used by agencies, and encouraged by the GAO, is to dispose of or seek to dismiss a protest because the protestor is not an interested party, the legal principle of standing. The CICA defines the “term ‘interested party’—with respect to a contract or a solicitation or other request for offers … [this] means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract” (31 U.S.C. §3551(2)). Yet GAO protest outcomes use an expansive interpretation and precedent for dismissing a protest when the protestor is not an interested party. The protest will be dismissed if the protestor is not considered an interested party because they are not next in line for award of the contract, or the agency evaluates the offer as technically unacceptable, or the protest does not meet a term of the solicitation, or the protestor is a teaming partner or subcontractor, or the protestor does not show that the outcome was prejudiced, as well as other bases for dismissal. Previous research extracts from the GAO reported two thirds of the protests filed were dismissed (Snyder 2020). Further research analysis on the number and reasons for dismissal is warranted, but this high number of protests dismissed is an extraordinary dismissal rate for a quasi-judicial,
expeditious, and inexpensive resolution of procurement improprieties, particularly when relying on contractor protestors to bring protests forward as a “private attorney general” (White, 2019) with limited possibly of receiving a remedy to offset the costs of protesting.

The protest outcome perceptions of the various stakeholders generally support, albeit for different reasons, the prevailing narrative that the protest system is moderately effective in correcting violations of acquisition rules and achieving accountability. The major stakeholders are commercial contractor protestors since the measure of effectiveness is thought of in terms of protestors receiving remedy for prejudicial procurement improprieties sustained in protests. Prominent among these protesting vendor stakeholders, and the focus of this research, are small business concerns, which represent over half of the protests filed. Additionally, the inexpensive, expeditious, and relatively informal venue make GAO protests the preferred forum for seeking relief. These small businesses more often perceive the protest outcomes as only minimally effective, as is shown in the reported sustaining outcomes relative to the total protests filed/closed, particularly regarding the costs outweighing the benefits.

The recent RAND study and a prior legislated study highlighted the different perceptions between the agencies and the private sector, concluding:

- DoD personnel are concerned that the process incentivizes protests, potentially preventing the timely award of contracts.
- The private sector think bid protests hold the government accountable for providing information about how a decision was made. (RAND)

To illuminate the perceptions of protests, RAND considered approaches to reduce and improve protests from small businesses since more than half of the protests at the GAO and the CFC are from self-identified small businesses. While small businesses are awarded more than half of the
DoD contracts, such contracts represent only 15–20 percent of total contract dollars. As RAND explains, this disparity raises another cost-effectiveness question: Should more than half of protest activity be focused on less than 20 percent of contract dollars? The frequency of protest activity by small businesses suggests that any improvements to the bid protest system should also address small businesses. For example, the current “loser-pays” pilot program for the DoD excludes businesses with annual revenues under $250 million (Section 827 of the FY 2018 NDAA). This program is analogous to a situation in which a civil case is settled out of court because it is more cost-effective for both parties. Furthermore, the fact that small businesses are generally less successful at the GAO (but not at the CFC) suggests that small businesses’ reasons for protesting differ from those of larger businesses. This aspect was corroborated in RAND’s discussions and my interviews. Sometimes, when debriefings are uninformative, small businesses lodge protests to gain an understanding of why they lost a procurement. To the extent that this is the case, the changes to the debriefing process, a form of communication, could help to eliminate some small-business protests.

Other changes related to small businesses could also be considered. Protests by both large and small businesses have a higher effectiveness rate at the GAO when under a protective order. Small businesses are also more likely to have their cases dismissed for lack of jurisdiction or for being legally insufficient. These differences suggest that small businesses might benefit from better legal representation when filing protests at the GAO. One option to address this issue would be to require all protests at the GAO to be filed through legal counsel. However, this approach might be viewed as unfair since small businesses might face more significant economic barriers to filing than larger businesses. Another option would be to provide legal assistance to small businesses, perhaps through the Small Business Administration. Such advice might be
useful if it is provided early enough that small businesses can determine whether they have valid cases, which could allow them to craft more persuasive arguments and possibly reduce the number of dismissed protests (RAND, pages 67-68).

**Key Stakeholder Perception Elements**

The different stakeholder perspectives of protest outcomes are shaped by the elements found in this research. The empirical research identifies these elements or factors, grouping them into protest perception themes that influence each stakeholders’ perspectives in a conceptual framework across the spectra of these key themes. The coded phases representing perception concepts are often overlapping and apply to two or more key elements. The elements are used to conceptually describe the key factors. These identified elements from the interviews affecting the perception of protest outcomes and corresponding view of effectiveness are grouped into the spectral themes below. Some notable interview excerpts are provided in Appendix B to illustrate each of these factors or elements in stakeholder perspectives.

**Cost-Benefit Spectrum**

The most prominent perception theme is the cost benefit tradeoff represented across this spectrum by nearly all stakeholders. Competing for contracts, whether in the private sector or the unique government market, is about sustaining a return on investment, just as it is for any free market enterprise. The return on investment is achieved when the benefits of business decisions exceed the costs, and the amount determines the ROI rate. The decision to protest a government contract is a fundamental business decision with long- and short-term benefits and cost-benefit tradeoffs involving intangibles such as goodwill, relationship building, business development, undetermined outcomes, and competitive intelligence. Intangible costs and benefits of participating in the unique GAO protest process are particularly difficult to quantify. This factor
makes perceptions of these protest outcome costs and benefits the primary element of success or
effectiveness. This cost-benefit tradeoff perception is also central to other stakeholders such as
government agencies, legal staff or outside counsels, the GAO itself, congressional staff, and
ultimately the American public. Academic research, practitioner reports, and congressional
legislation directing research and adjustments to the bid protest system focus on whether the
benefits or costs outweigh the other. This tradeoff is central to all stakeholders. These tradeoffs
can be expressed across a continuum with a negative and positive axis. The more experienced
stakeholders such as large businesses, legal counsel, the GAO, and, to a lesser extent,
government agencies have a much better appreciation for the actual and practical costs and
benefits.

*Fairness Spectrum*

The second most important factor influencing perceptions identified in the interviews is
an amalgamation of fairness and accountability as these concepts appear repeatedly in the coded
interviews (Appendix B). A more accurate description of this perception element is across a
fairness spectrum with different degrees of fairness, starting with zero or no fairness and
continuing out to full accountability. The concept of accountability is the positive open-ended
extreme across the fairness spectrum. Although not explicitly stated, the overall purpose of a bid
protest system is to ensure fairness, whether through full and open competition, fairness to small
businesses who have earned it, or a legislated procurement policy preference. The maximum
fairness is accountability.

One view of how accountability or ultimate accountability is pursued is through what
Gordon and White describe as a “private attorney general” model wherein the cumulative impact
of businesses protesting is the “things that don’t happen” effect, meaning that agencies avoid
procurement improprieties because of threatened and actual protests. Small business interviewees did not perceive this scenario as a successful outcome. Their sentiment is that it is not the responsibility of small businesses, nor do they have the resources, to hold agencies accountable. In fact, these interviewees expressed that, rather than preventing things from happening, protests encourage improprieties because contracting officers may try to obscure improprieties, insert dismissal traps, or protest proof a solicitation. The “private attorney general” model of agency accountability through individual protests fails because of the high dismissal rate since individual protests for individual acquisitions need to be within the GAO interpretation of interested party, must show prejudice, and must be timely. The cost-benefit tradeoff perception element described previously applies here. Few protestors, this researcher excepted, pursue individual protests can afford to incur the substantial burdens and costs of being a “private attorney general” to hold the agency accountable when an unsuccessful outcome is likely with a less than 4% effectiveness rate.

*Communications Spectrum*

The opportunity to communicate between the agency contracting officer and the contractor is another perception element of bid protest outcomes. Businesses may protest for a variety of reasons to facilitate communications, such as learning more about the requirement, learning more about the competitors, learning about the evaluation process, better understanding the terms of the solicitation, marketing the company’s capabilities, and/or sending a message of concern, resolution, or experience. Recent moves to reduce protests have focused on more thorough and timely debriefs of awards, evaluations, and solicitation terms. Agencies may learn more about vendor capabilities, past performance, and availability from protests. This learning is a form of communication. Agencies also use protests and pre- and post-protest actions to
communicate with protestors, the GAO, agency leadership, and the GovCon community to express policy differences, to be resolute, and exercise or convey control. The GAO communicates with protestors, agencies, and GovCon practitioners by announcing all protest decision summaries, publishing selected decisions, using hearing and alternate dispute resolution (ADR), reporting to Congress, and publishing studies. The communications element’s impact on the perceptions of bid protest outcomes is also understood across a spectrum. Some protests have minimal communication while the other end of the spectrum emphasizes forms of communication such as standing up to an agency and trying to hold it accountable. In between there are communications factors to learn more about the acquisition, competitors, the agency, and to communicate a performance stay for incumbent contract extension.

*Emotional Cloud*

As RAND concluded, the overall number of contracts protested relative to the total dollar value is very small, on the order of .3%, and these outcomes depend greatly on the characteristics of the solicitation or contract (RAND 2018). A legal or quasi-legal challenge against a protestor’s customer, the federal agency, is an exceedingly emotional endeavor, particularly for a small business who may only consider protesting once. For the contracting officer and the agency, it can also be an emotional experience as a black mark on their record, a reflection on their training and expertise, and certainly will require more work and documentation. For attorneys, whether they are representing or advising the protestor, the agency protest counsel, or the GAO and its hearing officers, the emotional desire to win a victorious or successful outcome is ever-present. In one of my protests, the GAO hearing attorney’s LinkedIn profile prominently mentioned that he had never had a protest sustained out of the 180 protests that he had represented the agency on as agency counsel before moving to the GAO. It seems that most
protest attorneys view a successful or effective protest as one that is not sustained, regardless of whether it is dismissed, summarily dismissed, or denied. Sustained or not sustained is the metric of success for attorneys just as it is for most protestors.

The emotional element in protests is not best understood as a continuum or spectrum, although to a degree, emotions play a role in the outcome and the perception of the outcome. Protest emotions are better understood as a broad and often-present cloud of influence on outcome perceptions.

Protest Perception Environment

After these four key elements in bid protests were identified in the interview coding, the researcher developed the conceptual framework of the impact and interaction of each element in the GAO bid protest ecosystem. The researcher conceptualized the protest environment in four categories: an illustrative matrix of key factors, do not apply to all in the stakeholder category, have members of the stakeholder category that do not share or completely agree, and are generalized as a common or the predominant stakeholder perception. This conceptualization occurred in an illustrative matrix of key factors or elements that are included from the GAO bid protest environment to describe the interactions of the key elements along spectrums of protest outcome perceptions as shown below in Figure 3.7.

In this explanatory concept the major axis, both negative and positive, is the cost-benefit tradeoff element that influences every protest, that protest’s outcome, and the perception of the outcome. Different stakeholders can have vastly different values conceptually assigned to this element. A protestors may, and often does, view the tradeoff as a ratio of positive revenue to the costs. The agency may perceive the tradeoff as a benefit in terms of most expeditious and cheapest acquisition of required goods/services or also as a benefit to the agency or the
acquisition system writ large. The GAO, GovCon, and researchers may assign a tradeoff value that corresponds to their view of the value versus cost to the acquisition system and their perception of the protest system.

This conceptual description of the interaction between the major perception elements in the protest environment is a novel explanation of complex factors influencing the perception of protest effectiveness outcomes, which is particularly significant in identifying the emotional cloud element where these perception spectrum interactions occur as well as the interactions taking place on the periphery or outside the fog of emotions. This is an area where further research is warranted to inform stakeholders of the role of this murky emotional impact on bid protest outcomes, their perceptions, and the effectiveness of bid protests.

This conceptual protest outcome perception environment is useful to describe the elements that a protestor should consider or at least be aware of when entertaining a decision to protest as well as that protestor’s individual perception of protest outcomes in general, and the
outcome of the protest under consideration. The environment model is a tool to better describe
the key perception elements and their interaction from the interview coding and action research.

Conclusions

Coming from a lifelong military background, I find it useful to break down my research
into tactical and strategic conclusions regarding the perceptions of bid protest outcomes and
corresponding recommendations.

From the tactical perspective of the researcher as a small business operating exclusively
in the federal government contracting market, I conclude on the tactical or operational level that
GAO protests create an overwhelming negative ROI for small business protestors with a tangible
beneficial success of less than half of the generously represented success rate of less than 4%.
This practical opportunity for a successful outcome is near zero when considering the elusive
benefits of sustained protest relief recommendations. Both the tangible and intangible costs are
immense.

This conclusion leads me to the recommendation that small business government
contractors rarely, if ever, file a GAO protests. This recommendation appears to directly
contradict my action research of participating in more than 200 bid protests with a success rate of
well below the nominal 4% rate. This counter intuitive view is explained in large part due to my
perception of reason for protesting in the outcome environment. My motivation driven by the
need to seek accountability as a key benefit to the larger small business contracting community.
Arguably, I have not reached success in achieving accountability. Collateral motivation is to
expand the knowledge base of this complex human endeavor of government contracting and
ensuring confidence in the process. Arguably, this research more effective in expanding the
knowledge base than it is in gaining accountability.
This research also yields a softer conclusion that small business protestors perceive protest outcomes as significantly less than the stated moderate effectiveness rate, but they perceive it as somewhat more effective than the 4% overall sustain rate identified in the research. Small business does perceive protests and the limited chance of success as a course of action to The rare times a protest might be warranted for a small business case are when: an obvious and egregious violation of acquisition law, for limited specific reasons (such as initiating a CICA stay primarily to gain a few months of continued incumbent performance), or in specific cases for asserting a business’s capability, knowledge, and seriousness in following the proper procedures. More research is needed for small businesses to better understand the disparities between reported protest outcomes and the ways these outcomes are perceived by other stakeholders and small businesses like themselves. The factors that influence and interact to create these perceptions provide insight into participants’ perceptions of success and the decision to engage in bid protests.

The strategic conclusion is that the GAO bid protest system at best provides the public and government contractors with a façade of accountability. I conclude that a case can be made that the GAO protest system has become a façade at best and possibly much worse, a misrepresentation of the protections afforded contractors, especially small businesses. This strategic conclusion leads me to recommend that the GAO system be replaced or significantly restructured to accommodate the impairment presented by our constitutional separation of government powers and inherent flaws as government bureaucracies metastasize and the size and longevity of our federal acquisition system grows.

In conclusion, most small business protestors perceive the GAO’s reported bid protest outcomes as ineffective and not worth the cost, contrary to the reported moderate effectiveness
mirage. The perception that the “role of the GAO is to dispose of protest based on the information in the case” is very much alive in the minds of some stakeholders, especially small businesses. The fact that the GAO discards most protests is evident in the more than 50% dismissal rate combined with the 46% denial rate in the last decade. The heavy bias in favor of dismissal or disposal of protests is also the conclusion of my extensive action research. The novel conclusions of this research are:

- The actual sustain effectiveness rate is less than 4% while the GAO reports outcomes at a moderate effectiveness of nearly half the protests filed.
- The reported protest “effectiveness” rate is a façade where the outward appearance is maintained to conceal a less pleasant or creditable reality.
- Stakeholders’ outcome and effectiveness perceptions depend on each stakeholder’s engagement in the bid protest environment.
- Stakeholders’ perceptions of protest outcomes are influenced by the interaction of key factors.
- Most small businesses perceive the reported bid protest outcomes as ineffective and not worth the cost contrary to the reported moderate effectiveness mirage.

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Appendix 3.1. Interview Questionnaire

Interview Instructions and Questions

Study Procedures:
If you take part in this study, you will be asked to participate in a single semi-structured interview. The interview should be no more than sixty minutes. The interview will explore your experience with federal government acquisition protests and your perception of the outcomes of your protest experience. A quiet location, suitable to audio recording that is mutually agreeable shall be chosen, at time mutually agreed upon. Only the Principal researcher and his dissertation committee will have access to the recordings, transcripts, and coded data related to the interview.

Questions you may be asked include:

Objective questions:
What is your role in the organization?
   a. Are you:
      i. the company owner?
      ii. Government affairs?
      iii. Legal advisor?
      iv. Contracting authority?
   b. Are you the ultimate decision maker in go/no go protest decision?
   c. What is your business?
   d. What classification vendor are you? (SBE, SDVOSB, etc.)
   e. Where in the country/area of country do you conduct business?
   f. What federal government agencies do you do business with?
      i. Which of them have you engaged or been drawn into a protest situation?

1. What experience do you have with protests?
   a. Have you protested?
   b. Were you the subject of a protest?
   c. Have you represented either of those parties?
   d. Do your competitors engage in the protest process?

Subjective questions?

2. Why do you (or your clients) protest?

3. How do you define successful protest outcomes?

4. What is your perception of the process based on your experience?
   a. Did the protest result in success as you defined it?
      i. What was the desired outcome?
b. Did it seem fair?
c. Productive and worth the effort and expense?
d. Did you have access to legal counsel?
   i. Was it helpful in achieving the desired outcome?

5. If you have protested, what was the motivation?
   a. Strategic
      i. Long term resolution of systemic improprieties
      ii. To gain a reputation as an enforcer
      iii. Communicate to Agency or parties
   b. Tactical
      i. Overturn decision of award?
      ii. Emotion or anger?
      iii. Correct a policy decision?
      iv. Stay of performance to extend a contract

6. If you could, what changes would you make in the protest process and why?
   a. How would you change the reporting process?

7. Do you (and/or clients) perceive that the reported protest outcomes represent the actual outcomes?

8. Do you believe the GAO system provides affordable and expedited resolution of procurement concerns?
Appendix 3.2. Excerpts from Interview Transcripts

These are excerpts from interview transcripts to support the findings of outcome perceptions and the complex interactions of positive and negative perceptions of key elements in the GAO protest bid protest environment:

Cost – Benefit

- Being a small business, people didn't want to spend the money, or very little, to protest. – agency contracting officer and former small business executive.
- More and more, what I'm seeing now, especially on large acquisitions in the services arena, is that protesters protest because they know that they can get extra time on the contract. If you protest today, an award decision comes out today, you're the incumbent. You protest. You know you're probably going to get at least three more months of whatever your margin is in those three months, and if you can string it out longer, maybe you can push it to six months... you protest because you do anything you can to capture that business. - agency contracting officer.
- The number of protests that are actually successful, I think in the Air Force lately it's been two to four percent, and it's never really much more. It's usually less than that, so the vast, vast majority of protests [are not successful] ...a sustained process would be successful from the protesters' point of view. A protest that is denied would be unsuccessful, from a protesters' point of view, and a good news story. The government always wants the protest to be denied. The protester always wants the protest to be sustained. Most protests are not sustained. Most are denied, the vast majority. - agency contracting officer.
- Oftentimes we're protesting something we have a relationship with or hope to have a relationship with and we want to make sure it's done professionally and it's not, that we minimize any discomfort or pain and damage to a long term relationship in the process and also because it can be expensive, those have to come across my desk and I have to justify the cost relative to the benefit for them...the cost is the hard and direct cost, that's the time for your employees to prepare a protest and file for it as well as third party costs. It's not unusual for them to need assistance from an attorney. Sometimes, we can use in house counsel, simpler GAO protest, state, local, education protests, we can do so, but other times it ends up in federal court and it's necessary to bring in a lawyer who's a specialist in federal...The real hidden cost that I'm always very focused on is the opportunity cost. That is the employees are no longer selling. They're about to spend days continuing this pursuit of this potential loss, the sale's already been lost at least through the customer's eyes in that process and then the opportunity cost of you know, the brand impact to the company. Always trying to balance the circumstances and ask you, is this gonna brand this better long term, because I do believe some protests can brand you positively or is it gonna brand us negative. – small business CEO.
- The benefits outweigh the costs...both sides learn 90% of the time. That's your consolation price. The government gets smarter about how they could have avoided that protest. I as a contractor get smarter about how I could have avoided the [costs/pain] to protest. Would it be in improving my proposal or the government gets smarter by being more clear and specific about what it was that they were out looking for. That's almost, so 90% of the time, that's your minimum benefit and then, often I say 20, 25% of the time, you get specific revenue off of that specific procurement action. – small business CEO.
• It seems like particularly a lot of DOD; a lot of the government agencies view the protest process as hindering of efficient acquisitions ... he or she wants to get the requirements met and get the best things acquired for the best price. Protests are just big bumps in that process. – GAO attorney

• It's a lot of costs and expense and disappointment to pursue protests, so ... it's hard to identify frivolous protests. – GAO managing attorney

• In my experience with a lot of my peers has been that unless you have something definitive that you are going to protest, you're really wasting your time. Plus, reputation-wise, too, many contracting officers obviously are not very fond of protests. If you have to work with that client again in the future, that's something you always have to consider if you're going to submit a protest. – small business CEO

• The best case would be if we feel that we should have been awarded the contract, success for us would be that we would be awarded the contract. That they would overturn the award to the previous awardee and would see the point that in this case for example we feel based on the previous scoring, we should have been awarded. Now we understand, of course, that the government could clearly go back and rescoring all the contracts and maybe we wouldn't win. That wouldn't be success for us. It's not just a matter of overturning. It's a little more than justice. I know some people will submit a protest because they feel that justice needs to be served. But I look at it more from a business standpoint that my outcome is that we would be awarded the effort. That we showed that there was obviously an error in how they made the determination for award and that we would get the award. – small business CEO

• One common reason to protest in which we have also done is: if you're the incumbent contractor and you're not awarded, and you have grounds for a protest ... either you have an argument with an evaluation that the government provided, or things of that nature, you can protest often, we'll extend your incumbency out for extended periods of time. We've done that on multiple occasions, where we've not been the awarded contractor on a re-compete, we've protested, and on a number of occasions won the protest and continued to support the contract. That's a principal reason. Other times we've protested because the government has not used their own procurement rules properly ... they'll list out their evaluation criteria and they'll tell the contractor this is how we're going to evaluate you, and they just don't evaluate you that way. They'll say, "minimally qualified, pass/fail on your technical and past performance, low price". Low and behold you're the low price, but they do some kind of cost trade off benefit and apply it to another party, yet their solicitation does not give them that purview. Really it depends on what the government is doing with the solicitation; are they following their own procurement rules correctly. – business contracting executive

• A lot of long-term intangible [protest]cost, yeah, because you're going to get the [agency] upset. If this is an agency that you work with a lot or you want to work with, the one thing you don't want to do is get the agency upset. They can always find things in your past performance and whatever, particularly in a negotiator procurement where it's not a low-fixed price but a competitive solicitation and there's more subjectivity to it from the source selection board committee, you don't want to get them upset with you for a future procurement. So, in the cost benefit analysis, we always counsel the client about the customer relations. – protest bar attorney

• What is the client perception about the likelihood of success, often when we get clients sometimes, they're just getting into the federal government contracting? We know that this is generally new to them. They are unaware of the statistics. They just know that they have a right to protest this and that, and they come in with their complaint and you walk through everything and then they are generally, I would say, surprised at the low likelihood of success – procurement bar attorney
• That is an important concern for businesses to have, not only in bid protest litigation, but in any type of legal action against anybody, to think of what the potential adverse consequences are and to make sure that those factors into the calculation as to whether or not to proceed with, in this case, the bid protest. I think, ultimately, most procurement professionals are just that, they're professional, and they understand that bid protests are an important part of the procurement function and that when they are done correctly and for the right reasons, they make the system better. – bid protest attorney

• An important factor on the automatic [CICA] stay, with respect to pre-award protests, is that sometimes clients, don’t quite understand that the stay as-of the pre-award protest, doesn’t mean that the agency just has to stop doing everything. It just means that they can’t make the ultimate award. They can continue to evaluate and continue to conduct discussions; they just can't make the award. – procurement bar attorney

• The stay is obviously a very important consideration. It's automatic at GAO. – bid protest attorney

Fairness and Accountability

• People protest for a couple of reasons. They protest, and historically they protested, I believe, when they honestly felt that they were not treated fairly. The protest is an opportunity for those vying for public funds to say, "Hey, I didn’t have an equal shot.” - agency contracting officer.

• The first thing that I do when a client calls me and says, I want to do a bid protest. I think I have good grounds for a protest, particularly if they’re a small business, is I tell them. I read them a small riot act, and I say, look unless you have absolutely dead-to-right grounds and you better check them, you're going to get this agency annoyed. If they're your customer and you want to continue to do business with them, you shouldn't be making a protest to "make a point," and show them we won't be rolled over, which is what you get a lot of. No, the purpose of a bid protest is because there wasn’t a level playing field, and you want to call to the attention of the agency that they didn’t have a level playing field, and that the procurement system has to work correctly when there is a level playing field. So, there’s a role for bid protests to play, but we have to be very careful. – protest attorney

• In my estimation, on both sides of the street, I would say that the protests, the pseudo-legal or legal protest decision-making process at the protest level is, I think, very fair. Occasionally, you get some protest decisions that really make you scratch your head. Occasionally, you get a wild hare, but by and large, I think that when the government fouls up, it gets discovered, and identified, and addressed, and when the protesters are on sinking sand, that shows as well. I really feel that from both sides, that in general, the process is very trustworthy. What I don’t think is fair, to be honest ... I hate the word fair, in many ways. It sounds like we’re on the playground, but I don’t think it’s fair to taxpayers, as much as anything, and this could be a bigger problem with our legal system, but that protesters ... It costs very little for them to protest, beyond their legal fees, if they’re going to hire attorneys, or even just to put in the protest and gum up the [procurement]. – agency contracting officer and former small business executive.

• The idea was to create what they called private attorneys general... such that you incentivize someone to identify waste is spawned in a government contract and you do that by rewarding them for having done it. And so, I think there’s a private attorneys general aspect that they protest. That’s why successful protestors get reimbursed their costs. – GAO managing attorney

• Some of these rather seemingly arcane rules that often create protest denials upfront [for] things like timelines. – agency contracting officer and former small business executive.
• Time zero’s a moment in which I started incurring costs to respond to the procurement. So, whatever the rules were at that moment, they should stay relatively steady because I made a decision to bid it because I believed I had the order of precedence as a strategic advantage. To change that after the fact, which would have affected my decision to bid the work and mine would be you know bad faith..., I would have known the rules to that procurement, and I could have made a business development decision based on those rules. – small business CEO

• [Protesting for Accountability] I’m a vendor, it’s not my job to enforce the code of federal regulations to the Department of Defense. That responsibility belongs to ... the oversight guys and or the SBA themselves who, or the congressmen themselves who took the time and trouble to pass that law and put forth this hub zone initiative. They sponsored that legislation. As a vendor, that’s where I agree with the client [government agency]. If you tell me what the rules are and then I decide to bid, I only ask that they implement those rules. If they want to challenge their authorities, if the contracting officer wants to challenge the SBAs, CFR authority, if they want to challenge the congressional legal intent. While I don’t agree with that by any means, I think they should honor it, that's not my role in that process as a vendor. As a taxpayer, if I want to get up and complain about them not acting lawfully, I have every right. But as a vendor, I’m not accountable, I’m not responsible. In fact, I think that's what [the agency] felt was happening. I think [the agency] thought we were trying to act as the procurement police and enforce procurement law and so every time we said, you're aware the law and you should be honorable and do it. They heard the, I'm gonna make you follow the law. – small business CEO

• I see us as victims, our interest is driven from our victimization of we lost the business development money or we lost some opportunity to perform the revenue so no more than I would say is a mugging victim the one that should be making any citizen's arrest of a criminal, nor would I say a small business should be enforcing those rules. We’re just bringing to the right people’s attention our opinion of victimization through a protest process. They heard the, I'm gonna make you follow the law. – small business CEO

• A successful one is simply where whatever the mitigating issue is, is neutralized. So, a preferred outcome would be where a Contracting Officer or an agency rules in our favor and gives us an advantage. That’s a preferred one, but that's usually not the case. The acceptable one is whatever of the offending element becomes neutralized. Often ... this is a good example. Often the government and the Air Force, when you protest to the GAO, the Air Force will often look at it and say, "You know what, there's reasonable merit to this argument", instead of letting the protest go forward and the judge making the decision, we're voluntarily going to reevaluate. Or we're voluntarily going to re-propose or solicit this requirement ... To get rid of whatever the offending element is. That doesn't give us an advantage, it doesn't give us reward. What it does is whatever was the problem becomes neutralized, now we're at the level playing field. Now a preferred method would be going to GAO or Federal Court, and they make an affirming decision that benefits us, not just neutralizes the offending issue, but benefits us in some additional way. – small business executive.

• The best you may get here is the agency to issue some corrective action, but at the end of the day, you're not going to get this award. – procurement bar attorney

• The process itself represents compromise between a lot of different and competing interests in the procurement system. We have a system that needs to be as fair as possible and allow for the thorough adjudication of protests wherever possible. It also exists in a world where the government has to procure certain goods and services by a certain time. – protest attorney
• Whether or not a protester is successful doesn’t necessarily have any indication on whether or not the process is itself fair or not. Instead, that’s a function of the strength of the argument and the underlying documentation. – bid protest attorney

• I do think that the protest is fair. I think sometimes fairness is, folks that protest might not … I think fairness is often times in the eyes of the beholder, where sometimes folks might be disappointed in a particular outcome but the process itself is fair. That is, as a protester, you are having your issues decided, evaluated, and decided, by knowledgeable and competent folks who actually review the underlying documentation and evaluate the underlying documentation to assess whether or not the evaluation was flawed and if so, whether or not you were prejudiced by that. I think that is absolutely a fair outcome, excuse me, a fair process for the protest process – bid protest attorney

• Most protests are denied. But the effectiveness rate, you can see two-thirds of the way down there, is the important one to look at. That is the percentage of protests, where the protester got some relief. Either through a sustained decision, or the agency took corrective action. So, 46 percent of the time that happened in Fiscal Year 2016. That was up a little bit, but basically in line with the previous years. You see there, interestingly the sustained rate for decisions issued by GAO on the merits, either sustained or denied, the rate of sustains went up from 12 percent to about 23 percent last year, and when that number came out, there was a lot of hubbub about it. "What’s going on here? Why are so many more protests being sustained?" But the effectiveness rate barely changed, so with that says is, last year, for some reason agencies were more likely to take protests all the way to decision, rather than taking a corrective action in meritorious protests, for whatever reasons. Not entirely clear. As you can see, I have a note there that a single protest decision had 18 sustains. So, that swayed the statistics a bit. That’s because every supplemental protest filing gets its own new protest under these statistics. So, a single protest with several protestors and lots of different supplemental protests, had 18 sustains in the same protest. So, as you can see the odds of getting as sustained decision are relatively low. Had been hovering around 12-15 percent, went up to 23 percent. We’ll see if that’s just a blip. But generally, protests, if they get all the way to a decision, are more likely to turn out in a denial than a sustain. But, nearly half of protests, overall, the protester gets some kind of relief. So usually, in those cases, the agency has taken corrective action. - procurement bar attorney

Communications

• On role of communications …My sense, industry days, and in other forums where small businesses will attend, is there’s a tenacity to them, too. Small business owners, they’re taking a lot of risk. They’re trying to build something. They’re usually folks that feel pretty confident. They believe they can provide something and do well, and they’ve typically been successful along the way, so they will bandy about the protest, oftentimes, more readily than a threat … Threaten protest, rather, more readily than the large companies. Large companies will sometimes worry about that. Small companies, I think, sometimes pull that out as something that a … Maybe the businesses that are more … Have less to lose, perhaps. I’m not sure, but I have seen that. I have seen companies say, “Hey, if you don’t change this or address this, I’m going to protest before you even put your RFP out," for example. On the government side, the government tries, if they’re doing their job, and some do it better than others … If they’re doing their job, they try to head off a protest by communicating why a protest would be a bad idea, or why the offer doesn’t have a leg to stand on, or to be open along the way, to show how fair they’re being. One of the things I found maddening when I worked with [small business executive] with the smaller agencies, the non-DOD agencies, for example, they often
didn't want to give us a post-award debriefing, or didn't work hard to give us meaningful information, whereas the best post-award debriefings give an offer or a potential protester as much information as they possibly can, with a view towards showing them why and how they weren't mistreated, why and how the offer selected was a better offer than theirs, and to show them that if they pursue a protest, they won't win... that's a type of communicating. – agency contracting officer and former small business executive.

• From a marketing standpoint, and particularly a small business, that use it communicate... I would consider that a pretty lousy way to communicate my capabilities. You should be doing that in your response to the RFP. If you can't articulate your capability and your proposal, I don't know ... Protest is kind of like blowing things up and hoping that it goes your way, I guess. Maybe some do that. I've never ... I guess it depends on how you would pull that one apart. Usually, a protester in some way, shape, or form, through the protest is trying to tell you, trying to show you why you should have picked them, because they're obviously the best [inaudible], and they will do that within a protest by saying, "See what we can do, and see what we said we would do, and see why we're better than whoever you picked?" – agency contracting officer and former small business executive.

• Typically, in a protest, both sides feel they've been wronged, and contracting officers, unfortunately, speaking in wide generalities, have grown callous over time, and it's easy for them to label all contractors as thieves, and cheats, and other bad things, and for small businesses and other businesses, especially small business realm, to consider the contracting officers as callous, and unfair, and biased, and whatnot. I found it true on both sides... I have seen small businesses, in my mind, be mistreated by contracting officers, and by the government, because it's easier to mistreat them. Because they have fewer resources, and they're often less likely to go hire a lawyer, it's often easier for contracting people to dismiss them, or to make the process harder for them than it should be, and I have seen that happen. – agency contracting officer and former small business executive.

• [Follow-on awards after voluntarily dismissing protest] was through a function of developing that relationship, that marketing relationship. As we interacted with them and we built some trust, they started being more frank with us... Communication and relationship. I know it sounds odd, but I've made a lot of friends, who I met them for the first time and got to sit with them for the first time as a result of a protest. – small business CEO

• The reason that we don't protest a whole lot other than the financial burden associated with it, is that the ability to win some of the small business protests, we think, isn't worth the effort to the potential negative repercussions of the small business in the space. – small business CEO

• GAO cannot force the agency to do anything. It only makes a recommendation. It is an arm of congress, it's not a court. It can't issue injunctions. But it an arm of congress, so there are potential consequences for an agency to simply ignore the recommendations of GAO, and it rarely happens. They almost always follow the recommendations of GAO, but not always. - bid protest attorney

• If those simple [protest] actions are that costly [for the government] that quickly, protracted protests and then reevaluation, it's gotta be an expensive number. I've never seen an amount on the government side on what protests are averaging. Perhaps your research will lead you to that if it hasn't already. It's gotta be pretty steep. From the industry side, I haven't seen ... Obviously if you invest in a protest and it doesn't go your way, meaning you don't get the award, obviously the cost benefit turned out to be a negative benefit and you spent more money than you should have. I don't know what the cost is to the company. They're all a little bit unique. It depends on the magnitude of the contract and how many people you get involved in it. I know I've had an entire senior staff of executives from the CEO's down to me, I'm not a senior executive in the company ... But when you wrap that many people up in
sometimes days and days, sometimes weeks in meetings over a single protest, it's very absorptive. Often cases, when it gets to be that lengthy, that [is a lot]. I don't have a dollar value for it, but unless you're just got a very solid case on your protest, it usually doesn't seem like it's, and this is just opinion, it just doesn't seem like, to me, it's worth it. I also think there's another side to cost that perhaps doesn't get discussed enough. That's your reputation as an industry provider. Negatively viewed ... I'm sorry. Negatively viewed companies that protest. Human nature is what it is, and so I just think it creates bad will when you protest. You've gotta be very sure it's the cards you want to play. If there's a little bit of ambiguity in your case, you've gotta think long and hard if you want to do that, and I always recommend that to my leadership. What's the second and third order effect of this decision. – former and current reserve contracting officer and small business executive/consultant

Emotions

- I think when you decide to do a protest there's a lot of emotion in it, because you feel harmed, and you feel it's justifiable to do one. – small business executive
- The best purposes of having a protest run are all the things that don't happen because people in the agency know that if they did that someone would file a protest. It's all the stuff that doesn't happen because you have a right to complain...I do get the sense because if they're all human beings involved in this that if there wasn't any kind of accountability you would see behavior that was less good – GAO attorney
- The emotion comes from when it feels nefarious. – small business CEO
- They [Government agency] didn't do anything retaliatory, but it was obvious that we weren't gonna be welcome going forward. If we were to put another proposal on their desk, they were, because they were emotional about it. They really, what it came down to was they were their own, what they would say to you was well this small business from Florida came up here and decided that they were gonna order us to buy from them and we just weren't gonna have that. They really felt like we were emotional about it, that by honoring the rules, they were saying that they thought we manipulated things that take their appropriate power away from them. They didn't take responsibility for their own rules. They weren't willing to accept responsibility for the fact that we relied on their rules and that we felt like we had an outcome we were entitled to.... – small business CEO
- Both sides of it [protest] got very subjective and emotional and it lost that air that we now pride ourselves on of objectivity and a great deal of care that respectfully disagree. Come in, and we try to come in very humbly, you know, you made this decision, we're a little disappointed, we'd like permission to share with you why we think that decision could have been better and doing it in the manner or gesture that at no time makes a contracting officer or a source selection committee feel like we're being disrespectful.... Emotion was the primary factor on both sides of that. There's no doubt, yeah. – small business CEO
- From a business perspective, we have to take those emotions and put them to the side. That's one of the reasons that generally speaking, almost 100% of the time we do send it to our lawyer because he gives us a different set of eyes and helps us take the emotion out of it. That way we are not making knee jerk reactions or decisions based on emotion that will cost us money. It'll use our legal budget and down the road it could impact teaming decisions in the future if we go against a teammate as I mentioned before, or impact internally within the government spaces. But the emotional phase is something that after a day we generally, it's gone after that. It's an immediate just frustration that all the time and effort and money that has been put into that proposal response, the business development activities leading up to
that. You significantly invest time, effort, travel, and everything like that in a lot of these ... Especially larger, IDIQ proposals that we submit. So we do, there is an emotional piece to that, generally. – small business CEO