

# Report on Department of Defense Contracting Dispute Matters



Office of the Under Secretary of Defense  
for Acquisition and Sustainment

JULY 2019

The estimated cost of this report or study for the Department of Defense is approximately \$46,000 for the 2019 Fiscal Year. This includes \$20 in expenses and \$46,000 in DoD labor.  
Generated on 2019May29 RefID: D-814FEF8

## **Requirements for this Report**

Section 822(a) and (b) of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Public Law 115-232) require that the Secretary of Defense submit to the congressional defense committees, the Committee on the Judiciary of the Senate, and the Committee on the Judiciary of the House of Representatives a report of a study along with related recommendations for improving the expediency of the bid protests process. Section 822 of the Act requires a study that covers the frequency and effects of bid protests involving the same contract award or proposed award that have been filed at both the Government Accountability Office and the United States Court of Federal Claims. The enclosed study provides responses to section 822 (a-d) of the Act with data covering Department of Defense contracts from fiscal years 2016 through 2018 and in accordance with section 822(a), includes as a minimum - (1) the number of protests that have been filed with both tribunals and results; (2) the number of such protests where the tribunals differed in denying or sustaining the action; (3) the length of time, in average time and median time – (A) from initial filing at the Government Accountability Office to decision in the United States Court of Federal Claims; (B) from filing with each tribunal to decision by such tribunal; (C) from the time to which the basis of the protest is known to the time of filing in each tribunal; and (D) in the case of an appeal of the United States Court of Federal Claims, from the date of initial filing of the appeal decision in the appeal; (4) the number of protests where performance was stayed or enjoined and for how long; (5) if performance was stayed or enjoined, whether the requirement was obtained in the interim through another vehicle or in-house, whether during the period of the stay or enjoining the requirement went unfulfilled; (6) separately for each tribunal, the number of protests where performance was stayed or enjoined and monetary damages were awarded, which shall include for how long performance was stayed or enjoined and the amount of monetary damages; (7) whether the protester was a large or small business; and (8) whether the protester was the incumbent in a prior contract for the same or similar product or service.

Section 822 (c) additionally requires not later than 270 days after the date of the enactment of the Act, that the Department establish and continuously maintain a data repository to collect on an ongoing basis the information required by section 822. In addition, section 822 (d) of the Act requires a submission of a plan and schedule for an expedited bid protest process for the Department of Defense contracts with a value of less than \$100,000 and a request for any additional authorities the Secretary determines appropriate for such efforts. In January, the ASD(A) submitted an interim report to Congress indicating the Department expected to submit the report by June 30, 2019 for both reporting requirements.

## **Background**

A previous comprehensive study assessing bid protests of Department of Defense procurements was delivered to congressional defense committees on December 21, 2017. This previous study was conducted by RAND in accordance with section 885 of the National Defense Authorization Act for FY 2017 and reviewed in detail protests at the Government Accountability Office (GAO) and the U. S. Court of Federal Claims (COFC) from FY 2008 through 2016. The previously submitted report is under Appendix A herein. This current report builds upon that previous study in accordance with the requirements of section 822 of the FY 2019 NDAA.

## **Discussion**

The Department reviewed the last three completed fiscal years of protest data (FY 2016 through FY 2018) for the study and resultant report. The information required by section 822 was accomplished from a manual data call to collect information from contracting activities of the Military Services and Defense Agencies. A majority of the required information was not maintained in any existing data system. Further complicating data collection efforts is the unavailability of a common reference number to compare protests filed at the GAO and protests filed at the COFC to determine any linkage between the protests in terms of whether the same contract awards are the subject of a protest at the GAO and a protest at the COFC, whether the protester in both forums is the same vendor, and whether the substantive issues are substantially similar. Protests at the GAO are tracked by the solicitation number even if the protest is filed against the contract award. The COFC tracks protests against an assigned protest number generated by the courts and does not include the contract number nor the solicitation number in their database system. The COFC started in 2017 asking protestors if a case had previously been filed at and decided by the GAO, however, it does not ask for the GAO protest number or the solicitation number from which to match the protest pending before it to the GAO protest. In addition, this information is voluntarily requested from the protester and cannot be verified since an accompanying GAO bid protest reference number or solicitation number is not required. Additionally, the COFC protestor is not always the same as the party who protested at the GAO.

Additional complicating factors in retrieving the data included the lack of a central data base in which the data was available at any of the Defense Components, ability to seal the records of the COFC cases, and the current tracking systems utilized by the GAO, the COFC, and Defense Department Components not utilizing a common protest identifier. Because the initial documentation that was received by the Defense Components was lacking many of the requested data fields required by section 822, the Department requested and received the COFC records that were compiled by the courts clerk's office from its docket system.

Details in the COFC provided information included the protestor, DoD agency, procurement value, case outcome, number of days until administrative record was filed, the number of days the case was pending, whether the case summary mentioned a prior GAO protest, and whether the protestor was a small business. It should be noted, while the actual case may have been voluntary dismissed by the protestor or denied by the courts, the summary record provided by the clerk's office simply stated the case was dismissed as annotated on the attached database. Starting midway in calendar 2017, the COFC added a question on the case submission filing report asking if "there was a previous GAO protest?" The filer could mark "yes" or "no" to the question. The form did not allow for the GAO protest number to be included or filled in or the solicitation number (the GAO tracks protests based on solicitation number) to be filled in. As a result, many of the COFC protestors may have had a GAO protest but did not check the block stating as such, or some protestors utilized a previous form that did not include the question. In addition, there are a percentage of solicitations or contract awards that had different protestors at the GAO than those who protested at the COFC. It was due to this difficulty that the Department obtained assistance from officials at the GAO and at the COFC in collecting and

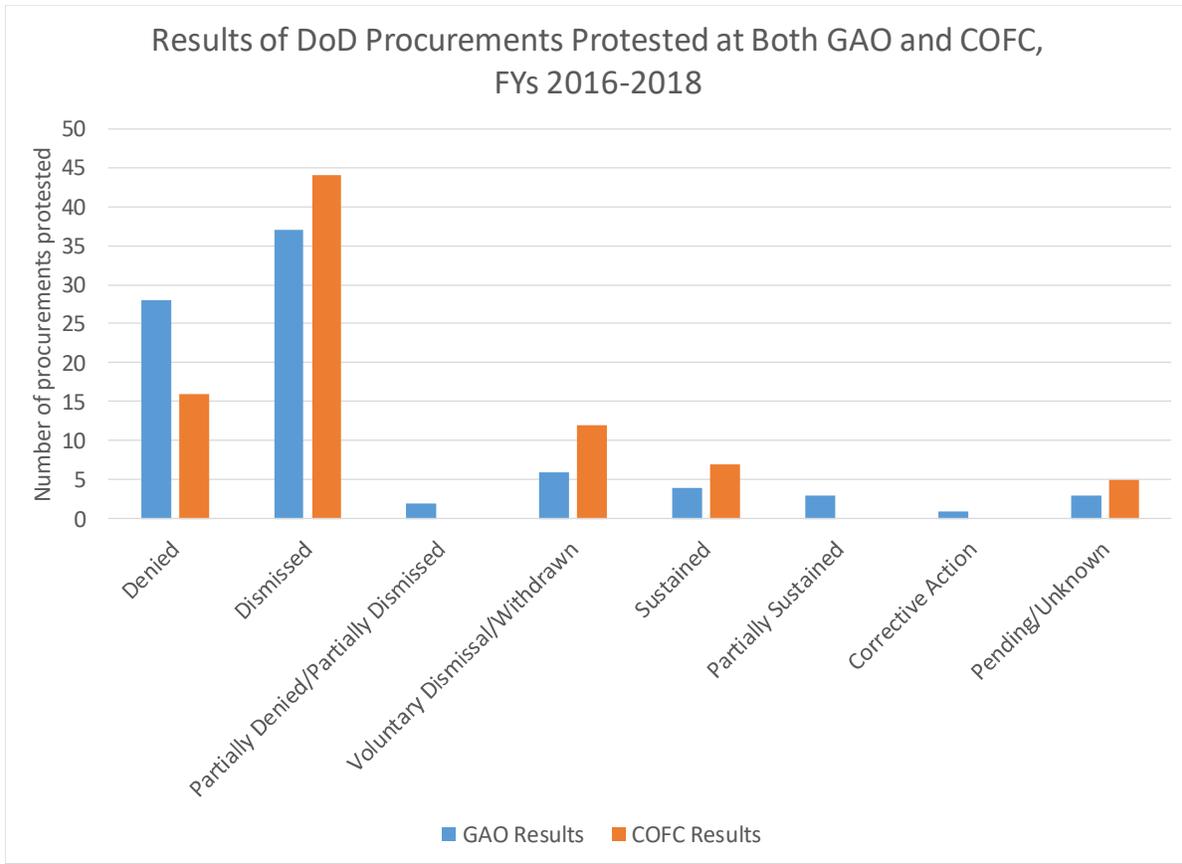
tracking the accuracy of the data. The Department acknowledges and appreciates the assistance provided by the GAO, Mr. Ed Goldstein and Mr. Lou Chiarella in preparation of this report.

This report is formatted such that the responses to the questions required by section 822 are provided in the same order as listed in section 822. The following includes relevant data and analysis of all the Department protests that occurred at the GAO and the COFC based on the reporting data at Appendix B.

**A. Frequency and effects of bid protests involving the same contract award or proposed award filed at both the Government Accountability Office and the United States Court of Federal Claims**

(1) For FY 2016 through 2018, there were a total of 84 protests that were reported as filed at both tribunals. In FY 2016, there were 22; in FY 2017, there were 33; and in FY 2018, there were 29. The table below shows the breakout:

<b>Protest Results</b>	<b>Number of DoD Protest Actions – The GAO Results</b>	<b>Percent of DoD Protest Actions – The GAO Results</b>	<b>Number of DoD Protest Actions – The COFC Results</b>	<b>Percent of DoD Protest Actions – The COFC Results</b>
Denied	28	33%	16	19%
Dismissed	37	44%	44	52%
Partially Denied/Partially Dismissed	2	2%	0	0%
Voluntarily Dismissal/Withdrawn	6	7%	12	14%
Sustained	4	5%	7	8%
Partially Sustained	3	4%	0	0%
Corrective Action	1	1%	0	0%
Pending/Unknown	3	4%	5	6%
<b>Total Protest Actions</b>	<b>84</b>	<b>100%</b>	<b>84</b>	<b>100%</b>



(2) For FY 2016 through FY 2018, there were 11 times or 13 percent of the time, where the tribunals differed in denying or sustaining issues involving the same contract or solicitation. The breakout by FY is reflected below.

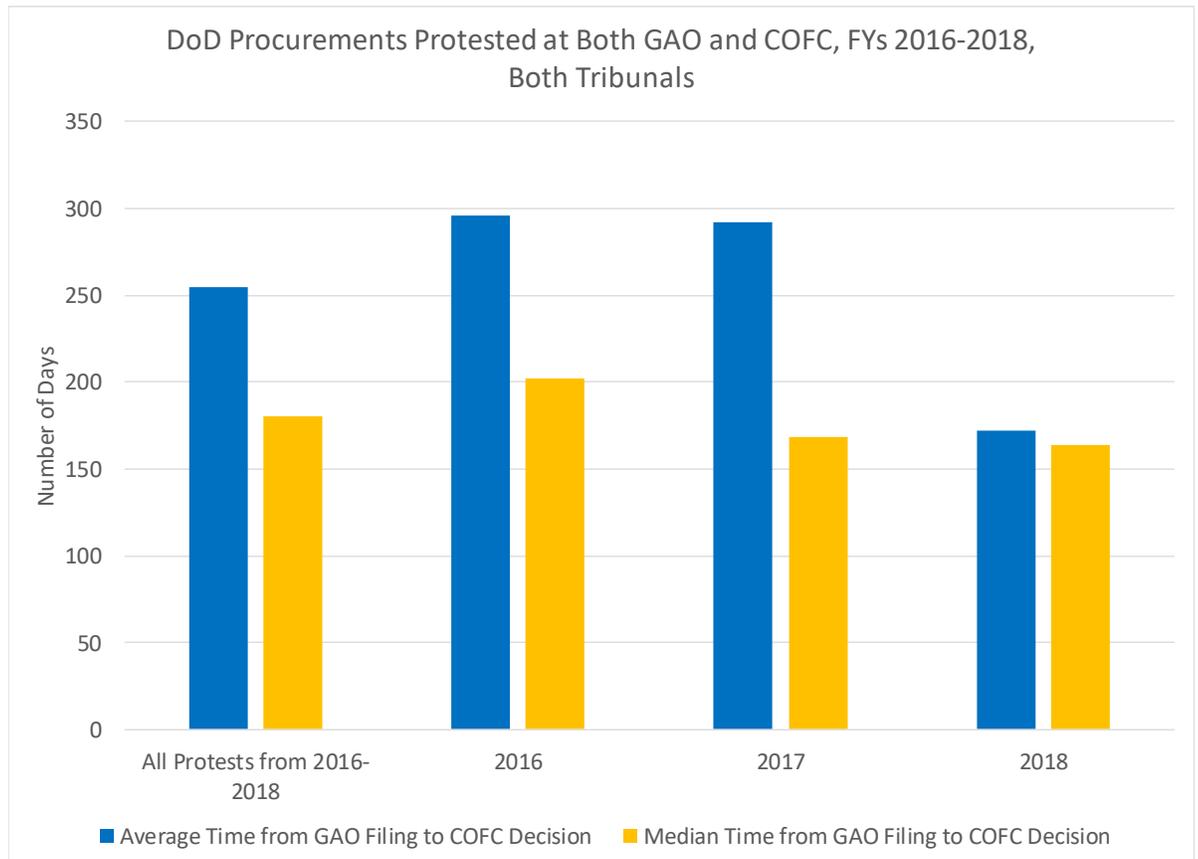
	<b>Number of DoD Protest Actions where Tribunals Differed in the Outcome</b>
FY 2016	3
FY 2017	6
FY 2018	2
<b>Total Protest Actions</b>	<b>11</b>

(3) For FY 2016 through FY 2018, the following tables show the length of time, in average and median time for the following:

(a) The average time for initial filing at the GAO to decision in the COFC was 255 days with 181 days being the median number of days. The breakout by FY is reflected below.

	<b>Average Days from GAO Filing to the COFC Decision</b>	<b>Median Days from GAO Filing to the COFC Decision</b>
FY 2016	296	202
FY 2017	292	168
FY 2018	172	164
<b>All Protest Actions</b>	<b>255</b>	<b>181</b>

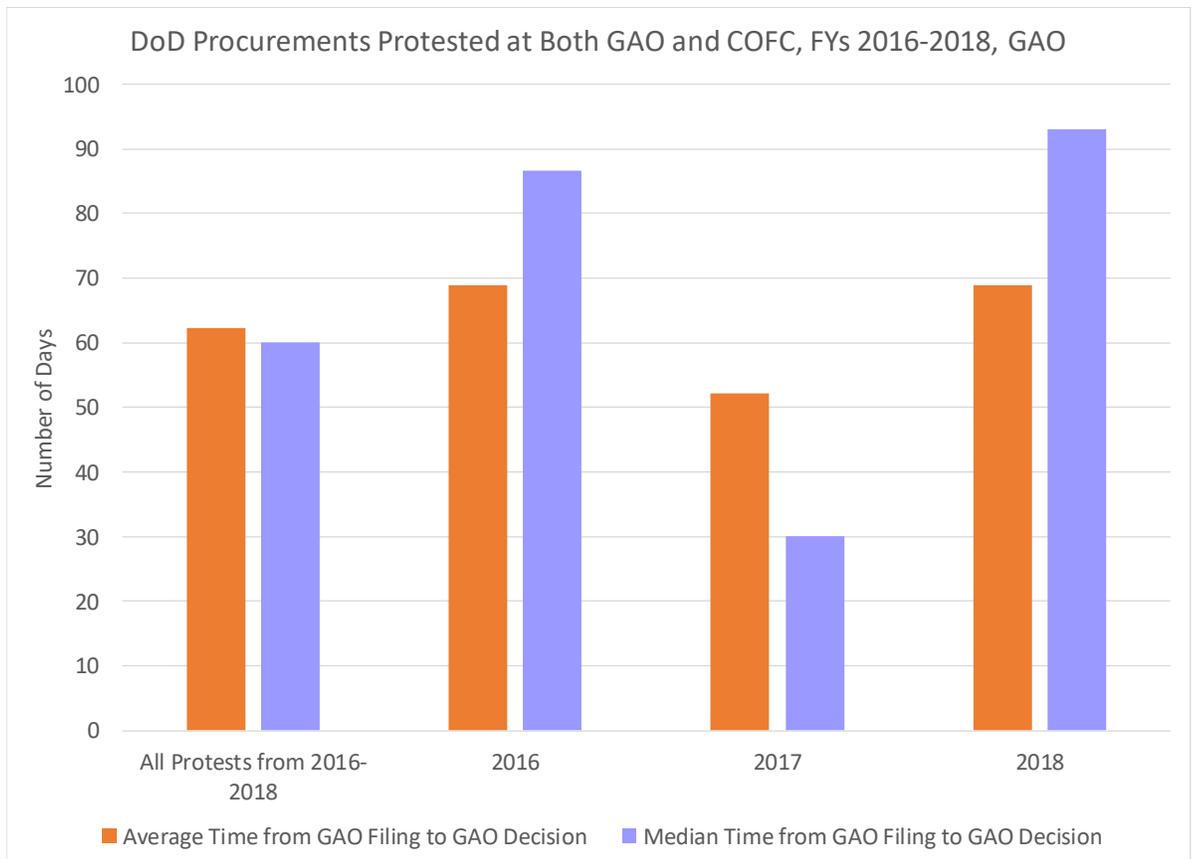
Note: Protest actions with enough information to calculate average and median days: 21 in FY 2016, 32 in FY 2017, 25 in FY 2018.

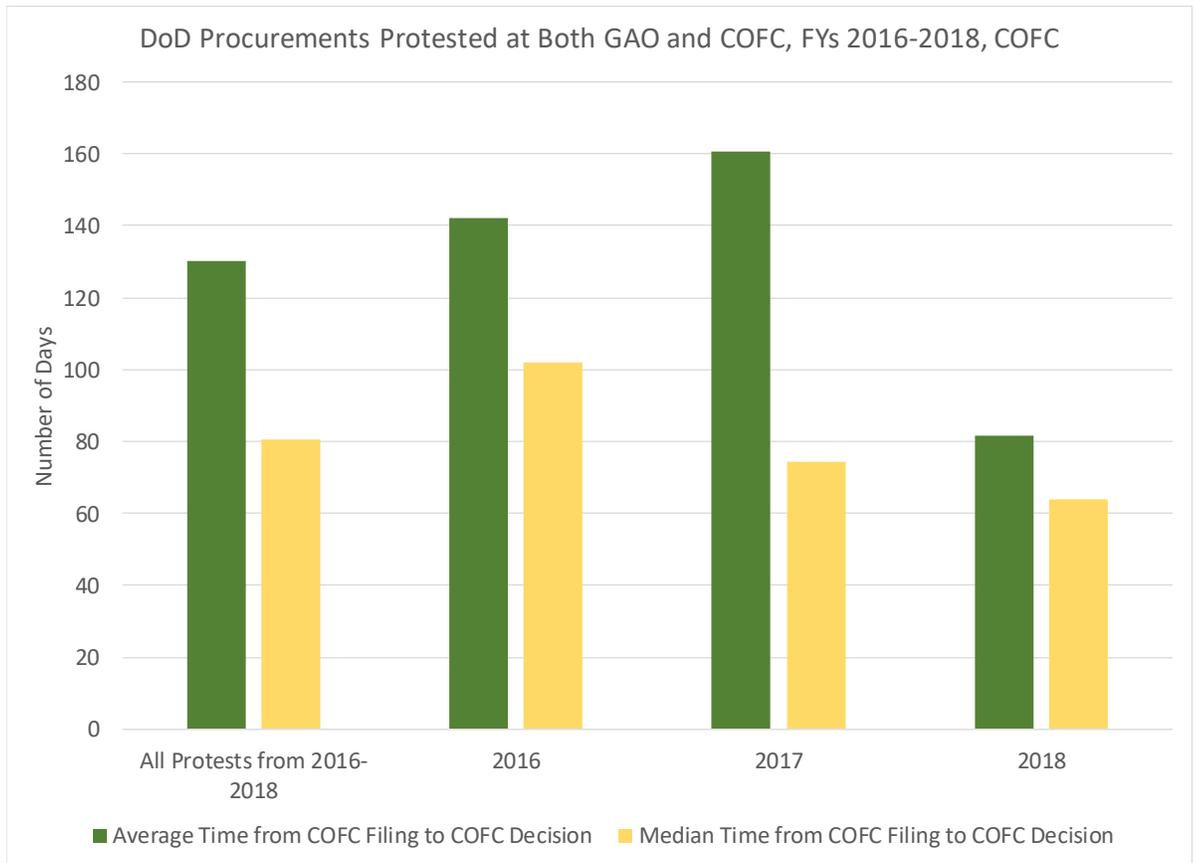


(b) The average time of the duration of the GAO protests was 62 days with 60 days being the median number of days. The average time of the duration of the COFC protests was 130 days with the median days of duration being 81 days. The breakout by FY is reflected below.

	The GAO – Filing to Decision		The COFC – Filing to Decision	
	Average Days	Median Days	Average Days	Median Days
FY 2016	69	87	142	102
FY 2017	52	30	161	75
FY 2018	69	93	82	64
<b>All Protest Actions</b>	<b>62</b>	<b>66</b>	<b>130</b>	<b>81</b>

Note: The GAO protest actions with enough information to calculate average and median days: 22 in FY 2016, 33 in FY 2017, 29 in FY 2018. The COFC protest actions with enough information to calculate average and median days: 21 in FY 2016, 32 in FY 2017, 25 in FY 2018.





(c) The average time at which the basis of the protest is known to time of the filing at the GAO was seven days with a median of three days. The average time at which the basis of the protest was known to time of the filing at the COFC was 28 days with a median of five days. The breakout by FY is reflected below.

	<b>The GAO – Basis of Protest Known to Filing</b>		<b>The COFC – Basis of Protest Known to Filing</b>	
	<b>Average Days</b>	<b>Median Days</b>	<b>Average Days</b>	<b>Median Days</b>
FY 2016	4	0	4	0
FY 2017	2	0	22	5
FY 2018	13	5	46	16
<b>All Protest Actions</b>	<b>7</b>	<b>3</b>	<b>28</b>	<b>5</b>

Note: The number of GAO protest actions with enough information to calculate average and median days: 13 in FY 2016, 16 in FY 2017, 23 in FY 2018. The number of COFC protest actions with enough information to calculate average and median days: 11 in FY 2016, 15 in FY 2017, 20 in FY 2018.

(d) When there was an appeal from a decision of the COFC to the Court of Appeals for the Federal Circuit, the average time from the date of initial filing of the appeal to

decision in the appeal was 83 days with a median time of 48 days. The breakout by FY is reflected below.

	<b>Average Days for the COFC Appeal</b>	<b>Median Days for the COFC Appeal</b>
FY 2016	–	–
FY 2017	102	69
FY 2018	44	44
<b>All Protest Actions</b>	<b>83</b>	<b>48</b>

Note: For FY 2016, there were no appeals noted. For FY 2017, there were 4 appeals and in FY 2018, there were two appeals.

- (4) The number of protests where performance was stayed was 35 or 42 percent of the protests for the GAO, and where performance was enjoined was seven or eight percent of the protests at the COFC for FY 2016 through FY 2018. The average time for stays at the GAO was 88 days and 101 days at the COFC. The breakout by FY is reflected below.

	<b>Number of DoD Protest Actions – Stayed (GAO)</b>	<b>Percent of DoD Protest Actions – Stayed (GAO)</b>	<b>Number of DoD Protest Actions – Enjoined (COFC)</b>	<b>Percent of DoD Protest Actions – Enjoined (COFC)</b>
FY 2016	5	23%	0	0%
FY 2017	12	36%	2	6%
FY 2018	18	62%	5	17%
<b>Protest Actions with Performance Stayed/Enjoined</b>	<b>35</b>	<b>42%</b>	<b>7</b>	<b>8%</b>

	<b>Performance Stayed (GAO)</b>		<b>Performance Enjoined (COFC)</b>	
	<b>Average Days</b>	<b>Median Days</b>	<b>Average Days</b>	<b>Median Days</b>
FY 2016	97	61	–	–
FY 2017	88	93	209	209
FY 2018	84	98	74	70
<b>Protest Actions with Performance Stayed/Enjoined</b>	<b>88</b>	<b>98</b>	<b>101</b>	<b>74</b>

Note: In FY 2016, there were five actions with performance stayed and no actions with performance enjoined; in FY 2017, only eight actions with performance stayed and one action with performance enjoined that provided enough information to calculate average and median days; in FY 2018, there were 13 actions with performance stayed and four actions with performance enjoined.

- (5) The requirement was obtained in the interim through another vehicle or in-house 21 times at GAO and 6 times at COFC, whether there was a period of stay or enjoining the action. The requirement went unfulfilled eight times at GAO; COFC did not have unfulfilled requirements. For the three years, six actions at GAO and one action at COFC were not identified and are reflected as unknown resolution as the data did not reflect one way or the other. The breakout by FY is reflected below.

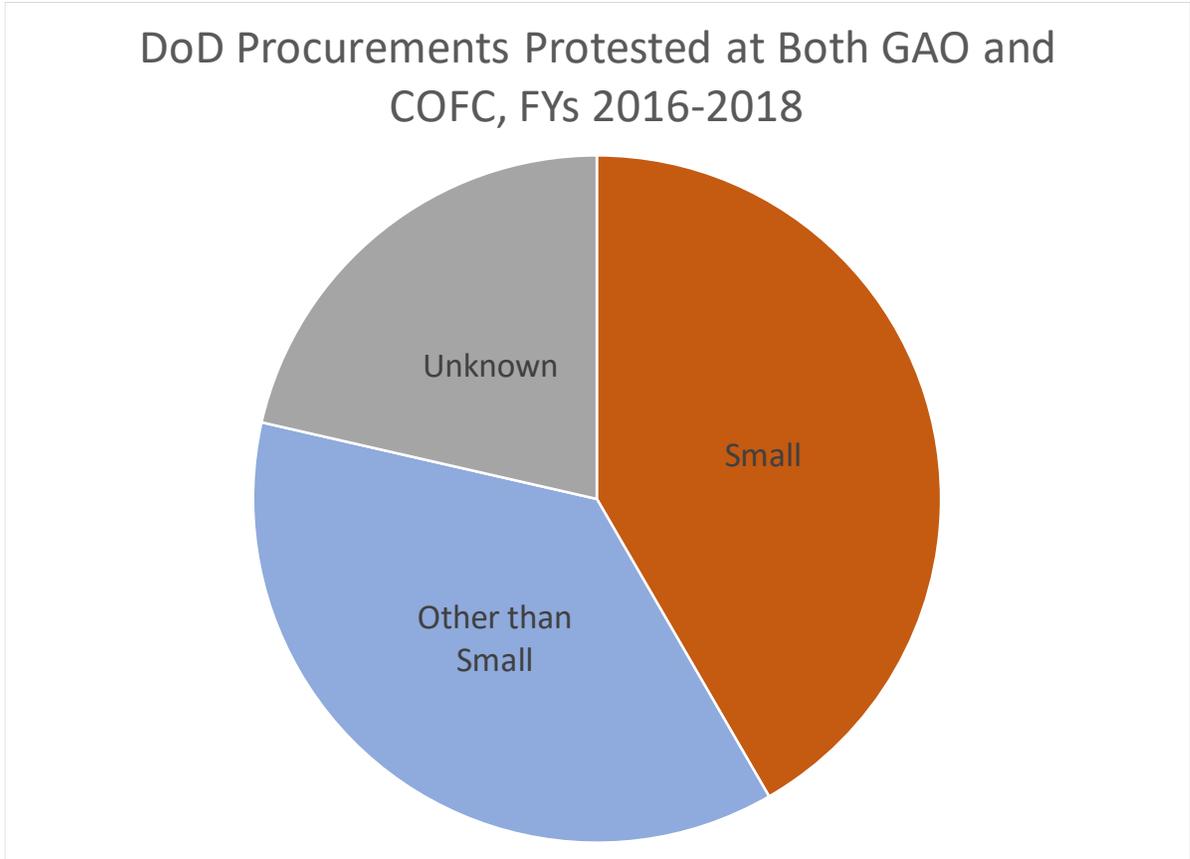
	<b>Performance Stayed (GAO)</b>					
	<b>Requirement Obtained through Another Vehicle/In-House</b>		<b>Requirement Went Unfulfilled</b>		<b>Unknown</b>	
	<b>Number of Actions</b>	<b>Percent of Actions</b>	<b>Number of Actions</b>	<b>Percent of Actions</b>	<b>Number of Actions</b>	<b>Percent of Actions</b>
FY 2016	3	60%	2	40%	0	0%
FY 2017	5	42%	5	42%	2	17%
FY 2018	13	72%	1	6%	4	22%
<b>Protest Actions with Performance Stayed/Enjoined</b>	<b>21</b>	<b>60%</b>	<b>8</b>	<b>23%</b>	<b>6</b>	<b>17%</b>

	<b>Performance Enjoined (COFC)</b>					
	<b>Requirement Obtained through Another Vehicle/In-House</b>		<b>Requirement Went Unfulfilled</b>		<b>Unknown</b>	
	<b>Number of Actions</b>	<b>Percent of Actions</b>	<b>Number of Actions</b>	<b>Percent of Actions</b>	<b>Number of Actions</b>	<b>Percent of Actions</b>
FY 2016	0	0%	0	0%	0	0%
FY 2017	2	100%	0	0%	0	0%
FY 2018	4	80%	0	0%	1	20%
<b>Protest Actions with Performance Stayed/Enjoined</b>	<b>6</b>	<b>86%</b>	<b>0</b>	<b>0%</b>	<b>1</b>	<b>14%</b>

- (6) The number of protests where performance was stayed or enjoined and monetary damages were awarded was reported only in one instance (one percent) at the GAO in FY 2017 for \$2.45 M. Performance was stayed for 14 days. None were awarded at the COFC.
- (7) There were 35 or 42 percent protests from small businesses, but the data shows 18 protests did not indicate the protestors' size standard which we indicated as unknown on the below chart and graph. This may be because the data showed that there were multiple protestors which were from small and large firms. The information was

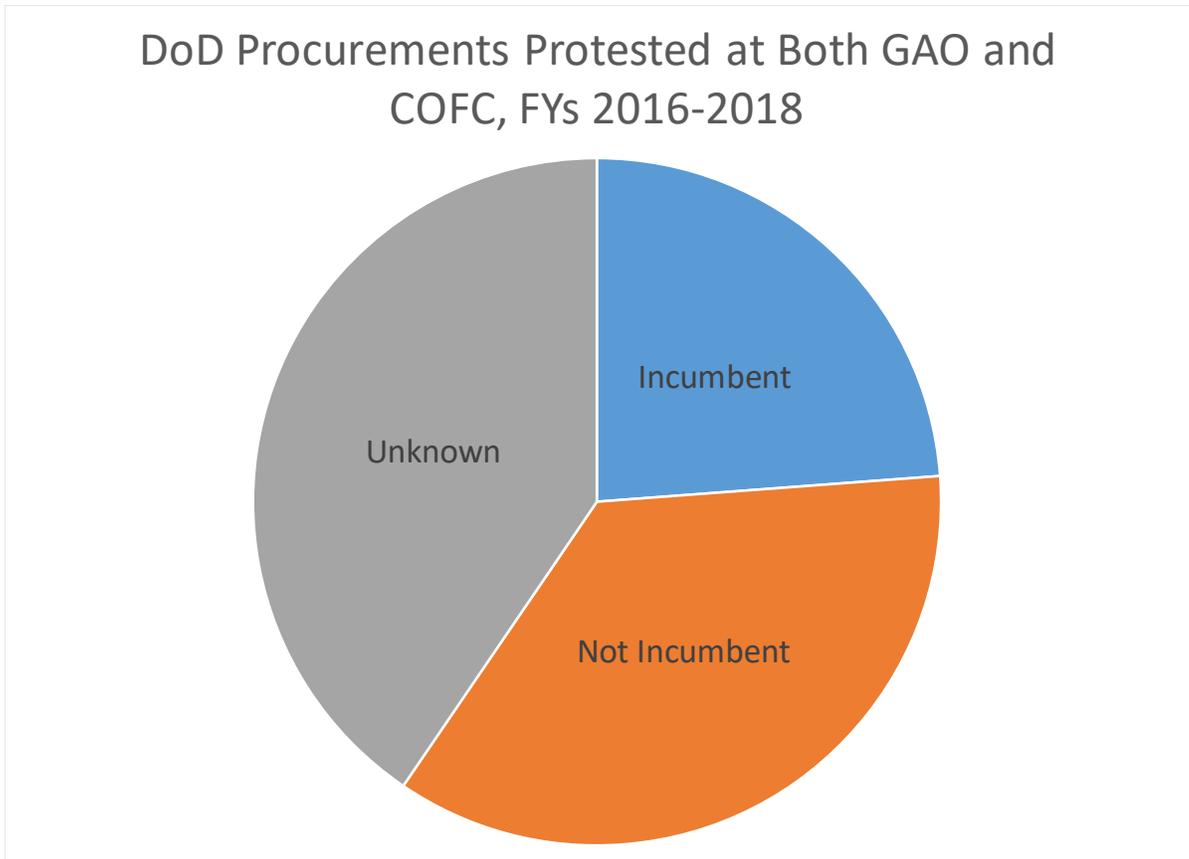
included in 66 of the protests. The breakout is reflected below.

<b>Business Size</b>	<b>Number of DoD Protest Actions</b>	<b>Percent of DoD Protest Actions</b>
Small	35	42%
Other than Small	31	37%
Unknown	18	21%
<b>Total Protest Actions</b>	<b>84</b>	<b>100%</b>



- (8) There were 20 or 24 percent of protests resulting from the incumbent in a prior contract who filed a protest at either the GAO or at the COFC when the incumbent was not selected by the contracting activity for an award for the same or similar product or service that it was performing under its contract as the incumbent. There were 34 cases in which the data was not available to provide further detail and as a result, we annotated those as unknown on the below chart and graph. The breakout is reflected below.

<b>Incumbent in Prior Contract</b>	<b>Number of DoD Protest Actions</b>	<b>Percent of DoD Protest Actions</b>
Incumbent	20	24%
Not Incumbent	30	36%
Unknown	34	40%
<b>Total Protest Actions</b>	<b>84</b>	<b>100%</b>



**B. Recommendations for improving the expediency of the bid protest process**

The Department submitted a FY 2020 legislative proposal, Timeliness Rules for Filing Bid Protests at the United States Court of Federal Claims, which was submitted to Congress on March 21, 2019. This was the Department’s recommendation for improving expediency of the bid protest process for the FY 2020 NDAA legislative cycle. This proposal which has been submitted several times in previous legislative sessions, would amend section 1491 of title 28, United States Code, to impose timeliness rules at the U.S. Court of Federal Claims that will mirror those for bid protests filed with the GAO, thereby reducing the time to decide bid protests by avoiding unnecessarily repetitive protests being filed at both forums. Looking at the last year of data, FY 2018, 59 percent (17 out of 29) of the protestors had taken “two bites of the apple” by filing a protest on the same solicitation or contract awards at both venues. By enacting this

legislation, this would reduce protests delays between 62 days and 130 days depending on the venue chosen. Due to the high percentage of the same protester filing protests at both venues and the small percentage of tribunals rendering a different outcome, the data strongly supports this proposed legislation. The Department's legislative proposal that was submitted to Congress on March 21, 2019, is included as Appendix C.

The Department does not have the ability to provide recommendations on expediting the bid protest process within the GAO or the COFC since we are unfamiliar with their processes and constraints that are in place at both forums and the resulting changes that may be necessary. The Department did reach out to officials in the GAO and the COFC regarding expediency of the bid protest system. The GAO response noted that within section 21.10 of their Bid Protest Regulations (4 C.F.R. § 21.10), it provides for an express option in which protests may be resolved within 65 calendar days of filing, rather than the normal 100 calendar-day timeframe. Further, the GAO's express option is available for all protests suitable for resolution on an expedited schedule. Accordingly, the GAO did not believe there was a need to develop a plan and schedule for expediting protests, to include small-dollar protests, as they already have an existing process in place. The GAO noted that most agencies do not take advantage of this option because agencies cannot comply with the compressed timelines of the expedited schedule.

In discussions with officials within the COFC, the Court discussed various options on an expedited process for DOD bid protest cases involving actions less than 100k, however, there are no plans to pursue an expedited process at this time.

### **C. Ongoing Data Collection Efforts**

The Department has established a data repository to collect on an ongoing basis the information described in subsection A above. The department established a web enabled capability to collect the data and the Defense Federal the Acquisition Regulation Supplement Subpart 233.171, Reporting requirement for protests of solicitations or awards, was added May 31, 2019, to mandate the required protest data collection for the same contract award or proposed award that have been filed at both the GAO and the COFC in accordance with the requirements identified in section 822 of the FY 2019 NDAA.

### **D. Establishment of Expedited Process for Small Value Contracts**

The section 809 Panel, Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations, provided a recommendation that addresses this issue in the Volume 3 Report, dated January 3, 2019. Panel recommendation 68 would limit the jurisdiction of the GAO and the COFC to only those protests of procurements with a value that exceeds, or are expected to exceed, \$75,000. The Department supports this recommendation.

## THE GAO SUMMARY PROTEST DATA FOR FY 2016 – FY 2018

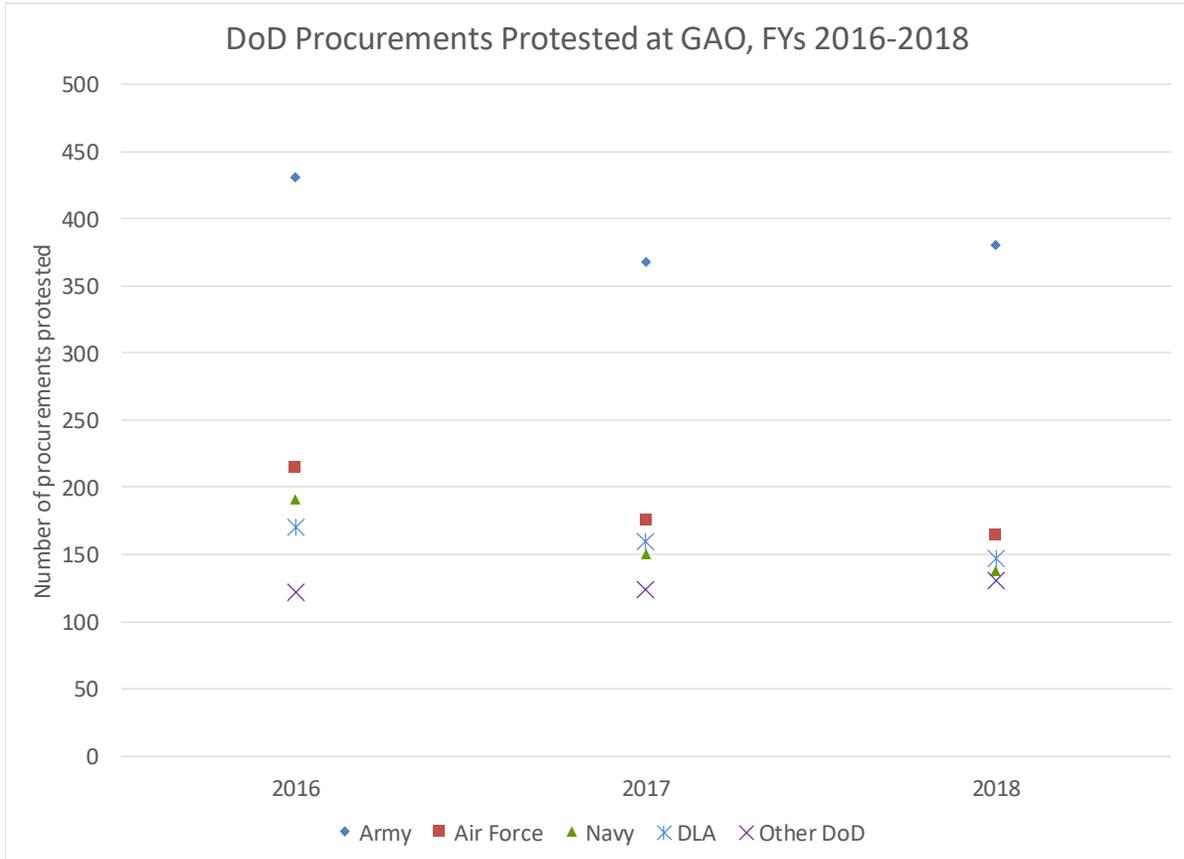
The complete spreadsheet of the GAO data is in Appendix D. For the Department, there were 3,066 protests at the GAO. The breakout by FY is reflected below.

	<b>Number of DoD Protest Actions at the GAO</b>
FY 2016	1,128
FY 2017	978
FY 2018	960
<b>Total Protest Actions</b>	<b>3,066</b>

The GAO results are as follows:

<b>Protest Results</b>	<b>Number of DoD Protest Actions at the GAO</b>	<b>Percent of DoD Protest Actions at the GAO</b>
Denied	488	16%
Dismissed	1,904	62%
Withdrawn	605	20%
Sustained	68	2%
No Decision	1	0%
<b>Total Protest Actions</b>	<b>3,066</b>	<b>100%</b>

For the Department, the following chart breaks out the protests by Service:



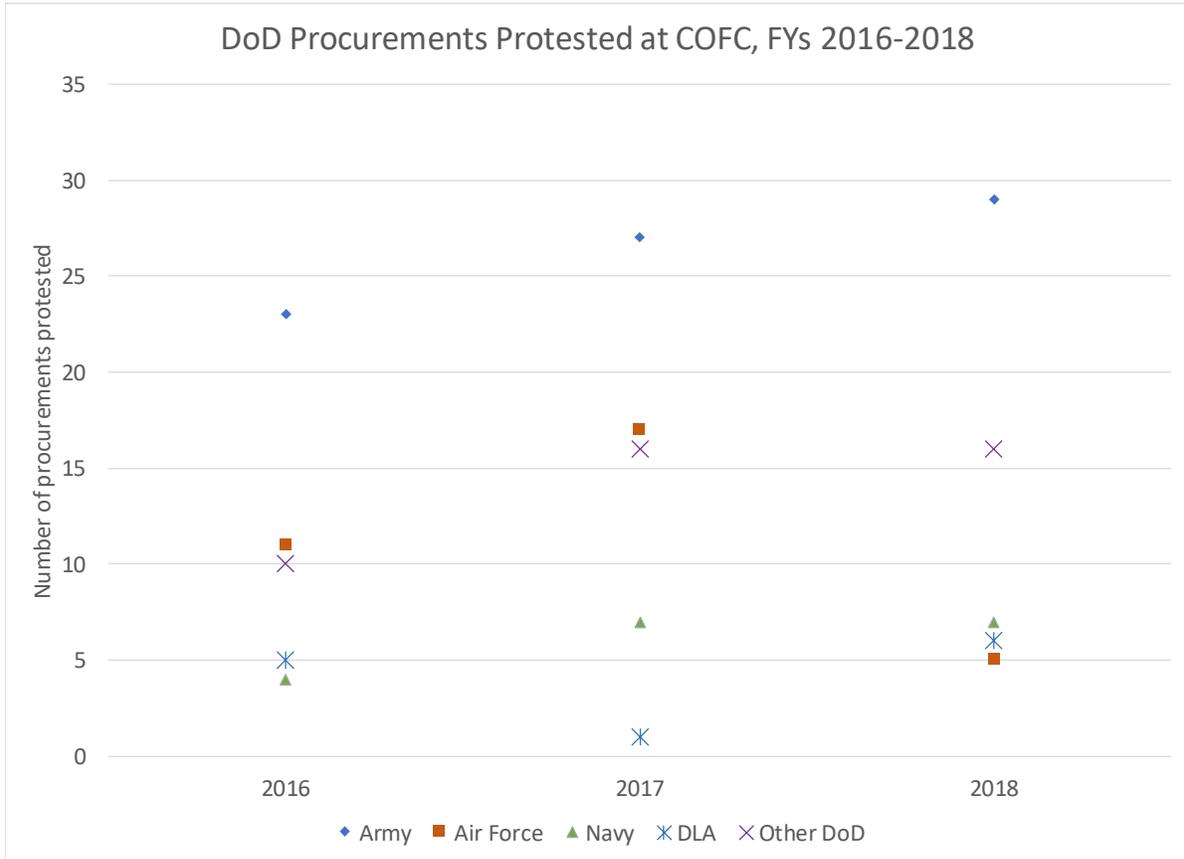
Note: Army Corps of Engineers protest actions are included in the Army category. Marine Corps protest actions are included in the Other DoD category.

### THE COFC SUMMARY PROTEST DATA FOR FY 2016 – FY 2018

The complete spreadsheet of the COFC data is under Appendix E. For the Department, there were 184 protests at the COFC. The breakout by FY is reflected below.

	Number of DoD Protest Actions at the COFC
FY 2016	53
FY 2017	68
FY 2018	63
<b>Total Protest Actions</b>	<b>184</b>

The following chart provides by FY a breakout of the Department by Service:



Note: Army Corps of Engineers protest actions are included in the Army category. Marine Corps protest actions are included in the Other DoD category.

**Appendices:**

- Appendix A, RAND Study, Assessing Bid Protests of U.S. Department of Defense Procurements [cited on page 1]
- Appendix B, Data Manually Collected for the Report [cited on page 3]
- Appendix C, Proposed Legislation [cited on page 12]
- Appendix D, GAO Data [cited on page 13]
- Appendix E, COFC Data [cited on page 15]