

GAO Section 885 Response: Enhanced Pleading and Loser-Pay Requirements

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PRACTICES Government Contracts

The Government Accountability Office's (GAO) response to congressional inquiry regarding GAO's bid protest function (Section 885 response), while pushing back against some proposed changes that could disincentive meritorious protests, proposes changes that may undercut the bid protest process.

Section 885 of the Servicemember Quality of Life Improvement and National Defense Authorization Act for Fiscal Year 2025 (FY2025 NDAA) required GAO to work with the Department of Defense (DoD) to submit a proposal that includes: (1) proposed enhanced pleading standards applicable to protests involving DoD procurements prior to permitting access to the administrative record; (2) "benchmarks" regarding protest costs to GAO and DoD based on the value of the covered protest; and (3) the "costs of the lost profit rates of the contractor awarded a contract" that was protested.

GAO submitted its Section 885 response on July 14, 2025.

GAO included salient data regarding the bid protest process. While GAO's review is statutorily limited to a 100-day cap, it has handled cases swiftly. Over the last 10 years, substantively "developed" cases are resolved in approximately 78 days and procedurally non-developed cases are resolved within 24 days. Over the same period, protests have decreased significantly, down 32 percent overall in the last 10 years overall, and down 48 percent for DoD-related protests over that same time, which account for nearly half of all GAO protests.

Congress granted GAO a bid protests role to promote fundamental fairness in the procurement system. Further, the barrier to entry of contracting with the government is minimized when contractors can seek review of the decisions regarding their bids in a meaningful way. Weakening the bid protest process could discourage new entrants from selling to the government—particularly concerning when the size of the defense industrial base has been steadily shrinking for a decade. GAO's response was of mixed comfort to those who recognize the importance of GAO's oversight role to the integrity of the system.

First, GAO proposes an enhanced pleading standard. The current GAO pleading standard is contradictory. GAO protests must set forth a detailed statement of the factual and legal grounds of protest and clearly state legally sufficient grounds of protest. 4 C.F.R. § 21.1(c)(4), (f). GAO has historically interpreted this to require a showing of "***either allegations or evidence sufficient***, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action," but has also found that "bare allegations" are insufficient to sustain a protest. GAO's 885 response suggests a "clarification" to its standard, requiring 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." The proposed standard is much more than a clarification. Instead, it requires protesters to raise credible allegations supported by sufficient evidence at the outset of a protest, without the benefit of the record.

GAO admits that “too stringent of a pleading standard could have the unintended consequence of harming the federal procurement system by discouraging protests and participation in the federal contracting process, thereby limiting competition.” GAO’s pleading standards are already higher than those at the U.S. Court of Federal Claims (COFC), particularly for initial access to the administrative record, which is critical for meritorious protests to succeed. Heightening the pleading standard to include credible allegations based not only on evidentiary support but also *sufficient evidentiary* support *before* the release of the agency record will prevent legitimate procurement errors from being discovered, addressed and resolved. It will also force more protests to go to COFC, increasing the cost of protests to all parties and the potential delay to the procurement system.

Second, GAO was unable to provide Congress benchmarks for costs associated with bid protests and proposed Congress pass legislation requiring GAO and DoD to track bid protest costs at the litigation, programmatic and third-party levels. Both DoD and GAO related that the potential benefit of this data tracking is not worth the administrative burden.

Third, while neither GAO nor DoD endorsed fee-shifting provisions for bid protests—and GAO related that protest counsel overwhelmingly disfavored fee shifting (86 percent of those polled)—it nonetheless proffered two mechanisms for Congress to consider.

Presumably the suggestion of a “loser pays” rule is aimed at frivolous protests. But there is no evidence of an adverse impact from allegedly frivolous protests. Less than 1.5 percent of DoD procurements are protested annually, per DoD’s data, and GAO’s pleading standards already have meant that it dismissed over 10,000 “non-developed” protests in the past 10 years within 24 days and before production of the agency record. There is no frivolous filer problem to address.

GAO noted that a “loser pays” system designed to filter out frivolous protests will have serious negative consequences for contractors—especially small business contractors—and the procurement process as a whole, potentially resulting in:

- Less competition in procurement, leading to higher prices for the government;
- Contractors including these costs in their proposals, leading to higher prices for the government;
- Shifting even more litigation to the courts, delaying award and performance on contracts well beyond the 100-day period for deciding a protest at GAO; and
- Decreased transparency in the procurement process, undermining its integrity.

Additionally, GAO considered the negative effects on small business contractors, who make up the majority of GAO’s filed protests, and may no longer be able to afford a protest if the loser-pay system is enacted. Loser-pay systems may also call into question the GAO’s neutrality and lead to conflicts-of-interest issues.

Nonetheless, GAO raised two options for consideration: (1) a statutorily-required contract clause in existing or bridge procurement contracts to shift the burden of paying costs for procedurally deficient protests to an incumbent contractor if it loses via disgorgement of profit or fee during the protest period; and (2) authorizing GAO to direct private parties to pay costs to DoD and other private parties.

While the first approach is situationally limited, whether a protest is procedurally deficient is irrelevant to whether there was a meaningful error in the procurement. Further, the evidence

suggests that incumbents correctly identify procurement errors at a rate nearly double that of non-incumbents, likely due to the incumbent knowledge of the procuring agency.

The second approach is much more sweeping for the reasons GAO noted. It would result in: (1) additional, unnecessary delays resulting from the case-by-case analysis required to adjudicate costs; (2) increased costs to the government for litigation; (3) contractors providing for the potential costs of a protest loss in their proposals; and (4) decreased competition, undermining GAO's bid protest function.

Government contractors—and especially small business contractors—must be aware of the proposed changes to GAO's bid protest functions with respect to the enhanced pleading standard and adoption of a loser pays requirement.