



THE GEORGE WASHINGTON UNIVERSITY  
GOVERNMENT PROCUREMENT LAW PROGRAM

# U.S. BID PROTESTS: PROGRESS AND REFORM

FREE WEBINAR

SEPTEMBER 9, 2025  
9 AM EASTERN - 15:00 CET

## Welcome

Christopher Yukins  
Lynn David Research Professor in Government Procurement Law  
GW Law School – Government Procurement Law Program

- Recording available (later today):
  - [publicprocurementinternational.com](http://publicprocurementinternational.com) (with program materials)
  - GW Law Government Procurement Law Program YouTube page
- Audience Questions & Answers
- Speakers' statements are in their personal capacities
- Chatham House rule applies



# Agenda

---

- Introduction
- Panelists
- Topics for Panel
  - GAO “Section 885” Report
  - Reform Proposals Under Consideration
  - The *Percipient.ai* Decisions
- Discussion and Questions

# Panelists

---

Kenneth Patton, Managing Associate General Counsel,  
U.S. Government Accountability Office (GAO)

---

Judge Marian Blank Horn, U.S. Court of Federal Claims

---

Dana Chase, Chief Trial Attorney, U.S. Army Legal  
Services Agency

---

Scott Flesch, Member, Miller & Chevalier

---

Bryan Goldberg, Attorney, U.S. Department of Defense

---

Christopher Yukins, GW Law – Moderator

# GAO's "Section 885" Report

Kenneth Patton, GAO



441 G St. N.W.  
Washington, DC 20548

B-423717

July 14, 2025

#### Congressional Committees:

This letter responds to section 885 of the Servicemember Quality of Life Improvement and National Defense Authorization Act for Fiscal Year 2025, Pub. L. No. 118-159 (Dec. 23, 2024) (hereinafter, the FY2025 NDAA). The FY2025 NDAA includes a provision for the Comptroller General of the United States, in coordination with the Secretary of Defense, to submit a proposal within 180 days of enactment addressing the following three elements relevant to the Government Accountability Office's (GAO) bid protest function pursuant to the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557.

First, the mandate required GAO to submit a proposal that includes a process under which GAO will apply enhanced pleading standards to an interested party with respect to a covered protest submitted by such interested party for which such interested party is seeking access to administrative records of the Department of Defense (DOD). FY2025 NDAA, §§ 885(a)(1), (b).

Second, the mandate required GAO to submit a proposal that includes benchmarks comprising the following categories of costs: (1) a chart of the average costs to DOD and GAO of a covered protest based on the value of the contract that is the subject of the covered protest; and (2) a chart of the costs of the lost profit rates of the contractor awarded a contract that was the subject of a covered protest after such award. FY2025 NDAA, §§ 885(a)(2), (c).

Third, the mandate required GAO to submit a proposal that includes a process for payment by an unsuccessful party in a covered protest to the government and the contractor awarded the contract that was the subject of the bid protest in accordance with the above-described benchmarks. FY2025 NDAA, § 885(a)(3).

GAO's response to the mandate is enclosed. The response notes that bid protests at GAO are down 32 percent over the last ten years, and protests of DOD procurements are down 48 percent over the same period. Approximately 1.5 percent of DOD procurements are protested on average.



---

**George Washington University  
Government Procurement Law Program**

**U.S. Bid Protests: Progress and Reform**

---

**GAO Proposal In Response to Section 885  
Of the National Defense Authorization Act for Fiscal Year 2025:**

**<https://www.gao.gov/legal/bid-protests/reference-materials>**

**Kenneth E. Patton  
Managing Associate General Counsel  
Office of the General Counsel**



---

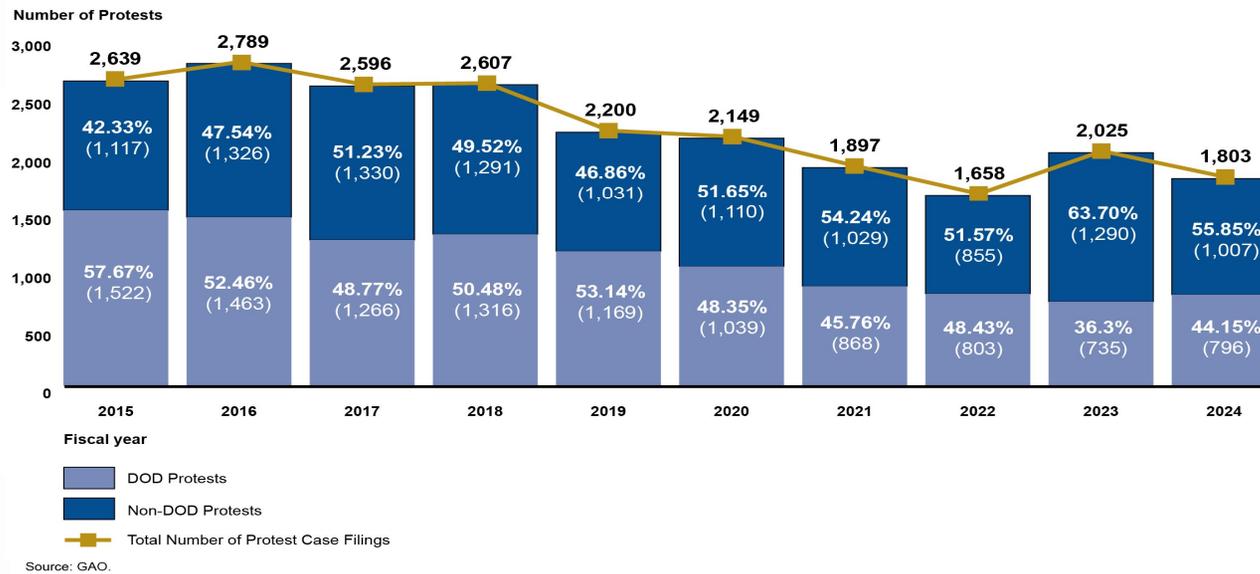
**The Servicemember Quality of Life Improvement and National Defense Authorization Act for Fiscal Year 2025, Pub. L. No. 118-159 (Dec. 23, 2024)**

---

**Section 885. PROPOSAL FOR PAYMENT OF COSTS FOR CERTAIN GOVERNMENT ACCOUNTABILITY OFFICE BID PROTESTS.**

- (1) GAO required to submit a proposal for applying enhanced pleading standards to an interested party seeking access to procurement records of the Department of Defense (DOD).
  
- (2) GAO required to develop cost benchmarks of:
  - (a) the average costs to DOD and GAO of a protest based on the value of the contract; and
  - (b) the costs of the lost profit rates of the contractor awarded a contract.
  
- (3) GAO shall submit a proposal that includes a process for payment by an unsuccessful party to the government and the contractor awarded the contract using the above-described benchmarks.

## Governmentwide and DOD Protest Numbers FY 2015-2024



- During fiscal years 2020 through 2024 DOD conducted:
  - 143,503 unclassified procurements (excluding orders);
  - 2,301, or approximately 1.58 percent, were protested at GAO.

## Enhanced Pleading Standards

---

- GAO's regulations require that protests must set forth a detailed:
  - Statement of the factual and legal grounds of protest, and
  - Must clearly state legally sufficient grounds of protest.
  - 4 CFR § 21.1(c)(4), (f).
- Protests that do not meet this standard are typically dismissed early in the process.
- Our decisions noted that the regulatory standard contemplates that a protester must “provide, at a minimum, either:
  - Allegations, or
  - Evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action.
- In practice, protest allegations based on speculation, factual inaccuracies, or flawed legal assumptions, are summarily dismissed.
- The “allegations or evidence” standard suggested that allegations alone are enough to establish a legally sufficient bid protest while in practice we dismissed bare or speculative allegations.
- We proposed to clarify the standard by explaining 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.
- *See Warfighter Focused Logistics, Inc.*, B-423546, B-423546.2, Aug. 5, 2025, 2025 CPD ¶ 169.

## Benchmarks DOD

---

- Section 885(c)(1) of the FY2025 NDAA included a provision for GAO to prepare a chart of the average costs to DOD of a covered protest based on the value of the contract that is the subject of the covered protest:
  - DOD litigation costs;
    - Counsel, contracting officer, program officials;
  - DOD program costs;
    - Contract delays, costs of awarding interim contracts.
  - DOD explained that it does not track any of these costs because the value of capturing such costs is not worth the effort considering that GAO protests only comprise about 1.5% of DOD procurements.

## Benchmarks Awardee Lost Profits

---

- Section 885(c)(2) of the FY2025 NDAA included a provision for GAO to prepare a chart of the costs of the lost profit rates of the contractor awarded a contract.
  - DOD does not track contractor profit;
  - Private sector declined to provide profit data citing proprietary/sensitivity concerns;
  - Without DOD or contractor data, GAO was not able to develop benchmarks.

## Loser-Pay – Alternative Options

---

- As GAO could not develop a proposal as envisioned by section 885 because of a lack of data, GAO proposed two alternative options for congressional consideration:
  - The first option would be to require, by statute, the Secretary of Defense to require the inclusion of a contract clause in all existing contracts or awards of interim contracts to incumbent contractors that recognizes DOD's right to seek reimbursement from the contractor if it files a protest that is dismissed.
  - The second option would be to authorize GAO to recommend the payment of costs to DOD and the awardee whose contract was stayed during the pendency of a protest where GAO determines that an unsuccessful protest was filed without a reasonable factual or legal basis.
- GAO noted that the second option would require significant changes to a number of GAO's statutory authorities.

# Proposals for Bid Protest Reform

---

Judge Marian Blank Horn,  
Dana Chase, Scott Flesch &  
Chris Yukins



## “Two-Bite” Protests: Protests that are lost at GAO, and then raised again at the Court of Federal Claims

---

- Are these burdensome for the agencies (D)?
- Are they necessary to ensure a full administrative record (S)?
- Can the Court take the GAO’s prior decision as persuasive (J)?



# Protests by Incumbents

---

- Are you concerned that incumbents may use protests to “stall” a follow-on procurement? Are there informal means of addressing this (D)?
- Is it possible to identify which incumbents are abusing the process (S)?
- Would enhanced debriefings help (S)?





## Meritless or Purely “Technical” Protests

---

- Does the Court have means to dispose of meritless protests (J)?
- Should all losing protests be considered meritless (S)?
- Are problematic protests a bigger problem with the dawn of artificial intelligence (D)?

Bonding: Requiring that the protester post a bond if the procurement is to be enjoined (stayed)

---

- How commonly are bonds required in COFC protests (J)?
- Would it be easy to institute a bonding requirement at GAO (S/D)?



# Consistent Timelines for Protests

---

- Should all protest forums have consistent timelines (S)?
- Would a regular protest timeline (like GAO's) work at the COFC (J)?



# Enhanced Debriefings

What are the practical obstacles to using enhanced debriefings more broadly (D)?

Do enhanced debriefings help reduce protests (S)?  
What did the ABA survey tell us (see next slide) (S)?



# Bid Protest Committee Survey



- 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?

Improving Agency-Level Protests – by making the protest timeline (and stay) more certain, affording the administrative record to the protester, appointing an Agency Protest Official, etc.

---

Are agency-level protests a good solution for agencies (D)?

Are agency-level protests worth reforming (S)?

Are they likely to increase with AI (S)?



# The *Percipient.ai* Decisions



UNCLASSIFIED

*Bid Protest Standing –  
On the Same Old Soil.  
Percipient.ai, Inc. v. United States*

Bryan J. Goldberg  
Acquisition and Fiscal Law Attorney,  
Department of Defense

UNCLASSIFIED



UNCLASSIFIED

# Disclaimer

All statements of fact, opinion, or analysis expressed are those of the author and do not reflect the official positions or views of the Department of Defense, any Defense Agency, or any other U.S. Government agency. Nothing in the contents should be construed as expressed or implied U.S. Government endorsement of the author's views.

UNCLASSIFIED

UNCLASSIFIED

## *Percipient.ai, Inc.:* *the Disappointed Potential Subcontractor*

- Full cite: *Percipient.ai, Inc. v. United States*, No. 23-1970, 2025 U.S. App. LEXIS 22128 (Fed. Cir. Aug. 28, 2025) (en banc).
- Brief Factual Background.
- Question: Can a disappointed potential subcontractor – that is not an actual or prospective bidder – still qualify as an interested party for purposes of Tucker Act bid protest jurisdiction when protesting any alleged violation of statute or regulation in connection with a procurement or a proposed procurement affecting a direct economic interest?

UNCLASSIFIED

UNCLASSIFIED

## *Original Federal Circuit Opinion and Percipient's Argument*

- US Court of Appeals for the Federal Circuit held in favor of Percipient:
  - Task order bar
  - Blue & Gold
  - 28 U.S.C. § 1491(b)(1) standing as a “prong three” interested party
- Percipient's argument for expanding “interested party.”

UNCLASSIFIED

## *En Banc Opinion: The Old Soil of “Interested Party”*

- US Court of Appeals for the Federal Circuit sitting en banc affirmed the original dismissal of Percipient’s bid protest on lack of standing.
- Heavy reliance on legislative history for interpretation.
- **Bottom line:** Must be an actual or prospective bidder to qualify as an interested party.

## *Unaddressed Arguments and the Dissent*

- Opinion silent regarding waivers of sovereign immunity.
- Opinion does not address 10 U.S.C. § 3453's status as a unique statutory requirement for standing purposes.
- Dissent: "interested party" should have different meanings based on what the party is protesting. Very concerned about eliminating judicial review for alleged violations of statutes like 10 U.S.C. § 3453.

## *The Impact*

- Back to where we started: the field of potential “interested parties” remains the same as before.
- Subcontractor standing severely limited to two situations:
  1. Agency-like relationship between the prime contractor and the government, or
  2. Greater government involvement in the selection of the subcontractor, such that the subcontractor was essentially acting like a prime.

# *Conclusion*

# Questions and Discussion

Next steps in bid protest reform?

# Conclusion

---

Video recording of today's session will be available on GW Law – Government Procurement Law **YouTube Page** & **[www.publicprocurementinternational.com](http://www.publicprocurementinternational.com)**