

**RESPONSES TO QUESTIONS OF CHAIRMAN PETE SESSIONS
SUBCOMMITTEE ON GOVERNMENT OPERATIONS
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES**

FOLLOWING ON A JULY 22, 2025 SUBCOMMITTEE HEARING ON

“BID PROTEST REFORM: UNDERSTANDING THE PROBLEM”

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Dear Chairman Sessions:

Thank you for the opportunity to respond to these questions that follow on the Subcommittee’s [hearing on bid protest reform](#) held on July 22, 2025.

As I noted at the hearing, I serve as the Lynn David Research Professor in the Government Procurement Law Program at the George Washington University Law School. I have spent over three decades working on bid protests, as an academic and as a lawyer, in federal, state and local forums. I have helped prepare reports on bid protest reform for (a) the [Administrative Conference of the United States](#), and (2) the [U.S. Department of Defense](#), which are referenced below. As noted in my [prior testimony](#), I have also worked on model procurement laws, in the [United States](#) and [internationally](#), which address bid protests.

Questions from Chairman Sessions

- 1. What gaps exist in information and data available to Congress on the costs of the bid protest process to the federal government and involved contractors?**

As the Organization for Economic Cooperation and Development (OECD) pointed out in a recent [landmark study](#), public procurement is an exercise in risk management. This is a new perspective: for centuries, public procurement law too often was viewed as a check-the-box exercise in compliance. Increasingly, however, public procurement -- and bid protests, as part of that system – are understood as a dynamic effort to manage the government’s various procurement-related risks, in

costs, performance and reputation. To set the rules governing that dynamic risk management system, Congress seeks data on the costs and benefits of bid protests.

Unfortunately, data on the costs of bid protests have long been lacking. As my colleague Professor William Kovacic pointed out in a [1995 study](#) with the Administrative Conference of the United States, there was (and still is) “scant empirical evidence” regarding the true costs of protests. In that same study, 9 Admin. L.J. at 489-90, Professor Kovacic identified several categories of bid protest costs:

- **Costs of Delayed Procurement:** In a [2018 study](#) on Defense Department bid protests, researchers from the RAND Corporation noted that the Department did “not have a full understanding of . . . the costs and schedule delays that it incurs” as a result of bid protests. Congress, through the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017, therefore called for a “comprehensive study on the prevalence and impact of bid protests on DoD acquisitions.” The RAND study concluded that only a tiny portion of DoD procurements (fewer than .3%) were actually protested. The RAND researchers were not, however, able to assess the “effects of protests on procurements” or “the time and cost to the government to handle protests” because of “a lack of available data.” In a follow-on Defense Department [study](#), which we performed through the Acquisition Innovation Research Center (AIRC), we found that the Defense Department lacked useful data on the programmatic costs of protests. We found that “in general, the federal bid protest system suffers from a lack of actionable data regarding bid protests.” We found that because “there is a lack of continuous oversight -- both over the bid protest system in general, and in efforts to leverage bid protest data for management purposes -- creating clear data collection standards is critical.” We suggested that automating the “collection and entry of bid protest data . . . would overcome . . . core weaknesses of the current DoD protest data collection process.” But more recently, GAO’s [report](#) responding to section 885 of the FY2025 NDAA, Pub. L. No. 118-159 (2024) noted DoD’s “view [that] additional data collection concerning DOD’s protest costs would not provide sufficient benefit compared to the cost and administrative burden the data collection would require.” *Id.* at 17 (emphasis added).

- **Costs of Litigating Protests:** As noted, prior studies have found that accurate data on the costs to *agencies* of defending bid protests are not reasonably available. A recent [survey](#) by the American Bar Association’s Public Contract Law Section, through its Bid Protest Committee, concluded that an award under protest before GAO costs on average roughly \$116,000 for an *awardee* to defend, and an award costs roughly \$202,000 to defend at the Court of Federal Claims. The litigation costs for *protesters* are likely to be higher. Vendors, however, have not complained vigorously about these costs, perhaps because they may find themselves on either side, protesting or defending an award. (Moreover, private parties’ protest costs may decline in the coming years, if artificial intelligence reduces litigation costs.) As a class, the vendors that bear serious costs in a protest – the protester and the awardee – generally remain quietly supportive of the *status quo*; the government, for its part, benefits from the accountability that those private vendors bring to the procurement system overall.
- **Costs of “Strategic Misuse” of Protests:** Professor Kovacic pointed out that, for example, an incumbent contractor that loses a follow-on award may use a protest “strategically” to delay the loss of revenues. As I noted in my testimony before the Subcommittee, others have argued that “second-bite” protests, brought in succession at the GAO and the Court of Federal Claims, are even more dilatory and disruptive. But these “strategic” protests are not necessarily meritless; as the RAND study noted, the “stability of the bid protest effectiveness rate [the rate of relief won by protesters] over time . . . suggests that firms are not likely to protest without merit.” The question, then, whether the systemic costs of protests brought merely for strategic advantage could be reduced by dismissing protests on a more expedited basis (as the RAND study suggested), or by imposing a heavier pleading burden on protesters, as GAO has already done in its August 5, 2025 decision in [Warfighter Focused Logistics, Inc.](#), Comp. Gen. Nos. B-423546 & B-423546.2. There, GAO explained: “In order to make it clear that only protests meeting the standards of legal and factual sufficiency will survive dismissal, we proposed to replace our existing formulation with a requirement that protesters must provide, at a minimum, credible allegations that are supported by evidence and are sufficient, if uncontradicted, to establish the likelihood of the protester’s claim of improper agency action. GAO’s Proposal in Response to Section 885 of the Servicemember Quality of Life Improvement and National Defense Authorization Act for Fiscal Year 2025

(FY2025 NDAA), B-423717, July 14, 2025 at 22-23. We adopt this formulation of our pleading standard here and in future decisions.” *Id.* note 3.

- **Costs of Lost Discretion:** Professor Kovacic also pointed out that to avoid bid protests, government officials may be overly cautious in making procurement decisions – the phenomenon so common to public procurement that my colleague Professor Steven Schooner called “risk aversion” in a [2002 piece](#) on the “desiderata” in public procurement. The practical problem in measuring these “soft” costs is that agency risk aversion is pervasive in public procurement – it is [caused](#) not just by the threat of bid protest, but rather more generally by the bureaucratic forces working on officials. It would be extremely difficult, therefore, to isolate and measure the costs specifically caused by protests and a [loss of discretion](#).

The [available data](#) also do not address the countervailing benefits of bid protests – or, put differently, we cannot readily assess the potential costs of dismantling the current bid protest system. Bid protests serve two primary purposes: (1) to maintain robust competition by ensuring the integrity of the procurement process, and (2) to bring to light failures in the procurement system, through what is in essence a “whistleblower” (“private attorney general”) accountability system largely funded by vendors themselves. No study has been done on what the costs would be, in terms of lost competition, corruption and masked management failures, if the bid protest system were undone.

2. What gaps exist in information and data available to Congress on the administrative impacts (e.g. programmatic delays, delays developing and implementing corrective actions, etc.) of the bid protest process to the federal government and involved contractors?

As the discussion above reflects, a number of studies have been unable to quantify the administrative impacts of bid protests.

3. What specific data should agencies and/or protest venues collect to quantify the impact of delays on the federal government due to the bid protest process?

The tools to assess the immediate costs and benefits of an individual bid protest already may be available to federal agencies. With regard to delay, agencies can assess, for example, whether project work has been suspended during the

pendency of a protest in accordance with FAR 33.104(c). If a delay in the project will cause residual damage to the government, those costs of delay in principle might be assessed using the sorts of measures used to assess liquidated damages under FAR Subpart 11.5. At the same time, however, if an agency's mishandling of a procurement has caused costs to a protesting bidder, it may be possible for the protest venues (both GAO and the Court of Federal Claims) to award (or recommend award of) the vendor's bid and proposal costs under 4 C.F.R. § 21.8(b)(2) (GAO) or 28 U.S.C. § 1491(b)(2) (Court of Federal Claims). In sum, if costs are to be more readily awarded, those costs might be increased in favor of either party – an agency burdened with a meritless protest, or a vendor burdened by agency misconduct.

- 4. What specific data should bid protest venues—the procuring agencies, Government Accountability Office, and Court of Federal Claims—collect and report to Congress regarding federal bid protests?**
- a. How can Congress and protest venues use this information to improve the effectiveness, efficiency, and fairness of the bid protest process?**
- b. How can Congress and protest venues use this information to reduce the costs associated with the bid protest process?**

As the discussion above reflects, it has proven very difficult for the procuring agencies, GAO or the Court of Federal Claims (or others) to collect and report to Congress data on the costs of handling bid protests.

What has not been fully explored, however, are the costs and benefits of expanding the use of debriefings to vendors (both winners and losers) to provide a documented explanation of an agency's award decision. See, e.g., FAR 15.506.

The organizers of an upcoming September 9, 2025 GW Law [webinar](#) on *U.S. Bid Protests -- Progress and Reform*, with support from the ABA Public Contract Law Section's Bid Protest Committee, have surveyed Committee members on agencies' potentially broader use of extended debriefings, which are currently required for some Defense Department procurements. See DFARS 215.506.

Extended debriefings currently call for disclosure of the agency's written source selection decision document, redacted to protect the confidential and proprietary information of other offerors.

The pending [survey](#) seeks the following information:

- Would extended debriefings used across government benefit the agencies, bidders and the public?

- Would extended debriefings reduce some of the risks inherent in “[other transactions](#)” contracting?
- Would extended debriefings reduce "second-bite" protests, in which a protester, having protested unsuccessfully at the Government Accountability Office, brings a follow-on protest to the U.S. Court of Federal Claims?
- Would extended debriefings reduce the risk of meritless protests?
- Would extended debriefings make “protest bonds” (security required to compensate the government for possible losses during a mandatory stay of contract performance pending a protest) less necessary?
- Would extended debriefings reduce corruption, competition and reputational risks to the government?
- Would extended debriefings increase future competition by allowing offerors to improve proposals, reduce prices and costs, and offer better technical solutions in the future?

We look forward to submitting the results from the ABA survey once available, if that would be of assistance to the Subcommittee. In the meantime, please feel free to let me know of any additional information that the Subcommittee might find useful.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Chris Yukins', with a long horizontal flourish extending to the right.

Christopher R. Yukins