

The Keys to Victory

1. While protests may seem inevitable, practice good proposal hygiene to minimize the chances of a successful protest against you
2. Analyze the decision carefully – taking historical success rates, incumbency, rigor of evaluation criteria, price, and vehicle (e.g. FEDSIM) protest-resistance
3. Plan your attack quickly – you only have 10 days from when you know a basis for protest to file
4. Seriously consider intervening to retain standing, even if you are not defending the protest
5. Recognize that almost all large awards today are protested and prepare for that eventuality as both the winner and loser
6. Use uniquely skilled capture experts during the protest – both to attack the winner and defend against the protest
7. Hire professionals to help – independent experts, outstanding legal counsel, pricing specialists, contracting experts – each of whom has a role to play in helping you win the war

Protesting and Winning in the Spirit of 1776

- 🐾 The rate of protests has been roughly flat, as has the sustainment rate at ~15% – with few ramifications in client relations
- 🐾 The sustainment rate cloaks the reality that nearly 35% of all protests result in corrective action (a victory for the protester)
- 🐾 Customers are turning to BIC vehicles to attempt to streamline the bidding process and avoid protests
- 🐾 Protests can occur with the agency, the GAO, and in the US Court of Federal Claims, making for a complex and lengthy process
- 🐾 Some vehicles – such as FEDSIM – are effectively protest-proof, with a 95% sustainment rate due to the acquisition structure
- 🐾 As the winner, be prepared for anything and anticipate delays – protests are never easy and are more vigorous than ever

Taxation without Representation is Tyranny – Otis

In the sweltering summer of 1776, a group of determined colonists decided that no longer would defiance suffice to gain the rights they deserved. They turned instead first to protesting unfair tax, and then to outright rebellion. In similar fashion, today's government contracting community is turning away from silent acquiescence to outright protest of award decisions that they feel unfairly restrict their right to win. Ten to fifteen years ago, protests were uncommon. Now, almost all major awards are protested. Why the change? First, companies no longer feel that protests negatively impact their relationships with their valued customers. Second, agencies often buy through BIC vehicles, where the user agency is more detached from the buying process. Finally, the stakes are high and make economic sense.

I have not Yet Begun to Fight – Jones

Much like John Paul Jones, once companies decide to protest, the fighting is fierce. First, a protestor can file with the acquisition agency. Second, the protestor can appeal to GAO. Finally, the protestor can escalate and protest in the US Court of Federal Claims. Each of these has specific rules of engagement (governed by FAR Part 33). The government has the obligation to address each protest, and each case appears on the docket of the GAO until ultimately decided. Protests often follow the path of agency, to GAO, to courts and back again – especially with multi-billion-dollar protests such as the recent DISA DEOS which went through myriad steps before final resolution. The current protest rules unwittingly encourage protests with automatic stays and inability to punish frivolous protestors. Simply put, the potential benefits of protesting far outweigh the downside risks and costs...and hence protests proliferate.

Give Me Liberty, or Give Me Death – Henry

Once a losing bidder protests, there are a number of outcomes – some good and some bad. The protestor wants to fight for their rights until a favorable decision is made and incumbents protest to keep their war chests full through extensions as the protests drone on. The government can **deny** the protest for lack of merit, and the protestor can appeal. The government can **sustain** the protest when they agree with the argument. They can **dismiss** for a procedural or technical flaw. They can also **dismiss** if the agency takes **corrective action**, often requiring a change in proposal or RFP. Finally, the protestor can **withdraw** if they believe that the government has acted to correct the basis for protest. The complexity has led the government to turn to effectively "protest-proof" vehicles like FEDSIM to avoid war at all costs.

GAO Protest Results FY17 – FY21

	2017	2018	2019	2020	2021
Cases	2,596	2,607	2,198	2,149	1,897
Merit	581	622	587	545	581
Sustains	99	92	77	84	85
Sustain Rate	17%	15%	13%	15%	15%
Effectiveness	47%	44%	44%	51%	48%

GAO's statistics show a stable number of cases decided on merit at ~600 (deny or sustain), a sustain rate at about 15%, and an effectiveness rate hovering near record highs. With an effectiveness rate of around 50%, as long as the basis is sound, the protestor should feel confident in their decision to protest.

Source: GAO Bid Protest Report to Congress for Fiscal Year 2021

Perseverance and Spirit Do Wonders – Washington

In today's GovCon market, survival has come down to winning the war for new work. Each company seeks to win more than their share of large and complex programs. When they do not, every firm carefully weighs their options and decides whether to protest or not. While the odds are not in their favor, the rewards often far outweigh the costs of protesting. Perseverance in the face of adversity helps win the war – through agency protests, appeals, court appearances, discovery, resubmittals, and all new proposals. This has led to an entirely new breed of capture, where teams understand how to win rebids, how to analyze customer findings, how to dig into scoring, and how to determine the ultimate winning price. Never before has there been such a need for specialized protest talent – capable of winning a protest after an initial loss or sustaining a win through a protest campaign – skills critical to carrying the day.