

GAO

Fact Sheet for the Chairman,  
Subcommittee on Oversight of  
Government Management, Committee  
on Governmental Affairs, U.S. Senate

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November 1994

## BID PROTESTS

# Attorneys' Fees Paid to Bid Protesters by Federal Agencies







United States  
General Accounting Office  
Washington, D.C. 20548

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**General Government Division**

B-208159

November 7, 1994

The Honorable Carl Levin  
Chairman, Subcommittee on Oversight  
of Government Management  
Committee on Governmental Affairs  
United States Senate

Dear Mr. Chairman:

During the Subcommittee's consideration of the Federal Acquisition Streamlining Act, which included a provision to limit attorneys' fees paid to bid protesters and exclude small businesses from the limitation, you asked us to obtain information on attorneys' fees paid to bid protesters by federal agencies.<sup>1</sup> At your request, we provided information to your office as we developed it and are summarizing that information in this fact sheet. This fact sheet pertains to bid protests sustained by GAO and the General Services Administration Board of Contract Appeals (GSBCA) during fiscal years 1992 and 1993. Specifically, you requested the following information on those protests:

- number of sustained or granted bid protests,
- number of bid protests where attorneys' fees were paid,
- ranges of attorneys' hourly rates,
- average attorney fee per hour,
- number of bid protests where the protester was a small business, and
- number of bid protests where the contract awardee was a small business.

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## Background

During a federal procurement, vendors may question whether the government's actions violate applicable procurement statutes and regulations by filing a bid protest. Vendors can use both in-house personnel and outside attorneys and consultants to pursue their protests. Protests decided in favor of the protester are referred to as either "granted" or "sustained." The Competition in Contracting Act of 1984 (CICA) gave GAO specific statutory authority to decide all bid protests and gave concurrent authority to the GSBCA to resolve protests involving automated data processing procurements. During fiscal year 1993, GAO received 3,109 bid protests, and GSBCA received 287.

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<sup>1</sup>The Federal Acquisition Streamlining Act of 1994 was signed by the President on October 13, 1994, P.L. 103-355.

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For sustained protests, CICA authorized the Comptroller General and the GSBCA to award bid or proposal preparation costs and costs incurred in pursuing the protest (including reasonable attorneys' fees).<sup>2</sup> Bid protest costs must be paid from the agency's procurement funds for protests sustained by GAO. The costs for protests granted by GSBCA are initially paid from the Judgment Fund,<sup>3</sup> which agencies then reimburse from their procurement funds.

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## Scope and Methodology

To respond to your request, we first obtained a list of bid protests sustained during fiscal years 1992 and 1993 by GAO and GSBCA. To avoid duplicate information, we did not count requests for reconsideration of protest decisions as separate cases.<sup>4</sup>

The lists of sustained bid protests in fiscal years 1992 and 1993 showed that there were 245 sustained protests—200 by GAO and 45 by GSBCA—at 44 agencies. To obtain detailed information on each protest, we sent a questionnaire to each of the 44 federal agencies. (The questionnaire is reproduced in app. I.) All of the agencies responded to our questionnaire.

Agency officials provided information on 236 (or 96.3 percent) of the 245 sustained bid protests.<sup>5</sup>

From the questionnaire responses, we determined that attorneys' fees were paid in 124 protests. Agencies provided detailed cost information for 90 of the 124 protests where attorneys' fees were paid and said that data on the remaining 34 protests were not readily available. Agency officials said that they had sent the 34 protest files to the Federal Records Center and retrieving them would take from 4 to 5 weeks. As agreed with the Subcommittee, we did not ask the agencies to retrieve the files because of the time it would have taken to obtain the information. From the data provided on the 90 cases, we (1) determined the average attorney fee per hour; (2) categorized the hourly rates by assigning them to various ranges, for example \$101 to \$150; and (3) calculated the amount of attorney time expended at each range. When needed, we obtained clarifying information from agency attorneys and procurement personnel.

From the questionnaire data, we obtained for the sustained bid protests the number of bid protesters and contract awardees that were small

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<sup>2</sup>See ADP Bid Protests: Better Disclosure and Accountability of Settlements Needed (GAO/GGD-90-13, Mar. 30, 1990).

<sup>3</sup>The Judgment Fund is a permanent, indefinite appropriation jointly controlled by GAO, the Department of Justice, and the Department of the Treasury and is available to pay for certain judgments, awards, and settlements against the United States, for which payment is not otherwise provided.

<sup>4</sup>Either the protester or the agency may request GAO or GSBCA to reconsider a protest decision. In the protest cases we reviewed, agencies counted both a protest and reconsideration as one case. Therefore, we combined the two cases also.

<sup>5</sup>Agencies did not have readily available information on 9 of the 245 sustained bid protests. These cases involved eight agencies—one case each for the Departments of the Air Force, Army, Navy, and Interior; the Army Corps of Engineers; the Marine Corps; the Naval Supply Systems Command; and two cases for the General Services Administration.

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businesses. Of the 236 protests in our universe, agency officials reported that they did not have information on the small business classification for 57 of the protesters and 47 of the contract awardees.

We did our work between July and September 1994 in accordance with generally accepted government auditing standards.

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## Results in Brief

During fiscal years 1992 and 1993, GAO sustained 200 bid protests and the GSBICA sustained 45 for a total of 245 sustained bid protests. Data were available for 236 of these protests. Protesters requested reimbursement of attorneys' fees in 155 of the 236 cases. Of the 155 requests, (1) protesters were paid attorneys' fees in 124 cases, (2) payment of attorneys' fees was denied in 15 cases, and (3) a decision on paying attorneys' fees in the remaining 16 cases was still pending as of September 30, 1994.

Of the 124 cases where attorneys' fees were paid, agencies provided enough information on 90 protests for us to determine the hourly rates paid. Hourly rates ranged from \$20 for paralegals to \$375 for law firm partners, with an average attorney fee of \$169 per hour for the 90 protests.

For the 236 protests we reviewed, agency officials reported that the protester was a small business in 113 cases and was not a small business in 66 cases.<sup>6</sup> They said that they did not have information to determine whether the protester was a small business in 57 of the cases.

In addition, a contract was awarded to a small business in 96 of the 236 protests and was not awarded to a small business in 81 cases. Agency officials said that they did not have information in 47 of the cases to determine whether the contract was awarded to a small business. Contracts for 12 of the 236 bid protests had not been awarded at the end of September 1994 because either the solicitation had been cancelled or the contract awards were still pending.

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## Number of Sustained Bid Protests, Fiscal Years 1992 and 1993

As shown in table 1, the 245 protests GAO and GSBICA sustained during fiscal years 1992 and 1993 were filed against 44 federal agencies.

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<sup>6</sup>The Small Business Administration uses different thresholds for different types of businesses in deciding whether a business qualifies for treatment as a small business, 13 CFR Part 121.

**Table 1: Number of GAO and GSBCA Sustained Protests During Fiscal Years 1992 and 1993**

Federal agencies	Number of sustained protests		
	GAO	GSBCA	Total
Agency for International Development	3	0	3
Army Corps of Engineers	3	0	3
Headquarters, Army Materiel Command	7	2	9
Defense Investigative System Agency	1	1	2
Defense Logistics Agency	20	1	21
Defense Mapping Agency	2	0	2
Defense Supply Service	2	0	2
Department of Agriculture	10	1	11
Department of Agriculture (Forest Service)	8	0	8
Department of Agriculture (Timber Management)	1	0	1
Department of Agriculture (Soil Conservation Service)	2	0	2
Department of the Air Force	23	9	32
Department of the Army	14	0	14
Department of Commerce	1	2	3
Department of Energy	4	3	7
Department of Health and Human Services	4	2	6
Department of Housing and Urban Development	5	0	5
Department of the Interior	7	2	9
Department of Justice	2	1	3
Department of Labor	1	2	3
Department of the Navy	0	10	10
Department of State	3	0	3
Department of Transportation	12	1	13
Department of the Treasury	2	1	3
Department of Veterans Affairs	8	0	8
Environmental Protection Agency	2	0	2
Federal Aviation Administration	0	1	1
Federal Emergency Management Agency	2	0	2
Federal Energy Regulatory Commission	1	2	3
General Services Administration	8	1	9
Marine Corps	2	1	3
Military Sealift Command	1	0	1
National Transportation Safety Board	0	1	1
National Archives and Records Administration	1	0	1
National Credit Union Administration	1	0	1
Naval Air Systems Command	1	0	1
Naval Electronic Systems Command	1	0	1
Naval Facilities Engineering Command	9	0	9
Naval Sea Systems Command	2	0	2
Naval Supply Systems Command	19	0	19
Nuclear Regulatory Commission	0	1	1
Office of Personnel Management	1	0	1

(continued)

Federal agencies	Number of sustained protests		
	GAO	GSBCA	Total
Panama Canal Commission	2	0	2
Securities and Exchange Commission	2	0	2
<b>Total</b>	<b>200</b>	<b>45</b>	<b>245</b>

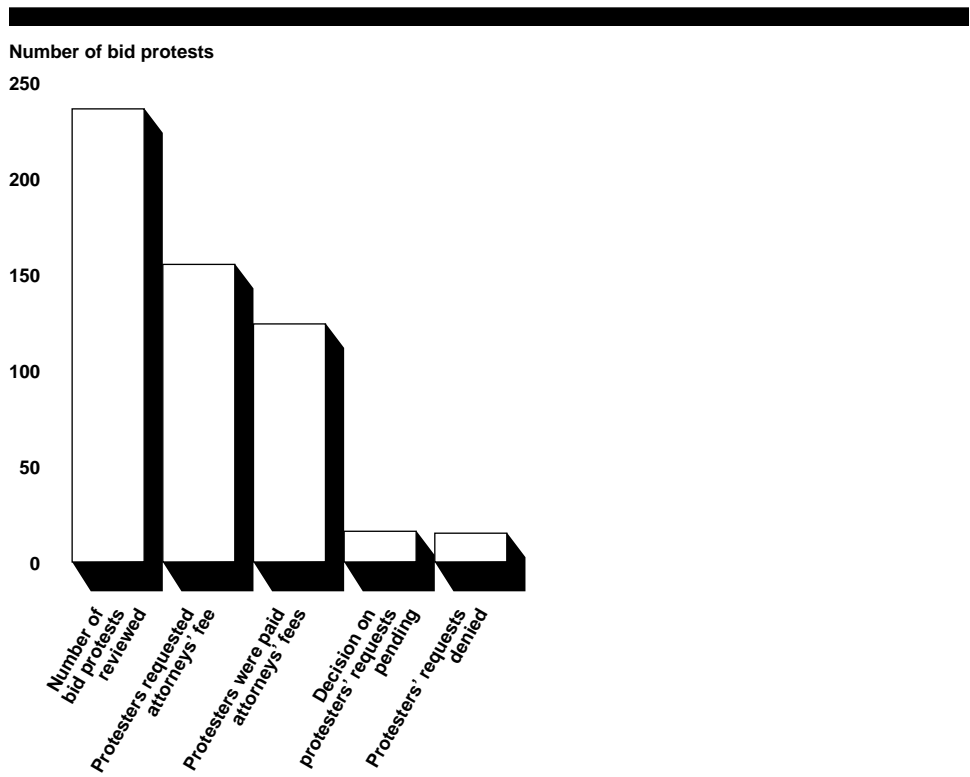
Source: GAO and GSBCA data on bid protests and questionnaire responses from federal agencies.

## Number of Bid Protests Where Attorneys' Fees Were Paid

Of the 236 sustained bid protest cases with available information, protesters requested attorneys' fees in 155 cases. According to agency officials, protesters in 73 cases did not request attorneys' fees because either the protester did not use an outside attorney or after winning the protest, the protester was subsequently awarded the contract and did not request protest costs. Officials said that they did not have readily available information to determine whether protesters requested attorneys' fees in the remaining eight protests.

As shown in figure 1, of the 155 cases where protesters requested attorneys' fees, attorneys' fees were paid in 124 cases, 15 requests were denied, and the decision on 16 requests was still pending as of September 30, 1994.

Figure 1: Number of Protests Where Attorneys' Fees Were Requested and Paid



## Attorneys' Hourly Rates in Bid Protests

Of the 124 cases where attorneys' fees were paid to bid protesters, agency officials provided hourly rates for 90, and detailed data for the remaining 34 cases were not available. Attorneys' fees for the 90 bid protest cases averaged \$169 per hour. The hourly rates varied depending primarily on the type of personnel who worked on the cases. For example, the hourly rates ranged from \$20 for paralegals to \$375 for law firm partners. As shown in table 2, the majority of total attorneys' fees (about 90 percent) and most of the expended attorney time (about 88 percent) were clustered in the three ranges that included rates from \$101 to \$300 per hour.

**Table 2: Range of Attorneys' Hourly Rates for Sustained Bid Protests, Fiscal Years 1992 and 1993**

Range of hourly rates (per hour)	Amount of attorneys' fees	Percentage of total attorneys' fees	Number of hours	Percentage of total hours
\$20-\$75 <sup>a</sup>	\$71,953	2.2	1,108	5.7
\$76-\$100 <sup>a</sup>	62,399	1.9	714	3.7
\$101-\$150	921,112	27.9	7,275	37.3
\$151-\$200	1,095,663	33.2	5,966	30.6
\$201-\$300	945,791	28.7	3,830	19.6
\$301-\$375	203,986	6.2	603	3.1
<b>Total</b>	<b>\$3,300,904</b>	<b>100.0</b>	<b>19,496<sup>b</sup></b>	<b>100.0</b>

Note: Percentages may not total 100 due to rounding.

<sup>a</sup>These ranges represent hourly rates primarily for paralegals, legal assistants, and summer associates.

<sup>b</sup>The average time charged was 217 hours per protest.

## Small Business Status of Bid Protesters and Contract Awardees

As shown in table 3, agencies reported that of the 236 protests with available information, the protester was a small business in 113 cases (or about 48 percent) and was not a small business in 66 cases. Agency officials said that they did not have information in 57 of the cases to determine whether the protester was a small business.

**Table 3: Small Business Status of Protesters in Sustained Bid Protests, Fiscal Years 1992 and 1993**

Small business status of protesters	GAO protests	GSBCA protests	Total protests	Percentage of total protests
Small business	97	16	<b>113</b>	47.9
Other than a small business	56	10	<b>66</b>	28.0
Status unknown	42	15	<b>57</b>	24.1
<b>Total</b>	<b>195</b>	<b>41</b>	<b>236</b>	<b>100.0</b>

As shown in table 4, of the 236 protests with available information, a contract was awarded to a small business in 96 cases (or about 41 percent) and was not awarded to a small business in 81 cases.

**Table 4: Small Business Status of Contract Awardees in Sustained Bid Protests, Fiscal Years 1992 and 1993**

<b>Small business status of contract awardees</b>	<b>GAO protests</b>	<b>GSBCA protests</b>	<b>Total protests</b>	<b>Percentage of total protests</b>
Small business	87	9	<b>96</b>	40.7
Other than a small business	62	19	<b>81</b>	34.3
Status unknown	37	10	<b>47</b>	19.9
No contract awarded	9	3	<b>12</b>	5.1
<b>Total</b>	<b>195</b>	<b>41</b>	<b>236</b>	<b>100.0</b>

Agencies did not have the information in 47 of the cases to determine whether the contract was awarded to a small business. Twelve of the contracts had not been awarded at the end of September 1994 because nine of the solicitations had been cancelled and three contract awards were still pending.

We are providing copies of this fact sheet to interested congressional committees, the Director of the Office of Management and Budget, and other interested parties.

The major contributors to this fact sheet are listed in appendix II. Please contact me on (202) 512-8387 if you have questions concerning this fact sheet.

Sincerely yours,



J. William Gadsby  
 Director, Government Business  
 Operations Issues

# Questionnaire Used to Survey Federal Agencies With Sustained Protests During Fiscal Years 1992 and 1993

United States General Accounting Office

7/13/94



## Attorneys' Fees Paid by Federal Agencies to Bid Protesters

### Introduction

The U.S. General Accounting Office, at the request of a Senate Subcommittee, is collecting data on attorneys' fees paid by federal agencies to bid protesters. We are collecting this information to assist the Subcommittee in its consideration of pending legislation regarding the hourly rate of attorneys' fees paid by agencies to bid protesters.

Please complete this form and fax your response to us by July 22, 1994. Our fax number is (202) 512-4420. GAO also is requesting relevant documents on attorneys' fees paid in bid protest cases. If there are too many documents to fax, please fax this form to GAO and mail copies of relevant documents to:

U.S. General Accounting Office  
 Ms. Lucy Hall  
 441 G Street, N.W., Room 3826  
 Washington DC 20548.

If you have any questions, please telephone either Lucy Hall on (202) 512-4425 or John Baldwin on (202) 512-4535. Thank you very much for your help.

\* \* \* \* \*

Agency personnel to contact if we have questions regarding information provided in this inquiry:

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Phone Number: (\_\_\_\_) \_\_\_\_\_

Fax Number: (\_\_\_\_) \_\_\_\_\_

We have provided identifying information for each case, including the names of the protester and agency.

Bid Protest Number:  
 Name of Protester:  
 Name of Agency:  
 Date of Protest Decision:

1. Were attorneys' fees requested for this bid protest?  
 (Check one.)

- 1.  Yes --> Continue to Question 2.
- 2.  No \
- 3.  Don't know / Skip to Question 3.

2. Were attorneys' fees paid for this bid protest?  
 (Check one.)

- 1.  Yes
- 2.  No
- 3.  Don't know whether fees were paid
- 4.  No decision has been made yet

If attorneys' fees were paid, please provide copies of documentation showing the amount of protest costs requested and eventually paid, including all details of cost components, such as hourly rates for attorneys fees.

3. Was the bid protester a small business?  
 (Check one.)

- 1.  Yes --> Provide documentation to GAO.
- 2.  No
- 3.  Don't know

4. Was the contract awardee a small business?  
 (Check one.)

- 1.  Yes --> Provide documentation to GAO.
- 2.  No
- 3.  Don't know

# Major Contributors to This Fact Sheet

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General Government  
Division, Washington,  
D.C.

John S. Baldwin, Sr., Assistant Director  
Lucy M. Hall, Evaluator-in-Charge  
Kenneth E. John, Senior Social Science Analyst  
George H. Quinn, Jr., Computer Programmer Analyst

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Office of the General  
Counsel, Washington,  
D.C.

Susan Linder, Senior Attorney  
Ralph White, Senior Attorney

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