

# **Bid Protests in the Defense Department: An Analysis of Recent Trends**

by

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## **CENTER FOR PUBLIC POLICY AND PRIVATE ENTERPRISE**

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The Center for Public Policy and Private Enterprise, in the University of Maryland's School of Public Policy, provides the strategic linkage between the public and private sector to develop and improve solutions to increasingly complex problems associated with the delivery of public services—a responsibility increasingly required to be shared by both sectors. Operating at the nexus of public and private interests, the Center researches, develops, and promotes best practices; develops policy recommendations; and strives to influence senior decision-makers toward improved government and industry results.

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## Executive Summary

The Government Accountability Office (GAO) provides an objective, independent, and impartial forum for the resolution of disputes concerning the awards of federal contracts. Today, filing a bid protest is easy, inexpensive, and does not require the services of an attorney (although protesters may be represented by counsel). In general, the bid protest process takes significantly less time than the alternative of court litigation.

Recently there has been a perceived increase in the number of protests and, more disconcertingly, that firms may be protesting government contracts as a strategy to either negotiate their way into contracts or derail an award process already in place. Are these perceptions accurate? Are firms protesting more frequently?

An examination of this phenomenon is important as bid protests could have significant detrimental effects to the cost and schedule of defense programs. Our study examined and evaluated some 5,763 bid protests by analyzing data we collected from GAO bid protest decisions and reports, Department of Defense (DoD) reports and press releases, corporate press releases, and other publically-available sources of information. Our research focused on bid protests occurring between FY01 and FY08. The data were segregated by military Service, the Defense Logistics Agency, and all other DoD organizations. Further, we also reviewed the total number of dollars spent on contracts during the period of inquiry, because we believe it is a key factor to consider when evaluating any change in bid protests. Of the bid protests we examined, 4,397 were dismissed, and 1,366 (23.7 percent) were found to “have merit” (i.e. were worthy of a detailed review by GAO). Of the protests with merit, 1,078 (78 percent) were denied, and only 288 (21 percent of the merit protests) were sustained (i.e. GAO agrees with some portion of the protestor’s claims). As a total fraction of bid protests originally filed, less than 5 percent were ultimately sustained, after going through the GAO bid protest process.

Based on our data analysis, we conclude that although there has been an increase in the number of bid protests, when examined relative to the increase in DoD spending on

contracts during the same period, bid protests overall have increased at a rate significantly lower than the total increase in DoD contract dollars, (resulting in fewer protests per dollar awarded). Further, when we studied all protests with merit, no significant increase was found, even when examining the absolute numbers of protests; so the number of protests with merit per dollar was actually declining. Additionally, while it is true that all protests have a negative impact (e.g. in slowing down the process), sustained protests can have significant programmatic impacts. For example, based on our analysis of 22 procurements with sustained protests, each valued at \$100 million or more, the average delay was 461 days, with the longest delay being nearly 3 years (1012 days).

We also used the data collected to examine the reasons for bid protests. “Agency Misevaluation” was determined to be the primary cause of bid protests (as it occurred most frequently). When broken into sub-categories within the “Agency Misevaluation” category, it was “cost proposal evaluations” and “technical proposal evaluations” that were the two greatest reasons for protests within this category. Other reasons examined for protests included “Terms of the RFP,” “Cancellation of Contract/Agency Chose to Perform Work as In-House,” “Conflict of Interest,” and “Other Reasons.”

From our analysis of sustained bid protests, we found a significantly increased risk of large programs having a sustained bid protest. For our study period, there were 49 GAO sustained protests, associated with 10 procurements valued at \$1 billion or more, equating to roughly 4.9 sustained protests per procurement (several of the procurements had multiple awards).<sup>1</sup> Further, during this period there were only 61 contracts awarded for amounts of \$1 billion or more.

To illustrate the significance of sustained bid protests on particular programs we examined three large sustained cases: the Logistics Civil Augmentation Program (LOGCAP) IV (with an estimated maximum value of \$50 billion per contractor, if all the options are exercised); Information Technology Enterprise Solutions 2 Services (ITES-2S) program (with an estimated value of \$20 billion); and, the Iraq Translation and

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<sup>1</sup> For the purposes of our data analysis we included the potential maximum value for ID/IQ contracts if all options were exercised. For example, for LOGCAP IV the maximum contract value was \$5 billion per year, per contractor (potentially \$50 billion per contractor over the ten year contract period). We used that value as oppose to the nominal value of the signed contract.

Interpretation program (with an estimated value of \$4.65 billion). Each case study includes background information, an overview of the contract, the items being protested, the result of the protest and the lessons learned in the process.

The first case we examined was LOGCAP IV. LOGCAP IV is the principal means by which contractors are currently providing logistics support for the U.S. Army in locations around the world. The contract for LOGCAP IV was protested by two firms, for multiple reasons related to evaluations of technical and management proposals. In our review of the case, we concluded that bid protests can be anticipated in large-dollar-value, long-term contracts; that offerors must have a complete understanding of the evaluation process; that it is difficult for the program office to maintain focus in a long source-selection; that external audits must be properly used when being considered as part of the evaluation process, and, that value of peer reviews was limited.

The second case we examined was ITES-2S. ITES-2S is a contract vehicle managed by the Army's Small Computer Program and Program Executive Office-Enterprise Information System. It is designed to provide global IT services and support for the Army, through multiple-awards and task orders. The award was protested by several firms who claimed a change in requirements took place, as well as improper evaluation of labor rates. In our review of the case, we concluded that the criteria for price evaluation were flawed; that a bid protest was inevitable; that the costs for the Army to respond to bid protests can be high; and that concern exists over the potential for protests on task orders (when there are multiple awardees on an IDIQ contract).

The third case we examined was the Iraq Translation and Interpretation program. The program sought to provide linguistic services in Iraq over a five year period. The contract award was protested by the incumbent for reasons related to the "fill rate" evaluation; experience evaluation; and, transition evaluation—all as completed by the source-selection authority. In our review of the case we concluded that an inherent incentive exists for incumbents to file protests (since, if they lose in the competition, their contract is extended during the protest period); and that (of course) the evaluation process must be fair, clearly articulated and consistent.

We also included an additional fourth case study (the HRsolutions program bid protest) that, while not an example of a large value, sustained bid protest, does highlight the effects of abuse of the bid protest process; even for those protests that are denied. The HRsolutions program was established to provide the Army with a mechanism to outsource those human resources functions that are appropriate for execution by the private sector. The program was protested numerous times during all phases of the procurement by the firm Global Solutions who claimed a long list of improprieties, on the part of the Army's contracting officer, in addition to numerous concerns over proposal evaluations and the small business status of the award winner. In our review of this case, we concluded that serious abuse of the bid protest process can occur and that even when protests are denied the impact can be significant, particularly in light of the fact that no penalty currently exists for frivolous bid protests.

Such frivolous protests cost programs, in terms of both time and money, as indicated by our findings regarding the average days of delay for contracts valued at \$1 billion or more, which we found to be over 15 months.

Following our data analysis (of all protests for the time period from FY01 to FY08), and our review of the case studies, we reached the following conclusions:

1. In general, bid protests are not a *growing* problem within the context of all DoD contracting (recognizing that the period under study was one of significant increases in contract activity—both in number of contracts and dollar values.
2. When the stakes are high on individual awards, bid protests are likely.
3. Perception of more protests is likely a result of an increase in high-profile/high value protests<sup>2</sup>.

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<sup>2</sup> Impact of protests for task orders valued over \$10M is still unknown. Section 843 of the 2008 Defense Authorization Act lifted the ban on GAO protests for task orders valued at \$10 million or greater. During the course of our research, we encountered much speculation that the impact of this action would be significant, yet found no such evidence to support it.

4. Impacts (as a combination of programmatic costs and schedule delays) for bid protests, particularly those that are sustained, are high.
5. The GAO bid protest process is important to maintain the reality and perception of fairness and transparency of DoD acquisition, but the process can be abused—so perhaps there should be penalties introduced for frivolous claims.

Finally, in order to improve the bid protest process in the future, minimize the potential for abuse, and ensure programs are not needlessly delayed, we recommend: DoD and the Services work to eliminate the reasons for sustained bid protests; ensure a balance is struck between maintaining programmatic stability and gaining the benefits of competition in procurements; and explore and implement disincentives for frivolous bid protests.

## Section I: Introduction

Bid protests have recently been perceived as a growing problem for the Department of Defense (DoD), as it seeks to modernize its activities for the twenty-first century (see Figure 1). Many claim bid protests are occurring more frequently than ever before. These individuals argue that the number of bid protests has increased, resulting in numerous problems, including negatively impacting DoD's reform efforts and denying needed services and products from reaching military and civilian personnel.

Although the number of bid protests has increased over the past 8 years, the rate of bid protests – when compared to the growth in expenditures for DoD contracts – has actually declined. While DoD should take steps to minimize the quantity of bid protests in the high-value, large-scale programs; we believe recent developments do not represent a growing problem within the scope of the entire DoD acquisition system.



Figure 1. The Perceived Rising Problem of Bid Protests.

## **Increase in the Number of Bid Protests**

Both public and private entities assert that bid protests are occurring more frequently. Numerous reports in the press have raised questions over why the number of bid protests lodged with the Government Accountability Office (GAO) have increased.

Government officials have also voiced concern. The House Armed Services Committee (HASC) publicly stated in its report on the 2009 Defense Authorization Act (NDAA), issued on May 16, 2008, that the Committee was worried that the submission of a bid protest was becoming pro forma in the event that a prospective contractor is rejected from the competitive range, or the award of a contract is made to another vendor. As a result, the Committee feared that the number of frivolous bid protests submitted to the GAO may be increasing (United States House of Representatives 2008). Ironically, however, the same bill included provisions that would make disputing contract awards easier by now allowing bid protests on individual task orders for contracts valued at more than \$10 million (Wingfield 2008). Further, DoD officials have also voiced concern regarding the increased use of bid protests. As indicated by an August 2007 memo, John Young, then Acting Under Secretary of Defense for Acquisition, Technology and Logistics, wrote:

*The DoD has experienced a significant increase in the number of competitive source selection decisions which are protested by industry. Protests are extremely detrimental to the warfighter and the taxpayer. These protest actions consume vast amounts of the time of acquisition, legal, and requirements team members; delay program initiation and the delivery of capability (Schwartz 2009).*

It is important, however, to note that bid protests serve several purposes. First, bid protests allow firms to lodge complaints against government procurement officials, who may have unfairly benefited one firm at the expense of the other competing firms. Second, as contracts are not automatically audited, bid protests help to enforce compliance with procurement laws and regulations. Finally, bid protests are used to correct the improper government actions as noted above.

The government established the bid protest process with the belief that by providing firms both the opportunity and direct economic interest to lodge protests, the system could effectively self-regulate. The system gives broad authority to all actual and

prospective bidders to challenge the actions of procurement officials by submitting protests to the GAO. Although government agencies are not bound by GAO bidprotest decisions – these decisions merely serve as recommendations that agencies are free to follow at their own discretion – however, GAO recommendations are rarely not implemented (Troff 2005). Firms have financial incentive, because if a bid protest is sustained, the contract could either be recompeted, or the protesting firm may be awarded a portion of the contract.

Recently, observers have warned that the bid protest system is being abused by companies that protest government contract awards as part of a strategy to negotiate their way into contracts, or to disrupt an award already in place. Some go further and assert that some firms include bid protests as a standard strategy within a company’s win plan, and firms even assess their protesting options before presenting their bids to the Pentagon. One industry source was quoted in a recent article as saying companies “have become comfortable with the fact that protesting is part of the business development cycle.” Accordingly, numerous companies are now keeping lawyers on retainer who specialize in protests (Trion 2008).

### **Focus of this Report**

Despite abundant concern regarding the increase in bid protests, should DoD be alarmed by the number of bid protests? This report will argue, based on publicly available data, that although the number of bid protests has increased in recent years, the rate of the increase in bid protests occurred at a pace that is much slower than the growth rate of spending on DoD contracts. In sum, bid protests are not a *growing* problem within the context of all DoD contracting. However, there is a valid concern regarding protests on large programs.

An examination of the overall bid protest phenomenon, however, is important since bid protests could have significant detrimental effects to the cost and schedule of affected defense programs. Our study will examine and evaluate bid protest data from fiscal year 2001 through fiscal year 2008 and use specific case studies to shed light on the current

state of bid protests across the military services and provide recommendations for moving forward. Specifically, this report will examine the extent to which protests are occurring more regularly than before; how the rate of bid protests has changed over this time period; and what some of the potential impacts of bid protests are on programs.

## ***Roadmap***

In Section Two, this paper will provide an overview of the bid protest process through the GAO. It will map the policies and procedures of a bid protest filed with GAO from start to finish of the filing. This section will also highlight the alternative mechanisms for unhappy offerors to seek redress. Next, in Section Three, we will present an analysis of the open-source bid protest data we have collected, our interpretation of the data, and its implications. In this section, data on each military service is presented. We will also provide graphical depictions of the data, along with brief summaries of key statistics regarding bid protests for each service; the reasons for bid protests; an overview of bid protests and award dollars; bid protests and program delays; and, finally, a summary of overall findings. Section Four will examine specific bid protest cases in greater detail. Each case will include background information, an overview of the contract, the items being protested, the result of the protest and our lessons learned. These cases include a review of the Logistics Civil Augmentation Program (LOGCAP) IV, the Information Technology Enterprise Solutions 2 Services (ITES-2S) program, the Iraqi Translation and Interpretation program, and the HRsolutions program. Section Five will provide “lessons learned” from our data analysis and review of the bid protest cases. Finally, Section Six will provide concluding remarks, and make recommendations for actions that should be taken to minimize future problems with bid protests.

## **Section II: Current Bid Protest Process**

There are multiple mechanisms whereby an unhappy offeror can seek remediation when contracting with the federal government. For the purposes of our study we will be focused on the activities of the bid protest process within the GAO. However, the agency-level bid protest mechanism, the Court of Federal Claims, and alternative dispute resolution also offer additional sources of remediation.

### ***Government Accountability Office Bid Protest Process***

The current bid protest process was formalized under the Competition in Contracting Act (CICA) in 1984. Under the CICA, the GAO received authority to preside over protests that concern an alleged violation of a procurement statute or regulation. Since 1985, GAO has had detailed regulations to inform protesters of the rules concerning where and how to file a protest, what to expect in the way of subsequent actions, and the time frames established for completion of those actions. In addition, GAO has impacted hundreds of contract awards by deciding on the validity of claims made against the contracting agency. Regulations from the CICA have been revised several times to implement updates from the Information Technology Management Reform Act of 1996, the National Defense Authorization Act for Fiscal Year 1996, and the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (United States Government Accountability Office 2006a).

A GAO protest must be filed by an “interested party.” In this case, an “interested party” is defined as an actual or prospective offeror with a direct economic interest in the procurement. In challenges of the evaluation of proposals and the award of contracts, an interested party would be an offeror that would potentially be in line for award if the protest were sustained. Additionally, in a public-private competitions conducted in accordance with the Office of Management and Budget Circular A-76 (which have come to be known as “competitive sourcing”)<sup>3</sup>, the official responsible for submitting the

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<sup>3</sup> Competitive sourcing occurs when a private sector firm and a government service provider compete to perform commercial activities currently performed by government employees. Just as the private sector would prepare a bid for a job, the targeted government employees form an entity, known as the Most

Federal agency tender is also considered an interested party and is permitted to file a protest (United States Government Accountability Office 2006a).

Protestors may challenge the (a) acceptance or rejection of a bid or proposal, or (b) the award or proposed award of a contract; in addition, they can protest: (1) defective solicitations that could have restrictive specifications, (2) the omission of a required provision, and (3) ambiguous or indefinite evaluation factors. Certain other procurement actions, such as the cancellation of a solicitation, may also be protested. Finally, the termination of a contract may be protested; if the protest alleges that the termination was based on improprieties in the award of the contract (United States Government Accountability Office 2006a). Protests can be deemed to “have merit” or to be dismissed. Those protests that have merit meet the minimum requirements, and are further reviewed for a final decision by GAO. Once a protest is deemed to have merit, it is reviewed in depth; and a decision is made to either sustain it, which occurs when GAO agrees with some portion of the protestor’s claims, or denies it, which indicates GAO does not find fault with action taken by the agency. Should a protest be sustained, the contracting agency is not legally required to adhere to the GAO’s decision and/or recommendations for remediation. Despite this, in almost all cases GAO’s suggestions are followed.

Because bid protests may delay the procurement of needed goods and services, the GAO strictly enforces protest-filing timeline requirements. Once the protest is filed, unless it is determined that urgent and compelling circumstances affecting the interests of the United States exist, a stay will be issued in the execution of the contract. Protests alleging a fault in the solicitation must be filed before bid opening, or the time set for receipt of initial proposals, depending on when the improprieties became apparent to the protesting party. In negotiated procurements, if an impropriety was not found in the initial solicitation but was later introduced into the solicitation by an amendment, a protest based on addition of the amendment only can be filed before the next closing time established for submitting

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Efficient Organization (MEO), to prepare a proposal; the proposals are evaluated with either the lowest cost provider or best value to the government used as the selection criteria and an award for the work is made either to the private sector or the MEO.

proposals (United States Government Accountability Office 2006a). Once the protest is filed, the GAO will notify the agency, which will then notify the party to whom the contract was awarded that a protest has been lodged. The awarding agency has 30 days to file a report citing facts, relevant law, and any documentation related to the award. Following this step, the protestor must respond within 10 days with written comments regarding the reason for the protest. Furthermore, an express option is available for a faster decision by GAO. The express option can be undertaken at the request of the protesting party or at the determination of GAO itself. Under such an express option, GAO is required to render a decision on the bid protest within 65 days (United States Government Accountability Office 2009).

While there is no prescribed form for filing a protest, it must be in writing. Protests may be filed by hand delivery, mail, commercial carrier, facsimile transmission, or e-mail. Protests should include a detailed statement of the legal and factual grounds of protest, including copies of relevant documents; all information establishing that the protester is an interested party for the purpose of filing a protest; information establishing the timeliness of the protest; the specific request for a ruling by the Comptroller General of the United States; and a statement describing the form of relief requested. In addition, a protest may include a request for a protective order if the hearing is believed to expose information the protestor deems proprietary, confidential or otherwise not releasable to the public (United States Government Accountability Office 2006a).

Besides the traditional GAO bid protest review process, flexible alternative procedures are also available. Under these procedures—either as requested by the protestor or based upon an internal GAO decision—the use of an accelerated schedule, or issuing of a summary decision for the purposes of minimizing disruptions to critical acquisitions and programs is possible. Additionally, either before or after a protest is filed, the contracting agency or the protesting party may request the protest issues be resolved using “alternative dispute resolution.” Alternative dispute resolution can involve negotiation assistance, via a GAO attorney; serving to resolve the protest issues between the parties without going through the protest process; or could include having the GAO advising the

parties on the likelihood of a successful bid protest, given the current status of their claim. Such intervention can assist the parties in coming to a successful resolution without going through the entire bid protest process and having the GAO issue a formal bid protest decision (United States Government Accountability Office 2009).

### ***Additional Sources of Remediation***

The agency-level bid protest also serves as another method for offerors to seek remediation. In 1995, Executive Order (EO) 12979 directed executive departments and agencies to prescribe internal procedures for the resolutions of internal protests. This EO enacted a policy that directed agencies to provide an inexpensive, informal and quick resolution of protests by allowing both actual or prospective offerors, who hold an economic interest in the disputed contract, an opportunity to have the decision reviewed at a level above the contracting officer (CO)—in cases where it is believed the CO violated a statute or regulation in an award decision, causing prejudice to the protesting party. Under the terms of this EO, unless urgent and compelling reasons are justified, the award or performance of the contract is prohibited while being protested at the agency level. The protest must be filed within 10 days of contract award or within 5 days of agency debriefing (President of the United States 1995).

Additionally, the United States Court of Federal Claims (COFC), created in 1982, is an alternative option to filing a bid protest. The COFC has jurisdiction to consider both pre- and post-award bid protests, and has jurisdiction over suits brought by disappointed bidders on government contracts. Although a provision of the Administrative Dispute Resolution Act of 1996 gave the Court of Federal Claims and U.S. districts courts concurrent jurisdiction over post-award protests, subsequent legislation provided that, as of January 2001, the COFC would be the exclusive judicial forum for bid protest litigation. The COFC handles suits where it can enjoin the award or performance of a government contract (Metzger 2008). The Competition in Contracting Act of 1984 explicitly provides that any interested party or protester retains the right to file a protest directly with the contracting agency or to file an action in the COFC. In the event a bidder files with the COFC, the CICA allows for the GAO decision and the agency

record produced for the GAO protest to be considered to be part of the agency record and subject to review. The COFC's exclusive jurisdiction over both contract-award protests and contract-performance disputes gives it a unique perspective, allowing principles from one area of procurement law to inform its decisions in the other. The COFC is traditionally not the preferred method for resolving contract disputes because it is a more formal process (a protester must draft, file, and serve a formal complaint to which the agency responds with a formal answer); and it is not as timely; but, unlike the GAO, the COFC can enforce its rulings (Metzger 2008).

## Section III: Bid Protest Data Analysis

To examine the bid protests that have taken place within the DoD, we collected data from GAO bid protest decisions and reports, DoD reports and press releases, as well as corporate press releases and other publically-available sources of information. We focused on bid protests that occurred between FY2001 and FY2008; and, in the end, we collected data on 5,763 bid protests. The data were segregated by military Service, the Defense Logistics Agency, and all other DoD organizations.<sup>4</sup> We also examined the total number of dollars spent on contracts for the same period, because we believe this is an additional factor that must be considered when examining any change in bid protests.

| FY           | Total DoD<br>Protests | DoD<br>Merits | DoD<br>Sustains |
|--------------|-----------------------|---------------|-----------------|
| 2001         | 603                   | 174           | 40              |
| 2002         | 667                   | 157           | 22              |
| 2003         | 704                   | 184           | 32              |
| 2004         | 731                   | 213           | 36              |
| 2005         | 706                   | 154           | 28              |
| 2006         | 739                   | 151           | 38              |
| 2007         | 775                   | 200           | 62              |
| 2008         | 838                   | 133           | 30              |
| <b>Total</b> | <b>5763</b>           | <b>1366</b>   | <b>288</b>      |

**Figure 2. Bid Protests, Merits and Sustains—from FY01 to FY08.**

### *Data Analysis*

Of the total of 5,763 bid protests filed with GAO during this period, 4,397 were dismissed, and 1,366 (23.7 percent) were found to have merit. Of the protests with merit, 1,078 (78 percent) of the protests were denied and 288 (21 percent) were sustained. As a total, less than 5 percent of bid protests originally filed were ultimately sustained, after going through the entire GAO bid protest process.

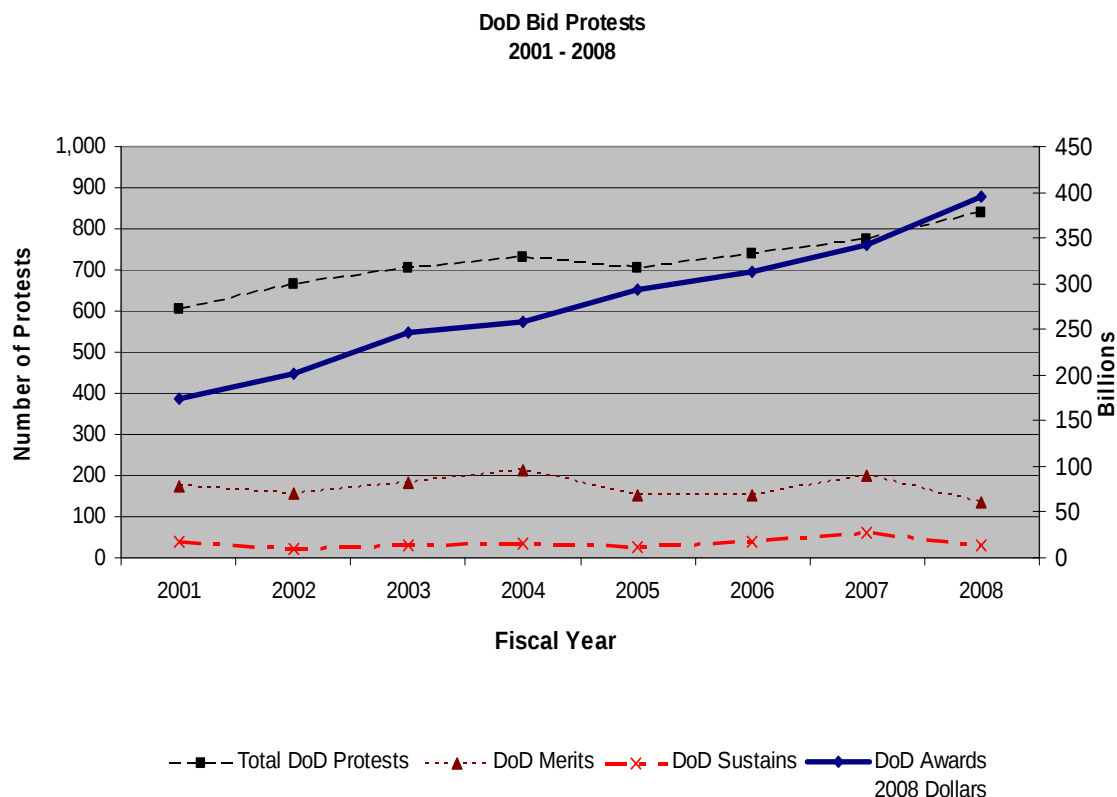
When considering the raw data, there has been a real increase in the overall bid protests for DoD, from approximately 600 in 2001 to approximately 840 in 2008 (as indicated by Figure 3 below). This is an increase of approximately 40 percent over the studied period.

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<sup>4</sup> While data was segregated by all Services along with the DLA and other agencies, detailed data analysis was only undertaken for the Services, since they represent an overwhelming majority of bid protests.

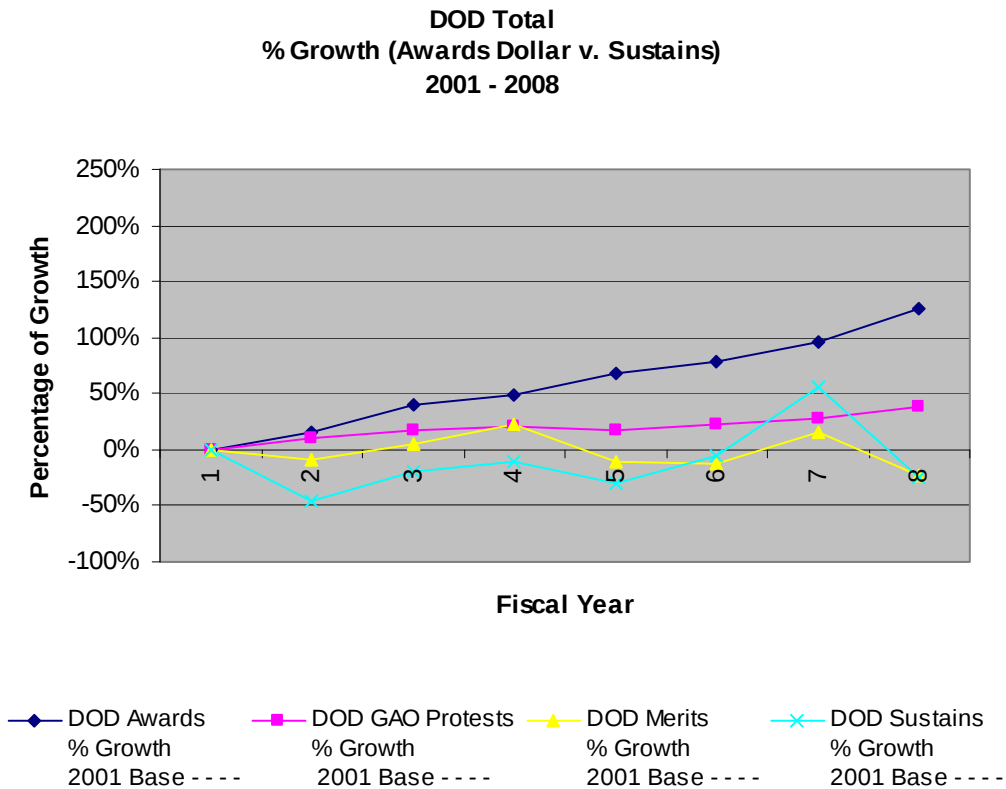
On the surface, this supports the conclusion that there has been growth in the number of bid protests. However, one must also consider the value of DoD contract awards which increased by approximately 126 percent during the period (\$175 billion to \$395 billion when adjusted for 2008 dollars), as reported by the government website USA Spending. Under these conditions, DoD-wide, the rate of bid protests, in real terms, decreased from a rate of 3.43 protests per billion dollars contracted, to 2.13 protests per billion dollars contracted, during the period of review.

The number of bid protests deemed to have merit, however, did not follow the total-number-of-protests growth trend; and, in absolute terms, decreased 24 percent, compared with the FY2001 base year. Likewise, the number of bid protests that have been sustained did not show any significant growth trend; and, in absolute terms, decreased by approximately 25 percent compared with the FY2001 base year. It should also be noted that during the FY01-FY08 period, only one year, FY2007, was found to have an increase in sustained bid protests compared with the base year.



**Figure 3. DoD Bid Protests, Protests with Merit, Sustained Protests and Contract Dollars Awarded.**

These trends can be more clearly seen when we plot the change, using 2001 as the base year (Figure 4).

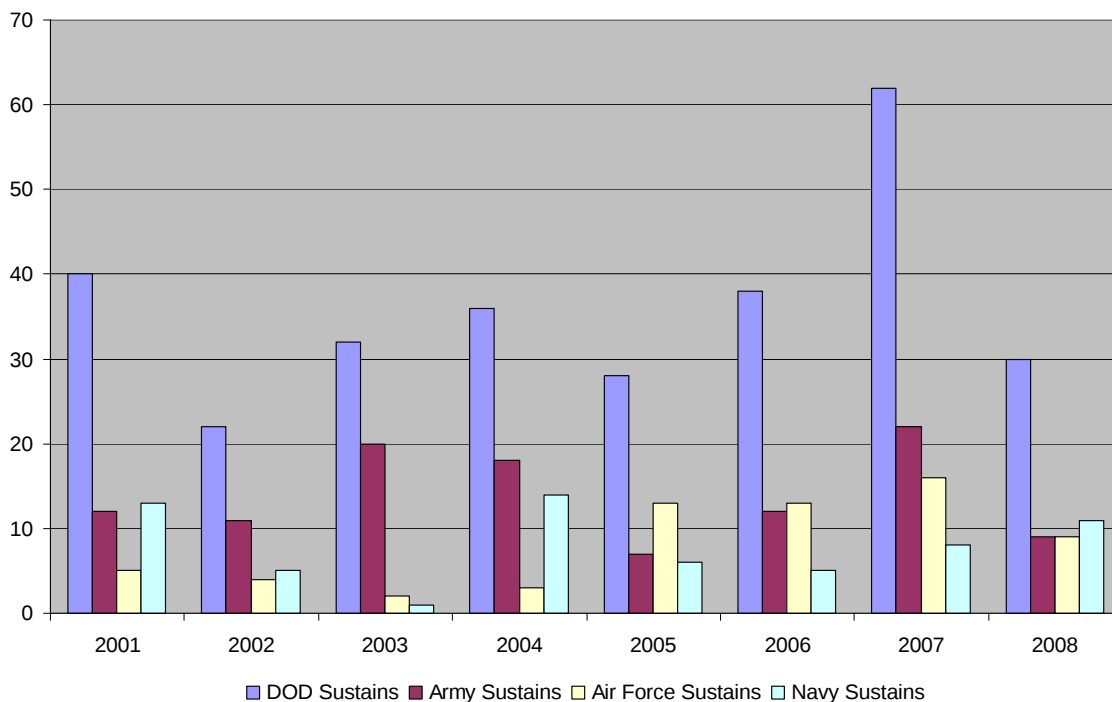


**Figure 4. Percentage Growth in Awards, Protests, Merited Protests and Sustained Protests.**

Thus, although there was an increase in the absolute number of bid protests overall, when viewed within the context of the increased amount of DoD dollars contracted, one can conclude that this increase is related to the increase in contract activity; and that the rate of bid protests per billion dollars contracted, decreased. Likewise, as indicated by Figure 2, the number of protests that were deemed to have merit during the FY01 through FY08 period were only a small fraction of the total. In addition, no visible upward trend is indicated in the number of bid protests that were sustained between FY01 and FY08. In fact, no upward trend in bid protests with merit, or those that are sustained, can be found in the data we collected, when examined within the context of DoD's increased spending.

## ***Detailed Analysis of Military Service Sustained Protests***

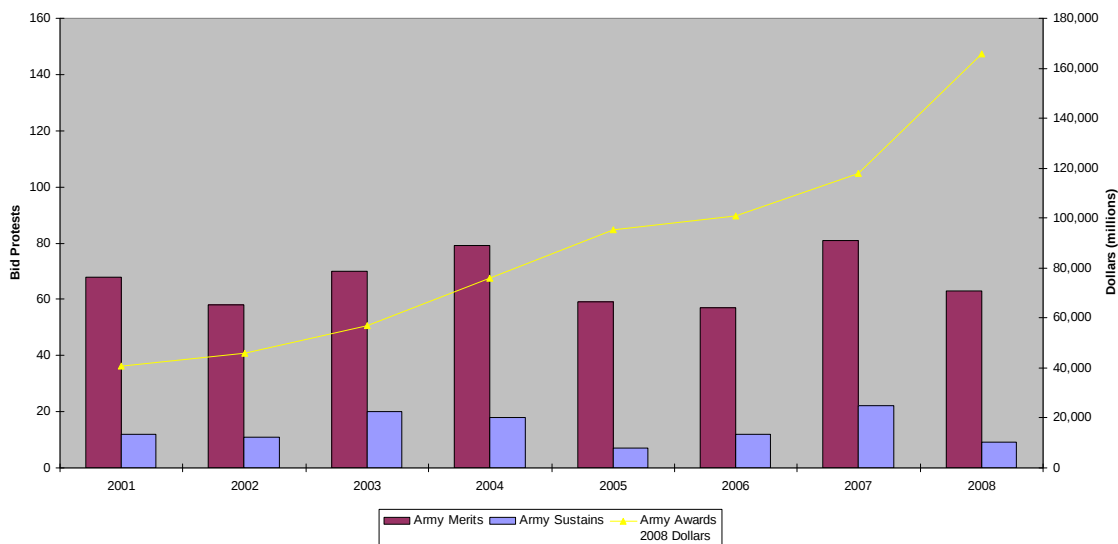
Next, a more detailed analysis of those Service protests that were sustained was conducted. We believe that a more detailed examination of sustained bid protests is important. Although all protests can have a negative impact, sustained protest potentially have the greatest negative effect on programs. Moreover, sustained bid protests identify those awards that the GAO acknowledges had a legitimate (and potentially avoidable) issue. As a result, sustained protests are those that agencies have the most control over remedying in order to avoid potential future problems; thus making the greatest and most immediate impact to the bid protest problem without any external intervention. In other words, if an agency works to reduce mistakes throughout the procurement process, fewer protests will be sustained and the consequences of sustained protests will be minimized. Additionally, focusing on sustained protests permitted us to refine our examination with a more limited data set. The distribution of bid protests that were sustained by GAO were broken down by military service (see Figure 5).



**Figure 5. Distribution of Sustained Bid Protests by Service.**

### ***Bid Protests and the Army***

Based upon the merit and sustain decision data collected—even at the individual service level—the data do not indicate a steady increase of bid protests when examined within the context of increased spending. For example, when looking at the Army, as indicated in Figure 6, even when dollars contracted increased as a result of Operations Iraqi and Enduring Freedom, those protests that GAO determined had merit, and those that were eventually sustained, followed no particular pattern and ultimately ended up declining to their second lowest point during the period by FY08 (9 protests were sustained in FY08 versus 12 in the base year and a low of 7 in 2005). Moreover, both the number of protests with merit and those sustained decreased significantly as a percent of the total dollars awarded over this time period.

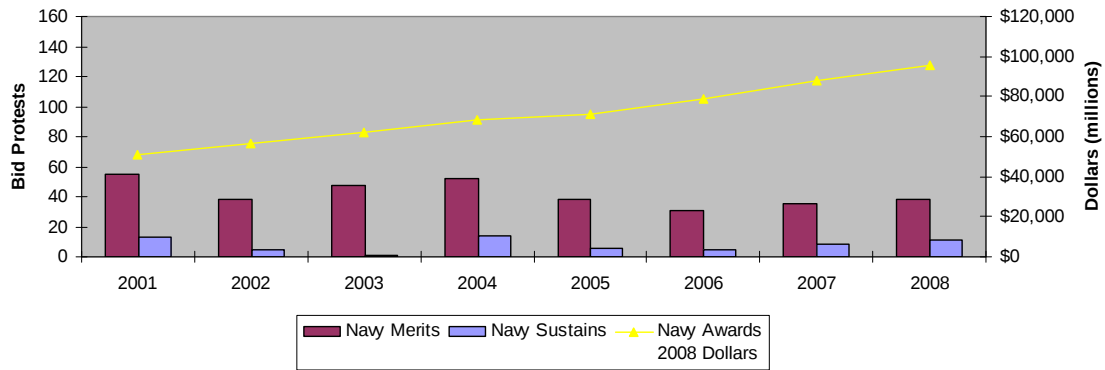


**Figure 6. Army Protests with Merit and Sustained Compared to Dollars Contracted.**

### ***Bid Protests and the Navy***

When looking at the Navy, as indicated in Figure 7, from 2001 through 2008, protests deemed to have merit declined and protests sustained remained relatively flat, even as dollars the Navy contracted steadily climbed. In fact, in 2008, with a 90 percent increase

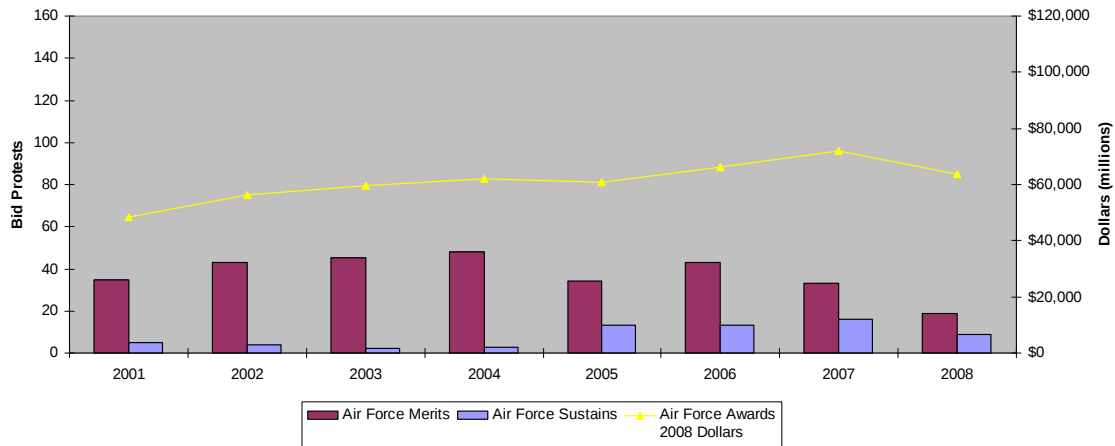
in the dollars contracted over that in the base year FY2001 (roughly \$50 billion in 2001 versus \$95 billion in 2008), the number of sustained protests was 15 percent lower than the base year.



**Figure 7. Navy Protests with Merit and Sustained Compared to Dollars Contracted.**

### ***Bid Protests and the Air Force***

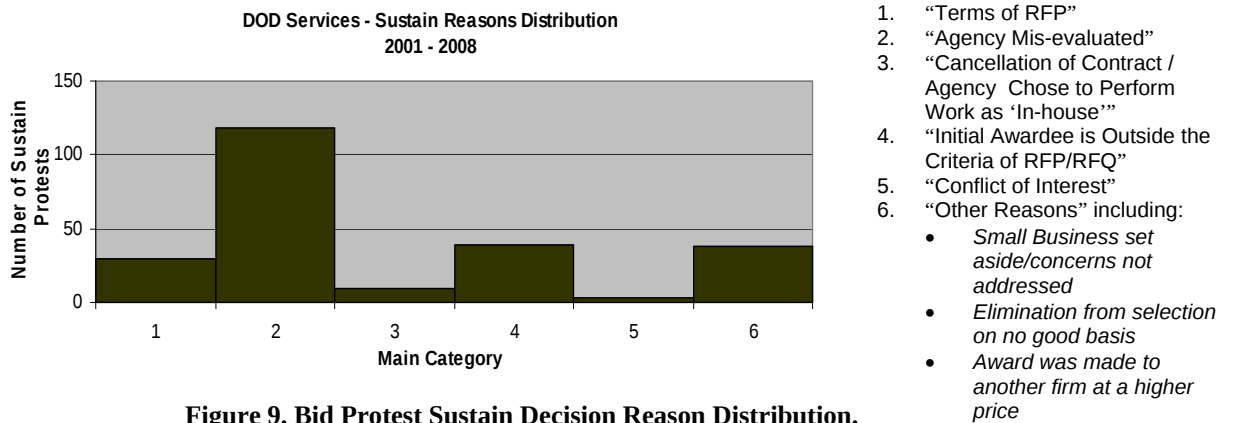
Finally, when looking at the Air Force, as indicated in Figure 8, while the dollars contracted steadily rose, between the base year and FY2008, bid protests with merit actually decreased significantly (from 35 in the base year, with a high of 48 in FY2004, and a low of 19 in FY2008). Sustained bid protests, on the other hand, increased between FY2005 through FY2008, as compared with FY2001 through FY2004. However, when taking a closer look at this increase, a major contributing factor to the larger number of sustained protests during the FY2005-FY2008 period was actually a function of three specific programs that yielded some 8 sustained protests each, during FY2005, FY2006, and FY2008 respectively. These programs included the KC-X tanker program, the C-130 Aviation Modernization program and the Bilingual-Bicultural Advisor/Subject Matter Experts (BBA-SME) program in Iraq.



**Figure 8. Air Force Protests with Merit and Sustained Compared to Dollars Contracted.**

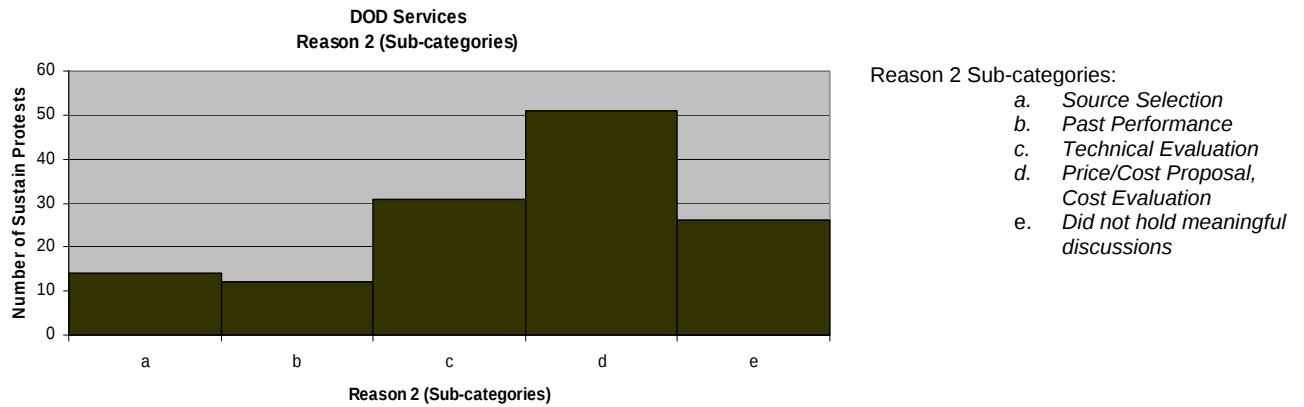
### ***Reasons for Bid Protests***

In an effort to better understand the reasons for the sustained bid protests, the reasons were categorized using six internally-derived classification categories. As can be seen from Figure 9, the primary reason that protests were sustained was due to some type of agency misevaluation.



**Figure 9. Bid Protest Sustain Decision Reason Distribution.**

Since agency misevaluation is such a broad category, it was further broken down into additional subcategories, as noted below in Figure 10.

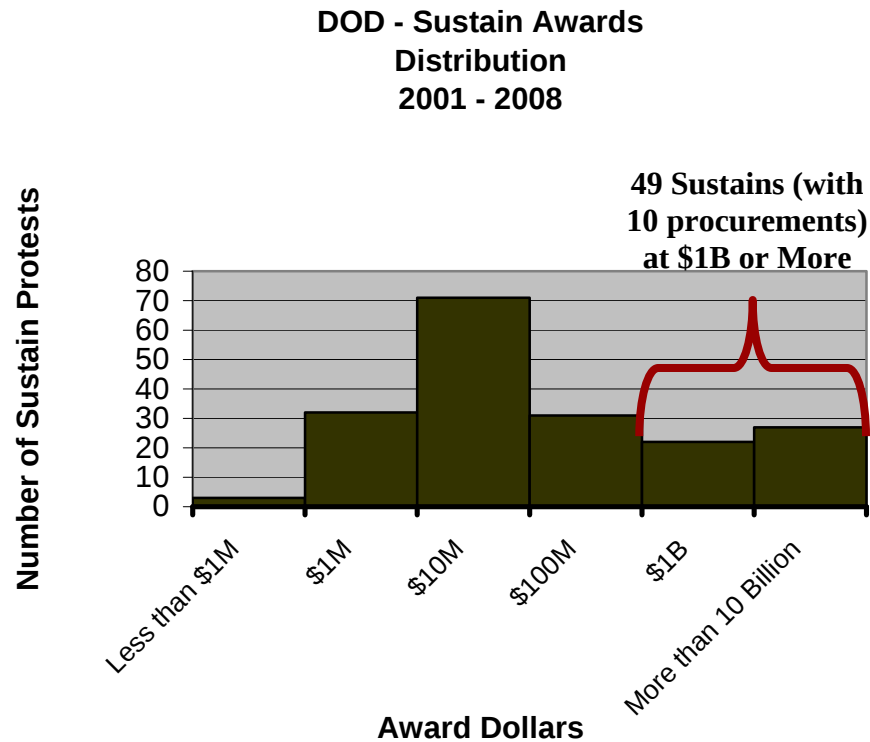


**Figure 10. Distribution of Sustain Decisions by Agency Misevaluation Sub-category.**

Of the agency misevaluation subcategories, “Price/Cost Proposal, Cost Evaluation” occurred most often as the specific reason that bid protests were sustained. These accounted for approximately 38 percent of the sustained protests. When the top three sub-categories (Technical Evaluation; Price/Cost Proposal, Cost Evaluation; did not hold meaningful discussions) are considered, they provide the reasons for nearly 81 percent of the reasons for sustained bid protests due to Agency mis-evaluation (within the three Services)<sup>5</sup>.

<sup>5</sup> Bid protests sustained under Reason 2 could have been sustained under multiple Reason 2 subcategories. As a result, the total sustains from Reason 2 subcategories in Figure 11 outnumber the total number of Reason 2 sustain decisions in Figure 10.

## ***Bid Protests and Award Dollars***



**Figure 11. Distribution of DoD Sustain Decisions by Award Dollars.**

Finally, when the distribution of the Services' sustained protests, based on the dollar value of the contract awards was examined we were able to uncover important findings. For some context, one must consider that for the years FY2001 through FY2008 the Department of Defense completed approximately 7,700,000 contracting actions. Within this context, as can be seen in Figure 11, the largest number of sustained protests (71) occurred for contracts valued between \$10m and \$100m.

From our analysis of sustained bid protests, we found a significantly increased risk of large programs having a sustained bid protest. For our study period, there were 49 GAO sustained protests, associated with 10 procurements valued at \$1 billion or more equating to roughly 4.9 sustained protests per procurement (several of the procurements had

multiple awards).<sup>6</sup> Further, during this period there were only 61 contracts awarded for amounts of \$1 billion or more.

### ***Program Delays***

A final aspect of bid protests we analyzed was program delays. Based on our analysis of 22 procurements valued at \$100 million or more, the average delay was 461 days; with the longest delay being nearly 3 years (1012 days), and the shortest delay being 0 days (in the case of the Air Force's C-130 Avionic Modernization Program, since Boeing, the incumbent and the award winner, was able to continue executing the existing contract during the protest period). Further, of 8 programs valued at \$100 million or more, the average delay was 458 days. For 14 programs, valued at \$1 billion or greater, the average delay was 466 days.

These delays can create severe schedule and budget penalties for DoD. In the case of the CSAR-X helicopter, for example, it could be argued that the delay (of some 999 days) ultimately influenced the decision to cancel the program. The CSAR-X, or the Combat Search and Rescue helicopter acquisition, had been going on for quite sometime. While the Air Force initially set out to find a quick solution to update the aging HH-60 rescue helicopter, the acquisition of its replacement became highly visible and controversial, as the Air Force struggled to manage the awarding of the contract. Additionally, as programs take longer to get underway, costs increase. Costs of materials, labor and investments in equipment for manufacturing, by the contract award winner, will increase over time as a result of the delay; eventually resulting in greater costs for DoD.

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<sup>6</sup> For the purposes of our data analysis we included the potential maximum value for ID/IQ contracts if all options were exercised. For example, for LOGCAP IV the maximum contract value was \$5 billion per year, per contractor (potentially \$50 billion per contractor over the ten year contract period). We used that value as oppose to the nominal value of the signed contract.

## ***Findings***

### **1. Protests have increased, but at a rate significantly less than the growth in DoD contract spending.**

Based on our review of the data we collected, we conclude that although there has been an increase in bid protests, when examined in relation to the increase in DoD spending, overall bid protests have increased at a rate significantly lower than the increase in total DoD spending on contracts. When the protests that had merit, and those that were sustained, were evaluated, there was no significant increase (even when examining the absolute numbers of protests); so the number of protests with merit per dollar was actually declining. We further conclude that, in general, bid protests are not a growing problem within the context of DoD contracting overall.

### **2. Large programs have the greatest risk of having a sustained protest.**

Another major finding from our data analysis was the increased risk of large programs having a sustained bid protest. For those contracts that were awarded for amounts of \$1 billion or more (61 total) there were 10 procurements that were protested; and of these 10 procurements, there were 49 GAO sustained protests; or roughly 4.9 sustained protests per procurement. Such a finding is significant as it indicates just how many potential sustained bid protests can occur to delay a large program. Further, multiple bid protests for the same program are a very frequent occurrence when the protestors are seeking such a high-value contract award.

### **3. Reasons for sustained protests.**

We believe a careful evaluation of sustained bid protests is critical, when discussing the overall state of bid protests at DoD. All protests have a negative impact, but, clearly, sustained protests can have the greatest impact on DoD programs. Moreover, sustained bid protests identify those awards that the GAO acknowledges had a legitimate, potentially-avoidable problem.

For the Services to successfully correct the internal causes of sustained protests, the reasons for sustained protests must be identified. Based on the categorization of reasons for sustained bid protests, “Agency Misevaluation” was determined to be the primary cause, by a significant margin. When broken into subcategories within the “Agency Misevaluation” category, it was “Price/Cost Proposal Evaluations” and “Technical Evaluations” that were the two greatest reasons for protests within this category, being cited more than half the time, over all other types of “Agency Misevaluation.” The Services and Defense Agencies must continue to work to minimize these causes of bid protests.

**4. For those programs that are affected by sustained protests, the impact can be significant.**

Both delays and the added costs of responding to a bid protest can take a major toll on the program. While our data analysis did not find an increase in the rate of bid protests when examined in light of increased spending, it must be realized that for those programs which receive sustained protests the impacts can be very significant. We believe therefore, the primary focus should be on fixing errors most commonly found in those bid protests that have been sustained. Furthermore, we believe a DoD-wide effort to discourage frivolous bid protests would also be beneficial.

## Section IV: Cases

In the following section we provide an in-depth review of four case studies. We believe the first three case studies (the LOGCAP IV, ITES-2S, and Iraq Translation and Interpretation program) provide a window into the specific types of problems that are typically experienced in large programs that have sustained bid protests. Finally, we use the fourth case study (HRsolutions) to demonstrate, that in limited instances, there can be an apparent abuse of the bid protest process, with resultant negative impacts on the program.

### ***Logistics Civil Augmentation Program (LOGCAP) IV Bid Protest***

Following the Vietnam War, Army leadership realized its forces needed to shed support responsibilities to allow more of its soldiers to be allocated for fighting wars. One mechanism for achieving this goal was a realignment of responsibilities within the supply chain, by relieving the Army of certain duties and assigning them to the private sector. By hiring contractors to perform food service operations, housing and facility services and management, or professional maintenance and repair, in this way, Army personnel



could focus explicitly on warfighting, thus maximizing combat fighting power.

Through the use of contractors that specialize in specific support functions, the military can increase efficiency, provide continuity for unit rotation cycles, and reduce overall costs. In addition, less overall support is required for a military unit as a whole, as realignment of

responsibilities reduces the need for people in uniform—and, thus, for their support (United States Army 2008a).

## Overview of LOGCAP IV Bid Protest

The Logistics Civil Augmentation Program (LOGCAP) was established by the U.S. Army on December 6, 1985 as an initiative to manage the use of civilian contractors who perform services in support of DoD missions during times of war and other military mobilizations. The use of LOGCAP contracts augments combat support and combat service support to military forces.

LOGCAP is the principal means by which contractors are currently providing logistics support for the U.S. Army in locations around the world<sup>7</sup>. Force sustainment responsibilities carried out under this program have included the Multinational Force-Iraq, and support to a host of various U.S. Government civilian agencies, such as the Iraqi Survey Group, Coalition Provisional Authority, Threat Analysis Agency, and the U.S. Department of State. Since its inception, the total amount awarded under LOGCAP contracts I, II and III is valued at nearly \$33 billion, with just under \$1 billion spent for LOGCAP I and II and some \$32 billion obligated for LOGCAP III as of July 2009 (Parsons 2009). Moreover, LOGCAP provides a majority of its services under harsh and hostile conditions; a feat considered to be unparalleled by many within the defense community and the Pentagon (United States Army 2008a). The LOGCAP contract is managed by the Army's Sustainment Command, and it has been re-competed three previous times. Re-competing the contract often encourages innovation and enables the government to get the most value. Because each of the LOGCAP awards are very large (in both volume of work and dollar amount), they are highly contested.

When LOGCAP was first introduced, the Army sought to create a logistics support program that would permit its forces to reach their maximum combat potential. Some support must be provided by external resources to accomplish this goal; for example, when the U.S. is engaged in military operations abroad, it relies on host nation support (HNS). LOGCAP was specifically designed to provide a secondary mechanism for support during military mobilization, and in various "wartime conditions" (defined as anything from heightened international tensions through a declaration of war) by

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<sup>7</sup> LOGCAP contracts have been previously awarded for work in Rwanda, Haiti, Saudi Arabia, Kosovo, Ecuador, Qatar, Italy, southeastern Europe, Bosnia, South Korea, Iraq, and Kuwait.

capitalizing on the private sector within the continental United States (CONUS) and overseas locations (United States Army 1985).

The original LOGCAP concept was for each of the Army's Unified Command components to individually plan, and contract for, its own logistics and engineering services. However, some seven years after the initial inception of this strategy, the model was modified to allow LOGCAP to serve as a single, centrally-administered, global planning and services contract (United States General Accounting Office 1997).

LOGCAP I was awarded to Brown and Root Services in 1992; subsequent tasking included supporting the Army in numerous locations, including combat operations in the Balkans. The follow-up contract, LOGCAP II, was awarded to Dyncorp in 1997. However, the U.S. Army in Europe preferred Brown and Root for its Balkans support operations, and the Army awarded Brown and Root a sole-source support contract for that purpose during the same year (Congressional Budget Office 2005). While these contracts did provide support services, they were not nearly the size or scale of the follow-on LOGCAP III and IV contracts.

LOGCAP III was awarded in December 2001, and had a total contract value of \$32 billion, as of July 2009 (Parsons 2009). It was a single, Indefinite Delivery/Indefinite Quantity (ID/IQ) contract awarded to KBR (the successor company to Brown and Root), for a period of one year, with nine one-year options. The pricing was based on a cost-plus-award fee model (Thompson 2006). Many sources, including Congress, had questioned the contract. In particular, inconsistent accounts of the contractor's role portrayed it as a sole-source award; even though the initial contract award was competed. Additionally, issues with prices and audits of KBR's work, claim investigations "have been unable to fully account for millions of dollars of those funds or justify all charges to the Pentagon's full satisfaction." Consequently, after five years, the Army decided to re-compete the effort under what would be known as LOGCAP IV, using a new approach to the program (Defense Industry Daily 2006).

With LOGCAP IV, the Army modified its acquisition strategy, and planned to award contracts to several firms to enable competitive bids on each of the task orders. The

Army would award up to three Indefinite Delivery/Indefinite Quantity (ID/IQ) contracts, with a base period of 1 year, and nine one-year options; with a maximum of \$5 billion per year for each contract, for a total estimated maximum value of \$150 billion. The RFP required each selected contractor to maintain a core program office, and specified that multiple task orders (TOs) would be issued during the performance period; with each of the TOs being competed among the three overall LOGCAP awardees. Finally, the contracts could be awarded using Firm Fixed Price, Fixed Price Incentive, Cost Plus Award Fee, Cost Plus Fixed Fee, Cost Plus Incentive Fee, Cost Plus No Fee, or Time and Materials Task Orders (United States Government Accountability Office 2007d).

In order to effectively evaluate the initial proposals, the offerors were each presented with a fictional logistics support scenario, and each contractor's response was assessed on how well it could provide quick support in a real-world environment. The offerors were required to provide bids and plans for construction and provision of 22 Combat Service Support (CSS) functions, including the provision of



supplies, transportation, life support, and maintenance support to U.S. forces in a fictitious contingency combat environment located within Sierra Leone. The scenario also outlined numerous variables about the situation that the contractors would encounter, such as the political and economic stability of the region. Offerors were to respond to this scenario by using a technical execution plan (TEP) which would detail their execution methodology, staffing and mobilization plans, and provide a complete overview of each contractor's approach to meet the scenario requirements.

Further details delineating the scope of work were included, such as a requirement calling for the establishment and operation of an aerial port of debarkation, and a forward operating base (FOB) capable of supporting a total population of 600 people. The level of required support was also detailed. For example, offerors were to “account for the

provision of retail fuel support at all bases for U.S. forces and U.S. inter-agency use, as well as personal hygiene facilities such as latrines, showers, and wash stands” (United States Government Accountability Office 2007d). Required timelines for providing responses to the scenario, were also specified. For example, a Contractor Advance Team (CAT) was required to be on the ground at the port of debarkation within 72 hours, and overall mission support was to begin within 30 days of the request. Plans to address these requirements had to be incorporated into the offerors’ proposals, and accounted for appropriately in their determination of resources and price proposals (United States Government Accountability Office 2007d).

To make the scenario as realistic as possible, the Army varied its requirements to see how effectively offerors would respond to changes. To let the bidders prepare, the initial RFP indicated that during the course of the procurement they would receive a technical change to the scenario through an amendment to the solicitation. This new requirement was to be addressed in the same way as described for the initial scenario. The change that was issued by the amendment called for the establishment and operation of a sea port of debarkation and five additional FOBs, as well other construction activities and 69 CSS functions, supporting a total of 11,500 people at eight locations. This added requirement thus served as a fairly major increase in size and scale of the operation (United States Government Accountability Office 2007d).

Proposal estimates were to include a comprehensive explanation of the proposed labor, equipment, materials and other direct costs for the scenario, including a detailed description of the methodology used for determining the types, amounts, and costs of the resources selected to complete the work (United States Government Accountability Office 2007d). The purpose of such detail was to allow the Army to examine the rationale used to derive the contractors’ estimates. The Army used this information to evaluate how the contractor would deliver estimates on future task orders.

## **Award Evaluation**

The Army made it clear that awards would be given to the contractors with proposals that were determined to provide the best value to the government. The Army would use

evaluation factors that included management, past performance, technical (scenario), and price. The price estimates would be evaluated to see if they were realistic for the completion of the proposed task (United States Government Accountability Office 2007d).

It was also made clear that proposal evaluations would consider the management evaluation factor to be “moderately” more important than the evaluation results under either of the equally-important past performance and technical factors. Evaluation of past performance and technical factors individually would also be considered moderately more important than final price estimates. These stipulations clearly indicate that price would be the evaluation factor given the least weight (United States Government Accountability Office 2007d).

In response to the RFP, the Army received proposals from five offerors, including: Fluor, Kellogg, Brown and Root Services Inc. (KBR SI), DynCorp, IAP, and Contingency Management Group, LLC. (CMG). After the initial evaluation, all proposals were deemed to be within the competitive range; an overview of their evaluations is provided in Figure 12. The Source Selection Authority (SSA) determined that the proposals submitted by Fluor, KBR SI, and DynCorp represented the best value to the government, and contracts were consequently awarded to those firms.

|                   |                                                        | CMG                | IAP                | FLUOR              | KBR                | DYNCORP            |
|-------------------|--------------------------------------------------------|--------------------|--------------------|--------------------|--------------------|--------------------|
| <b>Management</b> |                                                        | <b>Outstanding</b> | <b>Outstanding</b> | <b>Outstanding</b> | <b>Outstanding</b> | <b>Outstanding</b> |
|                   | Capability, Approach, Experience                       | Outstanding        | Outstanding        | Outstanding        | Outstanding        | Outstanding        |
|                   | Business Systems                                       | Good               | Outstanding        | Outstanding        | Outstanding        | Outstanding        |
|                   | Small Business Participation                           | Outstanding        | Outstanding        | Outstanding        | Outstanding        | Outstanding        |
| <b>Technical</b>  |                                                        | <b>Outstanding</b> | <b>Acceptable</b>  | <b>Good</b>        | <b>Good</b>        | <b>Outstanding</b> |
|                   | Feasibility & Completeness of Scenario Change          | Outstanding        | Acceptable         | Good               | Good               | Outstanding        |
|                   | Ability to Handle Requirements Changes to the Scenario | Outstanding        | Acceptable         | Good               | Good               | Outstanding        |
| <b>Past Perf.</b> |                                                        | <b>Low Risk</b>    | <b>Low Risk</b>    | <b>Low Risk</b>    | <b>Low Risk</b>    | <b>Low Risk</b>    |
| <b>Cost/Price</b> |                                                        | <b>\$335.8M</b>    | <b>\$237.4M</b>    | <b>\$152.8M</b>    | <b>\$155.2M</b>    | <b>\$275M</b>      |
|                   | PMO                                                    | \$14.9M            | \$11.7M            | \$4.1M             | \$10.3M            | \$15.6M            |
|                   | Scenario                                               | \$320.9M           | \$225.7M           | \$148.7M           | \$144.9M           | \$259.4M           |

**Figure 12. LOGCAP IV Award Evaluations** (United States Government Accountability Office 2007d).

## The Protest

Shortly following the contract awards, protests were submitted by CMG and IAP, arguing that the award was improper, based on three issues: 1. The Army failed to conduct meaningful discussions during the proposal process; 2. the Army's misevaluation of the proposals under both the technical and cost factors; and, 3. the Army's misevaluation of KBRSI's and CMG's proposals under the business systems sub-factor to the management evaluation factor. While not addressing all of the specific issues raised by the protesters (such as the claim that the Army failed to conduct meaningful discussions during the proposal process), the GAO sustained the bid protests on the following basis:

1. Evaluation of Fluor's technical proposal
2. Evaluation of KBRSI's technical proposal
3. Evaluation of KBRSI's management proposal

### **1. Evaluation of Fluor's Technical Proposal**

The first factor that was considered significant by the GAO in its review of the bid protest was the variation in the evaluation of Fluor's technical proposal by the Army. The government is required to treat all offerors equally, and the GAO considered it improper conduct for the Army to base its award decision on a proposal that was based on incorrect and/or inconsistent assumptions.

Specifically, one of Fluor's stated assumptions was that there will be a period of time between the award of the task order and the notice to proceed. The protestor, CMG, argued that the Army's acceptance of this assumption allowed Fluor to use it to its advantage in the development of its technical and cost proposals (ultimately allowing for \$40m lower freight costs), a markedly different proposal than that of all other offerors. Despite this fact, the Army claims it did not possess any evidence indicating that it was aware of the difference in Fluor's technical execution plan, or the difference in Fluor's assumptions:

*"Rather, the Army explains that, in its view, because Fluor's TEP proposed the use of a regional equipment supplier, in addition to shipping certain materials and supplies from its proposed base of operations in [DELETED], Fluor's proposal was built so that if the TO award and NTP were issued simultaneously, Fluor would meet all scenario milestones" (GAO 2007).*

In our interviews with Army personnel working directly in the proposal process, they indicated that Fluor's assumption for the scenario, with respect to the period of time between the TO and NTP, appeared to be an administrative oversight. Specifically, they noted that the incorrect assumption appeared to be an oversight that was reflected in the proposal when it was considered in its entirety (Loehrl 2009). They believed that it was most likely overlooked during corrections of proposals, after the question and answer period. Finally, it was noted that the Army's interpretation of the matter could be

supported by the fact that Fluor's cost proposal did not reflect the period of time noted in their technical proposal. In other words, the assumption that there would be a delay was not even used consistently as the basis for Fluor's final cost estimates.

Despite this, the GAO concluded that regardless of whether or not the Army was aware of the assumptions being used as the basis of the cost estimates, the assumptions must be consistent with the terms of the scenario as adhered to by the other offerors. With this consideration, the Army's acceptance of Fluor's proposal under its different basis of assumptions was considered improper and unfair to the other offerors (United States Government Accountability Office 2007d).

## **2. Evaluation of KBRSI's Technical Proposal**

The second factor that was reviewed by the GAO, and found to be significant, was the evaluation of KBRSI's technical proposal. In this case, KBRSI submitted information which stated that its technical response plan included the use of a local supplier to lease heavy equipment needed for mission execution. By leasing the heavy equipment locally, shipping costs decreased substantially for KBRSI. In light of this fact, both protesters argued that KBRSI's proposed use of this heavy equipment subcontractor was unreasonable because it could not be proven that the proposed subcontractor "has or can provide the type of heavy equipment necessary for this mission, in Sierra Leone or anywhere else" (United States Government Accountability Office 2007d). As a result, the GAO concluded that the Army failed to treat all offerors equally, as it did not evaluate proposals based upon common requirements and/or assumptions.

## **3. Evaluation of KBRSI's Management Proposal**

The third issue raised by the protesters and addressed by the GAO was the evaluation of KBRSI's management proposal. Specifically, they argued that the Army's evaluations of the proposal as "outstanding" under the business systems subfactor and "outstanding" overall, under the management evaluation factor, were unreasonable in light of a recent Defense Contract Audit Agency (DCAA) evaluation.

The Army requested that DCAA perform an audit of KBRSI's proposal to assess the strength of the contractor's internal controls. DCAA released their report in April of 2007, ultimately concluding that KBRSI's budgeting and planning systems were in compliance. However, a number of concerns were expressed with regard to KBRSI's accounting system, estimating system, purchasing system, and billing system, which were further supported by previous DCAA audits of the same systems that had very similar findings. Despite this report, the Army's proposal evaluation rated KBRSI's business systems "outstanding."

The Army responded by claiming that it actually considered all of the DCAA findings in its evaluation of KBRSI's business systems. In its review of the issue, the GAO concluded that the Army's rating of "outstanding" was inconsistent with a conducting a thorough evaluation of all available resources, including the DCAA audit (United States Government Accountability Office 2007d). However, Army representatives believed the differences in types of evaluations made and the purposes of each used by the auditing agencies were not consistent with the intent of the Army's proposal evaluation; thus, they maintained that this was the reason for the different ratings (Loehrl 2009).

### **HCN Evaluation**

Finally, while not sustained, the GAO responded to the protesters claim that the solicitation was flawed and misleading in its explanation of the requirements for the use and mix of host country nationals (HCNs), third country nationals (TCNs), and/or U.S. nationals (ExPats) in the offerors responses to the scenario. Each offeror's technical execution plan was to include, among other things, a staffing and mobilization plan that included the break down of HCN, TCN and ExPat labor to be used in the offerors response. As indicated in the Figure 13 below, offerors provided a range of varying strategies for the usage of labor.

|       | IAP | CMG | Fluor | KBR | DynCorp |
|-------|-----|-----|-------|-----|---------|
| HCN   | 82% | 47% | 57%   | 62% | 21%     |
| TCN   | 0%  | 32% | 36%   | 31% | 64%     |
| ExPat | 18% | 21% | 7%    | 7%  | 15%     |

**Figure 13. HCN, TCN, and ExPat Labor Distribution.**

The GAO rejected this claim and supported the Army’s evaluation, concluding that the necessary information regarding the use of HCNs was provided in the RFP and was also reflected in the agency’s discussions with the offerors. The major finding by the GAO was that, in this case, explicitly defined ratios of HCNs to TCNs and ExPats could have been considered to minimize risk, and be technically acceptable (United States Government Accountability Office 2007d). In response to the GAO, the Army noted that such evaluation criteria could have used further clarification despite insisting that it did not impact the other bidders.

## **Lessons Learned**

### ***Anticipate Contract Protests.***

Due to the size and scale of the LOGCAP IV contract, we have concluded that there would have been a protest no matter who won the contract. LOGCAP IV had a \$150 billion maximum value; with annual \$5 billion TO ceilings, along with a potential maximum contract length of 10 years. As a result of the competition, some 23 issues were raised by the two losing bidders. Because of the size of the contract and its length, we believe this likely created a make or break scenario for the bidding firms. If they could not win this contract, some firms would be out of the Army logistics business for as long as a decade. When this is coupled with a complex proposal process, with literally thousands of pages of documents, and months—if not years—of preparations, it was inevitable something would get overlooked and be potential grounds for protests.

Finally, given the criticism of the LOGCAP III contract, (partially as a result of the involvement of KBR and Halliburton), this acquisition was under a great deal of

scrutiny.<sup>8</sup> The GAO did not hold a hearing with respect to this protest; an action which is almost unprecedented given several critical factors: the size and scale of the proposal; and, the fact that GAO did not take the entire allotted time to make a protest decision. These facts all appear to indicate the GAO's desire to resolve the dispute as quickly as possible.

***Offerors Must have a Complete Understanding of the Evaluation Process.***

We believe it is important to ensure an overall understanding of the information being evaluated. With respect to the TCN/HCN protest issue specifically, more information should have been included, in terms of the precise evaluation factors. Furthermore, offerors could have benefitted from articulated evaluations, standardized answers to questions, and having comprehensive debriefs. In the long term, such efforts will allow firms a better understanding of what the process entails, how to appropriately respond, and what corrections to make for the future.

***It was a Struggle to Maintain Focus in Long-Term Source Selection.***

Despite having an appropriate balance between the number of personnel and levels of expertise, one difficulty the Army encountered was maintaining consistency within the source selection team. First, due to the length of the source selection process, keeping the team focused from start to finish was difficult. Second, some team members did not report directly to the Army Contracting Office (ACO); thus, over the long term these individuals could be reassigned, transferred or replaced with different people, making it difficult for the ACO to ensure team integrity (Loehrl 2009).

***Ensure Proper and Consistent Usage of External Audits for Proposal Evaluations.***

An additional lesson learned was the difficulty encountered during the proposal evaluation process due to differences in language and terminology used by DCAA and DCMA in their evaluations and its interpretations by the Army. The different use of language by DCAA, DCMA and the Army, in some cases, led to different

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<sup>8</sup> Concern over the awarding of the LOGCAP III contract to KBR was raised since Vice President Cheney was a former board member and CEO of KBR's parent company, Halliburton.

understandings, ultimately creating confusion when attempting to incorporate such reviews into proposal evaluations. Without the proper coordination in evaluation standards, between these agencies and the ACO, the value of using external audits for the purposes of a source selection becomes limited. Further, it is vitally important that information provided within the external audits, that are considered during proposal evaluations, is accurate and updated. Using out-of-date audits may actually hurt a prospective bidder's chances, because they are not reflective of either improvements or reductions in capabilities.

***Peer Reviews were of Little Value.***

Finally, peer reviews that were conducted by the Air Force and Navy provided little overall benefit and slowed down the process, according to Army representatives. Because of the unique nature of LOGCAP IV, and major differences in requirements for the Army versus the Air Force and Navy, the value of having other services involved in the source selection process was minimal (Loehrl 2009).

**Conclusions Regarding the LOGCAP IV Protest**

The impact of the LOGCAP program on the ability for the Army to conduct operations around the world cannot be denied. Likewise, the importance of this contract, given its size and scope, is one which creates fierce industry competition. As potential offerors are bidding on an opportunity to provide support services for a period as long as 10 years, any failure to win a piece of this award will surely have a negative impact on the losing firms' vitality during the performance period. In sum, the GAO sustained the protests and recommended that the Army re-compete the contracts. Following this decision, KBRSI asked GAO to reconsider its evaluation, claiming that by sustaining the protests the GAO "failed to find competitive prejudice, improperly relied on information outside of the contemporaneous evaluation and source selection record in determining that the agency misunderstood an aspect of KBRSI's technical proposal, and misconstrued a government audit report regarding KBRSI's business systems" (GAO 2007). Despite this effort by KBRSI, the reconsideration request was denied (United States Government Accountability Office 2007d). So the whole award was recompeted; and the same three

firms were, once again, declared winners. Initial TO competitions are currently underway, and the performance period for LOGCAP IV has officially begun—after a lengthy delay.

## ***Information Technology Enterprise Solutions-2 Services (ITES 2S)***

In the twenty-first century, ever-changing mission requirements have become the norm. This reorientation of the international security environment has left planners struggling to effectively meet the demands of a military operating under such uncertainty. As a result, the military and all its branches must be mobile, adaptable and responsive. Thus, as the DoD seeks to refocus its efforts, modernizing the military will ultimately begin with a transformation of the way it conducts its internal business and operations.

The pursuit of efficiency and cost effectiveness has become paramount in DoD's efforts to modernize. To accomplish these goals, a strategy of employing the private sector to supplement and in some cases manage support functions has been adopted to improve efficiency.

### **Overview of ITES-2S Bid Protest**

ITES-2S is a contract vehicle managed by the Army's Small Computer Program and Program Executive Office-Enterprise



Information System. It is designed to provide global IT services and support, through multiple-awards and task orders. Specifically with ITES-2, the Army's plan was to award multiple Indefinite-Delivery/Indefinite-Quantity (IDIQ) contracts for a base 3-year period, to be followed with three additional 2-year options. The contract was designed to support their overall goal of attaining maximum flexibility, and would permit the private sector to provide many of the Army's IT solutions (specifically those that did not fall under the realm of the Installation Information Infrastructure Modernization Program and Command, Control, Communications, Computers and Information Management (C4IM) requirements) (Inspector General 2007).



ITES-2S is structured to enable contractors to provide a full range of IT equipment to satisfy worldwide development, deployment, operation, maintenance, and sustainment requirements. The ITES-2S vehicle was also intended to allow the private sector to provide feedback, which the Army could use to streamline its processes and become more efficient. This feedback would be obtained by allowing contractors to analyze requirements, develop and implement recommended solutions, and operate and maintain legacy systems and equipment. Since the Army expects its requirements to change during the period of performance, a major theme of the program is flexibility (United States Government Accountability Office 2006b).

## **Award Evaluation**

The plan was to award the ITES-2S contract to multiple firms based on the following three criteria: (1) mission support (with sub-factors for the performance-based approach, performance-based task approach and small business participation); (2) performance risk (past performance, corporate experience and financial); and (3) price. The Army also stated the non-price factors would be judged more critically than the price factor. Of the seventeen proposals that were received, the Source Selection Authority (SSA) selected 11 proposals for award (United States Government Accountability Office 2006b).

The Army's Information Technology E-Commerce and Commercial Contracting Center (ITEC4) awarded ITES-2S in April of 2006 to 11 prime contractors, which included 8 large businesses (Booz Allen Hamilton, Incorporated; CACI International, Incorporated; Computer Sciences Corporation; EDS Corporation; General Dynamics Corporation; IBM Corporation; Lockheed Martin Corporation; and Science Applications International Corporation) and 3 small businesses (Apptis Incorporated, STG Incorporated, and QSS Group Incorporated) (Inspector General 2007).

Shortly after the award, several firms (Multimax Incorporated; NCI Information Systems Incorporated; BAE Systems Information Technology LLC; Northrop Grumman Information (NGI) Technology Incorporated; and Pragmatics, Incorporated) filed protests with the GAO. However, prior to GAO's formal review, the Army noted some deficiencies had occurred in its evaluation of performance risk, and independently withdrew the awards; resulting in the dismissal of the GAO protests. Following the dismissal, the awards were reviewed internally by the Army and the original winning firms were re-awarded the same work. Immediately following the second award, the previous group of protestors submitted new protests with the GAO. The protesting firms cited two problems: 1) the Army changed the requirements midstream, and 2), the Army failed to reasonably evaluate labor rates.

### **1. Change in Requirements**

Four of the protesting firms (Multimax, NCI, BAE and NGI) claimed that the Army failed to amend the solicitation to reflect an increase in its requirements, and to consequently allow offerors to submit revised proposals. In particular, during the proposal process it was rumored that the Army considered making the ITES-2S contract vehicle **required** for IT services acquisition, as opposed to a program that was simply one of many created for the purpose of procuring such services. Additionally, the SSA awarded three additional contracts (from the initially planned 8 to a total 11), which some interpreted as a reaction to the increased mandate.

However, as the GAO found in its review, the Army's requirements did not undergo a material change, as the range and scope of services to be provided remained the same, and the solicitation had clearly stated the Government reserved the right to make more than eight awards. The GAO additionally concluded that any discussion of ITES-2S being officially mandated could not be confirmed. Accordingly, the Army's official statement on the matter was that "there is not currently, nor was there ever, any proposal or initiative to make use of ITES-2S mandatory" (United States Government Accountability Office 2006b). As a result, the GAO found that there was no material change in the Army's requirements that would have necessitated modification to the

solicitation.

## **2. Evaluation of Labor Rates**

A second area of contention for the protestors was related to the evaluation of labor rates. Three of the protestors, Multimax, BAE and Pragmatics, complained that the Army's evaluation of proposed labor rates was unreasonable.

The Army, which denied the claims, used a two-step process to evaluate the labor rates and assess "price reasonableness." The first part of the evaluation process was a comparison of an offeror's rate for a labor category to the independent government cost estimate (IGCE) rate for that category. The second step was a calculation of the average (mean) rate for all the offerors' labor rates, for each labor category. Once this step was completed, a two standard deviation measure was used as an evaluation of price reasonableness, i.e. to identify outlier rates. A major flaw with this technique is that a single rate, far from the mean, can significantly affect the standard deviation; and, in fact, this process resulted in an extremely wide range of acceptable rates (United States Government Accountability Office 2006b).

Using this two-step approach, the Army issued an "item for negotiation" (IFN) to an offeror, questioning a proposed labor rate, if the rate both exceeded (or was lower than) the IGCE rate, and was more than two standard deviations greater (or less) than the mean rate of all offerors for that category. The Army team used this two-step evaluation technique to identify the rates they believed were significantly overstated or understated, increasing risk that the Government would pay more than the fair market value. Since this technique was also used to identify which rates to bring to the attention of the offerors, two of the protesting parties (NGI and Multimax) claimed that they were misled into believing that only a small proportion of their labor rates were high, when in reality many more of their labor rates should have been determined to be significantly overstated (United States Government Accountability Office 2006b).

Finally, some believed the confusion over the evaluation of labor rates sowed the seeds for a protest, since all bidders could easily submit virtually identical bids in the non-price

areas of the program. This was possible since the Army held four rounds of consultations which aided in clarification of technical requirements, and essentially standardized the technical portions of the proposals. Therefore, “if everybody meets or exceeds the standards, then all you have left is price...the government kind of boxed themselves in” (Rogin 2006).

GAO concluded that the evaluation of labor rates was unreasonable and sustained the protest on this basis. Shortly after the decision, the Army settled with the protestors and allowed all five to join ITES-2S as prime contractors. Many believe that protests are becoming just a larger fact of life in the business of government contracting – in part because of the increase in size and scope of umbrella type contract vehicles like ITES-2S.

Clearly, in this case, protesting paid off; since the protestors (who were the initial losers) all were declared contract winners. With respect to the protested issue of labor rates, the Army, in retrospect, acknowledged that the two step evaluation process was not helpful. Moreover, the IGCE rates, based on the then current ITES-1 contract, were not as useful a measure as they could have been.

## **Lessons Learned**

### ***Criteria for Price Evaluation were Flawed.***

One of the largest issues in the ITES-2S case was the flawed price evaluation process. Uncertainty with respect to acceptable mechanisms for pricing evaluation creates ambiguity in proposal submissions and makes evaluations difficult for the Source Selection Authority (SSA). Common sources of reference, such as the Army Source Selection Manual or the Army Contracting Agency Guidebook for Independent Government Cost Estimates, provide general guidance only, and leave room for the SSA to determine its own best measures of cost reasonableness. In this case, the standard deviation method was one such example of an attempt to weed out unreasonable bids from the evaluation process; however, the effort actually added more confusion to the process and was ultimately brought up during the bid protests.

Furthermore, the IGCE rates were not as useful as they could have been, in part because IGCE rates used for ITES-2S were based on the ITES-1 contract, which may have not been the most appropriate rates to use (Drury 2008). Moreover, in their effort to create an objective evaluation scheme, the Army failed to create one that accurately identified unreasonable labor rates. As a result the Army team did not identify all of the “outlier rates.”

***A Bid Protest Was Inevitable.***

Another conclusion drawn from the ITES-2S protest was similar to the one drawn from the LOGCAP IV program: that bid protests for programs of such magnitude may be difficult to avoid. Due to the contract size and its long duration, it is likely that firms have a significant incentive to protest to ensure they continue to be competitive in this market segment. In essence, this contract was the major vehicle for doing IT business with the Army (and potentially with other Government agencies) for the next 9 years; as a result, the stakes were high. Finally, one must also consider what is invested in the proposal process, both professionally and personally.

***Costs for the Army to Respond to a Bid Protest are High.***

One of the often overlooked consequences of bid protests are the inherent costs associated with the protest. These costs not only include time (as in delays in the performance of contract requirements), but also include costs borne by the agency. In the case of ITES-2S, in addition to the program personnel, the Army’s Information Technology Enterprise, E-Commerce and Commercial Contracting Center had 3 of their attorneys, plus several other Army attorneys, working on the bid protest response. It was estimated that two of ITEC’s attorneys were working roughly half time for 50 days, while a third attorney was needed for a 10 percent effort during the same period. These attorneys represent some of the best and highest paid attorneys the government has to offer, and their focus on this case impacted their ability to perform their other tasks. (Drury 2008).

### ***Concern Exists on Protests over Task Orders.***

Further, there is a concern within the program that, as a result of allowing bid protests on task orders over \$10 million, there will be a lot more protests (Drury 2008). Despite this belief, there have been less task order bid protests than anticipated; some say this is perhaps due to contractors' reluctance to earn a bad reputation with the Army, that could potentially jeopardize future awards.

### **Conclusions Regarding the ITES-2S Protest**

Following the protest, the Army awarded contracts to 5 additional firms, including Multimax, Inc. (which was purchased by Harris Corporation), NCI Information Systems, BAE, Northrop Grumman and Pragmatics, Inc. These firms were those who initially filed the protests with the GAO and were ultimately awarded contracts for work on the program.

Upon resolution of the bid protest, the Army contract was also audited by the DoD Inspector General (IG) for potential irregularities and to ensure that proper competition was undertaken in the program. Given the major impact the contract could have upon IT acquisition within the Army, a thorough review was certainly appropriate. A major concern raised by the DoD IG was the justification for the bundling of contract requirements and its potential impact on the ability for firms (particularly small businesses) to compete for work. As a result of its audit, the DoD IG concluded that the bundling of the ITES-2 contract, without proper justification, violated both United States Code and Federal regulations. Furthermore, it was concluded that the Army Contracting Agency's internal controls were not adequate for this competition. As a result of its findings, the IG requested that contract activity be suspended until all issues raised in the IG's audit were resolved. As a result, of the DoD IG's report, the Assistant Secretary of the Army for Acquisition, Logistics, and Technology (ASA (AL&T)) responded by stating he did not agree with the DoD IG's assessment because of the broad scope of the ITES-2S requirements, the nature of the work performed, the pre-approval of the NAICS code used, as well as the level of small business participation.

## ***Iraq Translation and Interpretation Program Bid Protest***

In response to the reorientation of the international security environment, foreign language capabilities are now a vital requirement for the successful completion of modern military missions. Former Chairman of the Joint Chiefs, General Maxwell D. Taylor, believed so much in the importance of having an understanding of an enemy's culture that he wanted all military officers to have foreign language training. However, while education for a period of several months may provide students with a practical proficiency, it does not provide the skills needed for extensive language competence (Porter 2003). The current lack of language skills can clearly be identified as a problem in the Global War on Terrorism (GWOT). In this case, a true understanding of U.S. adversaries (such as state and non-state actors) requires an understanding of their culture, politics and religion, which in turn requires expertise in their language. Not only is this a difficult challenge for the military to overcome in its current composition, but it also presents a problem for the State Department and intelligence community. The necessary in-house language capacities for missions such as Operation Iraqi Freedom (OIF) and Operation Enduring Freedom (OEF) simply do not exist.



Looking at the problem internally, the GAO inquired over a decade ago into the general lack of foreign language capacity within the DoD and found the problem may have initiated as a result of poor training at the DoD's language school, the Defense Language Institute. At that time it was found that many students graduated from the school without having reached proficiency level two; which is defined as having sufficient language capability to meet routine social demands and limited job requirements (United States Government Accountability Office 1994). Despite this recognition years earlier, it was concluded by many only a short time after the invasion of Iraq that the United States would have difficulty dealing with this unique operating environment. Such an environment was characterized by major cultural dissimilarity, along with severe

language barriers, making dependence upon military resources alone ineffective for mission success. Because language is vital not only for military operations and intelligence but for simple communication and establishment of basic diplomatic relations with Iraq's civilian population, it was quickly understood that existing resources were inadequate. Of the 1,100 employees at the U.S. embassy in Iraq, the Iraq Study Group found that only six spoke fluent Arabic in 2007 (Harris 2007). The military, State Department and intelligence community simply cannot maintain a ready fleet of linguists capable of addressing numerous language requirements on stand-by. As a result, a majority of language resources needed for operations in OIF and OEF would need to be procured from the private sector. To meet the demand for linguists, contracts to provide translation services at varying levels have been awarded to private firms deemed capable of providing on-demand language translation services in hostile environments. One of



the most prominent contracts for these services was recently awarded to Global Linguistic Solutions LLC (GLS).

### **Overview of Iraq Translation and Interpretation Protest**

In June 2006, the Army released a solicitation seeking proposals to provide linguistic services in Iraq. The offering sought to award an ID/IQ contract for a 5-year period, during which individual task orders were to be issued; with a maximum of \$4.65 billion available. The solicitation identified linguist staffing levels, by category, that would be required under the first task order (referred to as task order 1), and noted that proposals would be evaluated against its requirements. Award evaluations would be based upon the proposal offering the best value to the government, considering the following evaluation factors: 1) management, 2) past performance, and 3) cost. Management, identified as the most important factor, contained the following additional sub-factors: fill rate, experience, sustainment, staffing plan, transition plan and small business participation. Following the release of the solicitation, proposals were submitted by three offerors (United States Government Accountability Office 2007).

In December of 2006, the U.S. Army Intelligence and Security Command (INSCOM) awarded a 5-year, \$4.65 billion contract for Iraq-related translation and interpretation to GLS, a partnership formed between DynCorp International and McNeil Technologies. Under the terms of the contract, GLS would hire some 7,000 local employees with another 2,200 U.S. civilians who are native speakers of the languages, that were needed to fulfill the terms of the contract. At that time, the contract for these same translation services was held by L-3 Communications-Titan Corporation (L-3). Shortly after the award announcement was made, L-3 submitted a protest to GAO, delaying the award. L-3 disputed the Army's evaluation of three evaluation factors: 1. fill rate, 2. experience, and 3. transition (United States Government Accountability Office 2007b).

### **1. Fill Rate Evaluation**

First, L-3 disputed the fill rate evaluation by the Army's proposal to fulfill RFP requirement for 7,217 linguists. The dispute was in regards to a particular number of linguists that were proposed by L-3 which was considered by the Army to be more likely to create staffing shortfalls compared with GLS' proposal. Specifically, the issue of concern was in the definition of the proper number of linguists that would be required to be hired beyond the 7,217 linguists who were actively working. Because a number of linguists would always be in a non-productive status (such as in-processing or on vacation leave), more than 7,217 would need to be hired in order to maintain the required level of labor at any given time. The question disputed was precisely how many extra personnel would be needed to ensure required staffing levels were consistently met. However, in this case the Army did not provide any particulars as to their method for evaluating the fill rates during the proposal review. As a result, the GAO concluded that the Army did not properly evaluate this portion of L-3's proposal because it failed to demonstrate why L3's fill rate was considered unreasonable (United States Government Accountability Office 2007b).

### **2. Experience Evaluation**

The second issue raised by the L-3 protest was the evaluation of past experience. L-3 claimed the Army was supposed to evaluate proposals based upon the contractor's recent experience levels and their ability to have:

(a) Interpreters and translators speaking the required SCRL [specific contract required language].

(b) Recruiting, hiring and retaining of quantities of personnel similar to Task Order 1.

(c) Managing personnel in an environment similar to Task Order 1.

L-3 essentially challenged the consistency of the evaluation as indicated in the RFP, versus what was used during the actual evaluation process. Instead of following the procedures for evaluation outlined in the RFP, L-3 claimed the Army's Source Selection Authority (SSA) used a pass/fail assessment to evaluate whether an offeror's experience was satisfactory (contrary to evaluation based upon compliance with Task Order 1) (United States Government Accountability Office 2007b). The GAO agreed and stated that it believed the Army substituted the evaluation benchmark previously identified in the RFP.

### **3. Transition Evaluation**

Finally, L-3 protested the evaluation of the transition plan as submitted in response to the RFP. Specifically, the solicitation established a transition period of 90 days. Immediately following the initial 90 day period, the awardee was to be performing at the level indicated in Task Order 1. The differences in the transition plans of the offerors had varying impacts on the evaluated costs, but no effect on the final costs to the government. According to the GAO, because there seemed to be a general sentiment that there was no way of addressing the issue, the SSA's solution was to add the evaluated costs for the transition period into the total evaluation costs used for source selection (United States Government Accountability Office 2007b). GAO concluded that because of the Army's methodology for resolving the issue, L-3 was effectively penalized while GLS was effectively rewarded. As a result of the bid protest, the GAO sustained the matter.

## **Lessons Learned**

### ***An Incentive Exists for Incumbents to Protest.***

A major conclusion that can be drawn from this case is the inherent incentive for an incumbent to protest a follow-on contract. If an incumbent is able to drag out the award of the follow-on contract as long as possible (specifically, in a situation where they have not won the follow-on), then every day, week and month that a notice to proceed has not been issued to the winner of the follow-on contract, the incumbent contractor is able to continue work on the existing contract, in addition to getting a second opportunity to win the award. In the above case, L-3 continued to provide translation services in Iraq for about 15 months after the initial awarding of the follow-on contract. Additionally, it has also been made known that L-3 was able to broker a deal with GLS to become a subcontractor on the follow-on contract provided they dropped the bid protest. Such an arrangement only provides the potential for an additional incentive for future incumbents to use the protest mechanism as a bargaining chip against a winning firm.

### ***Evaluation Process must be Fair, Clearly Articulated, and Consistent.***

It is imperative that the evaluation process remain fair, clearly articulated and consistent from start to finish. In this case, unclear guidelines for the fill rate evaluation, inconsistent use of guidelines for experience evaluation, and a faulty scheme for transition evaluation ultimately provided several opportunities for a protest. Furthermore, offerors could have benefitted from more feedback during the proposal process, standardized answers to questions, and having comprehensive debriefs. This lesson is similar to that learned in LOGCAP IV; offerors should have a clear understanding of the evaluation process.

## **Conclusions Regarding the Iraq Translation and Interpretation Program**

Following GAO's decision, the Army responded by issuing a Request for Reconsideration, asking that the GAO review its findings again and reassess the award. In the request, the Army contended that the GAO's conclusion that the Army's evaluation

of the fill rate, experience and transition subfactors was unreasonable, and asked GAO to review the issues again.

In sum, according to the GAO under its bid protest regulations, the requesting party must show that the prior decision contained errors of fact or law that would merit the reversal or modification of the decision (Defense Industry Daily 2007), GAO did not believe this was the case. Following the refusal of the GAO to reconsider the matter, the Army issued an amendment to the original solicitation, calling for a five page proposal which allowed it to re-evaluate the three evaluation sub-factors protested by L-3. Despite the re-competition, GLS was again awarded the contract.

Following this award, L-3 protested yet again, in December 2007. Upon filing of the protest, the Army extended L-3's existing contract through March 2008, until the matter could be resolved. In March 2008, L-3 withdrew its protest and agreed to become a subcontractor to GLS, under the previously awarded contract (L-3 Communications 2008). Further, it has recently been made known that a deal was actually brokered between L-3 and GLS for the purposes of getting L-3 to drop the protest. Per the terms, L-3 agreed to drop the bid protest if they could be added as a subcontractor to GLS for 22.5 percent of the work on the contract; and the protest was dropped. Recent reactions to the agreement have not been positive; as a member of the Commission on Wartime Contracting indicated, he believed it was the taxpayer who was losing out as "it was their \$1 billion being used to eliminate GLS' competition" (Castelli 2009).

## ***Global Solutions Case Study for HRsolutions Program Office***

The twenty-first century security environment is challenging the military's ability to operate under continuously changing, deeply complex and widely diverse operating conditions. As the military has expanded its operations, the functions that compose human resources (HR) have grown in both number and complexity. However, due to budgetary pressures on the military to address all of its commitments, resources must be dedicated to operations and modernization. The military can identify and exploit those areas where cost savings can occur through business transformation (United States Army 2008b). In 2005, the Army made a great leap forward by formally declaring its intent to modernize its business practices through a coordinated business transformation effort. The Army sought to adopt certain methodologies to accomplish this goal, many of which were proven effective in the private sector. These methods would permit the Army to increase responsiveness and decrease cycle times, and it thus declared this an effort to make "a fundamental change in how the Army does business" (United States Army 2008b).

One method of accomplishing this goal is the application of private sector resources for the completion of selected public sector support functions. Created by the Deputy Under Secretary of the Army for Business Transformation (DUSA (BT)), the HRsolutions program provides the Army with a mechanism to outsource those HR functions that are



appropriate for execution by the private sector. By outsourcing these tasks, the Army can achieve greater efficiency, higher performance and substantial cost savings. The HRsolutions program focuses its efforts on providing support for individuals, programs and organizations. The Army has approved a dozen vendors that have the capability to provide a wide

variety of HR services to the Army. With this knowledge, the Army structured the program so that three contracts for HR support services would be provided to prime contractors (United States Army 2008c).

## **Request for Proposals Protest**

The Army issued the RFP on July 29, 2006, as a set-aside for historically underutilized business zone (HUBZone) small businesses, seeking firm-fixed-price proposals to provide services for a 1-year base period and four 1-year option periods. The RFP indicated that proposals would be evaluated on the basis of technical approach, personnel resumes, past performance information, and price. Further, it was noted that technical approach, personnel, and past performance factors were to be equal to each other in importance, and when combined, were to be significantly more important than price in proposal evaluations (United States Government Accountability Office 2006c).

During the competition for the HRsolutions program (prior to the award), one firm, a small business known as Global Solutions Network, Inc. (GSN), protested the conduct of the procurement by the Department of the Army. GSN protested the procurement (the RFP itself) on three grounds: 1) a particular Army official was believed to be biased against GSN; 2) the procurement was conducted under commercial item procedures; and 3) the government estimate and workload data in the solicitation are incorrect (United States Government Accountability Office 2006c).

### **1. Bias of U.S. Army Official**

The first item protested by GSN was the role of a specific person involved in the procurement process. GSN believed this person to be biased against the company and consequently had negatively influenced the award process. Despite these suspicions, bid protest regulations are very clear that a claim regarding the bias of an official must be legally sufficient and requires a detailed statement based upon both the law and factual evidence. After the GAO review, it was found that this accusation was actually quite speculative and baseless.

## **2. Use of Commercial Item Procedures**

GSN also claimed that the use of commercial item procedures in the procurement was improper because the contract tasks do not qualify as a commercial item under the “commercial item” definition in the Federal Acquisition Regulations (FAR § 2.101). The Army responded by indicating that its initial assessment to classify the contract tasks as “commercial items” was correct.

The Army also reiterated that GSN failed to demonstrate how or why it was competitively prejudiced by the allegedly improper use of commercial item procedures for the procurement. The GAO stated that it would not sustain a protest unless the protester demonstrates a *reasonable* possibility that it was prejudiced by the agency’s actions, and otherwise it will be considered to have had a substantial chance of receiving the award. GSN was unable to do so, as no evidence was given to indicate prejudice during the procurement process (United States Government Accountability Office 2006c).

## **3. Workload Data**

Finally, GSN argued in its RFP protest that some of the workload data provided in the RFP was inaccurate and inconsistent because it did not reflect the prospect of an increasing workload over the course of the contract, as indicated in other parts of the RFP. The Army responded by noting that amendment 1 to the RFP addressed increasing levels of effort, and that the workload data was provided for information purposes only, and was not to be used as a strict guideline. As such, the required performance-based work statement would require each individual offeror to determine its own required level of effort to complete the tasks. The GAO found that GSN did not present any meaningful evidence to challenge the Army’s assertions; however, it did note that the offerors will “no doubt place some reliance upon that information” (United States Government Accountability Office 2006c). As a result of all of the previously noted findings, the protest of the RFP by GSN was denied and the Army released the solicitation for bidding in June of 2006.

## **Small Business Administration Challenges**

Following the denied RFP protest, GSN filed a size protest with the Small Business Administration against one of its competitors, Accurate Conceptions, LLC (AC), in July of 2007. The protest claimed that the proposed prime contractor, AC, was unduly reliant on another firm, RCD Management Alliance to perform the contract, which is a violation of federal regulations. The Small Business Administration (SBA) considered AC to be a small business concern for the procurement and rejected GSN's protest. Despite this fact, GSN unsuccessfully appealed the matter two more times, followed by a request for reconsideration, which was ultimately denied as well. In addition to GSN's appeals to the SBA, it also filed various forms of appeals within the Army itself, through the Executive Level Agency Protest (ELAP) mechanism. During this process, the Army did take corrective action, but still ultimately awarded the contract to AC in January 2008. Through March of 2008, GSN went to great lengths to continue to challenge the size of AC and all claims were subsequently denied (United States Small Business Administration 2008).

## **Second Bid Protest**

The actual HRsolutions contract was awarded in January of 2008. At that time, the Army had debriefed GSN about the award to AC for task order management and financial support for the HRsolutions program office. In their protest, GSN claimed the Army misevaluated the proposals, and consequently should have found AC's price to be unreasonably low. The RFP was to evaluate technical approach, personnel, past performance and price. Each technical approach proposal had to describe the organizational structure, procedures, controls and quality control plan for each firm. The personnel evaluation was to consider the qualifications of key personnel and their proposed organizational structure. With respect to past performance, each offeror was to identify its references in the proposal and distribute copies of a past performance questionnaire form to those references for completion. As for pricing, a change was made in the RFP specifically related to the method by which pricing would be evaluated. The initial portion of the RFP stated only that the proposed price would be evaluated for completeness and reasonableness; the amended version defined price reasonableness

specifically and alluded to both costs being evaluated for being too high or low (United States Government Accountability Office 2008b). Three proposals were received, and after evaluating initial proposals, the Army opened discussions with the offerors and permitted final proposal revisions. During this time GSN lost its contract manager, resulting in a negative impact on its personnel evaluation in the RFP. A breakdown of the proposal review is indicated in Figure 14 below:

|                    | GSN         | AC            |
|--------------------|-------------|---------------|
| Technical Approach | Very Good   | Very Good     |
| Personnel          | Good        | Very Good     |
| Past Performance   | Low Risk    | Moderate Risk |
| Total Price        | \$8,142,006 | \$6,611,936   |

**Figure 14. HRsolutions Proposal Evaluation.**

In the Army’s final source selection decision, it acknowledged the advantage of AC under the personnel factor, and of GSN under the past performance factor. However, the Army was unable to justify the price premium in GSN’s proposal, and consequently awarded the contract to AC. Following the award to AC, GSN filed an agency-level protest. In March, the Army denied the agency-level protest, and GSN then filed a protest with the GAO (United States Government Accountability Office 2008b). In its protest, GSN challenged the evaluations of both itself and AC, and argued that AC’s price was unreasonably low. GSN also argued that the award decision was based only on AC’s low price.

### **1. Evaluation of GSN**

GSN’s first challenge was the evaluation of its proposal. Specifically, GSN believed that the Army misinterpreted its final proposal revisions by mistaking the responsibilities of some of the proposed employees as a result of the format of the revised proposal. The GAO concluded that the Army’s assessment of the revised proposal was appropriate and reiterated that it is the offerors responsibility to specifically demonstrate how the revised

offer will satisfy the contract requirements in the proposal itself, not with an additional discussion after submission (United States Government Accountability Office 2008b).

## **2. Evaluation of AC's Technical Approach**

An additional complaint by GSN was that the technical approach factor in AC's proposal was not properly evaluated. GSN argued that AC should have been downgraded from its technical evaluation rating of "very good" because of its failure to address issues with Technical Exhibit 1. The Army disputed this claim, citing the fact that responses to Technical Exhibit 1 were not actually required for the proposal. The GAO concurred with the Army's assessment and felt the contracting officer acted appropriately in their evaluation of AC's technical approach (United States Government Accountability Office 2008b).

## **3. Evaluation of AC's Personnel**

GSN also challenged AC's personnel evaluation. GSN argued that AC did not have enough personnel to complete the job, as they reduced their staffing level for this project by one person. Additionally, GSN argued that AC's price was so unreasonably low that the work could either not be performed at that rate or that a deep lack of understanding of the task was at play. The Army and GAO both responded by disagreeing with GSN's claims, citing the fact that it was at the discretion of the Army to review these matters internally and merely represented a disagreement over judgment. The Army argued that neither the government estimate nor GSN's proposed prices could be treated as a definitive standard of price reasonableness; as a result, AC's price could not be considered unreasonably low. This argument is additionally supported by the fact that the bid was for a Firm-Fixed-Price contract, where price is only a concern if a firm's price is unreasonably high, not low (United States Government Accountability Office 2008b).

## **4. Evaluation of AC's Past Performance**

GSN also challenged AC's past performance and argued that it should not have been rated as a "moderate risk." GSN maintained that the firm lacked relevant past performance and relied heavily on its subcontractor's past performance; they argued that

it thus should have received a neutral rating on this evaluation factor. The Army responded by saying that the CO produced significant documentation of the past performance evaluation of AC and its team members. It was also noted that the CO appropriately expressed some doubt about AC's ability to perform this requirement, thus substantiating the "moderate risk" evaluation. Regardless, GSN's evaluation of "low risk" could not have improved; consequently, the "moderate risk" evaluation would not have impacted the overall decision, since GSN was already superior in this evaluation factor. The GAO concurred, and stated that it believed GSN had not shown evidence of competitive prejudice by any of the claims made in regards to past performance (United States Government Accountability Office 2008b).

GSN also claimed that the page restrictions on resumes were not enforced. The GAO concluded that it will only sustain a protest that an agency has waived or relaxed its requirements for the awardee when the protester is able to establish that its chances of winning the award were limited by the agency's actions. In this case, GSN would have to show that a waiver on page limits would have resulted in a different outcome on the resume reviews for past performance assessments (United States Government Accountability Office 2008b).

Finally, GSN argued that the award decision was based on price alone and not consistent with the RFP's indication that non-price factors were a priority for the award. The GAO reiterated the point that ultimately the source selection official has the final discretion in determining the manner and extent to which technical and price factors would be evaluated; such judgments are restrained only by rationality and consistency with the given evaluation criteria. In this light, the GAO denied the protest and noted that a protestor must reasonably demonstrate that the agency was prejudiced in its actions; or, in other words, that the protesting party would have won the award if it were not for the actions of the agency (United States Government Accountability Office 2008b).

## **Lessons Learned**

### ***Mechanisms Should be Developed to Curb Bid Protest Abuse.***

This case study is a good example of the abuse that can occur via the bid protest mechanism. Currently, there are several mechanisms that a contractor, with a perceived grievance, can pursue. However, when all avenues are pursued, they can significantly delay a program. Savvy contractors know how to file consecutive protests in order to prolong the award decision. In this instance, the delay for the HRsolutions program was nearly two years, because a single losing bidder sought to pursue every possible legal means of protesting the program and delaying the award program (Mixon 2008).<sup>9</sup>

### ***Even When Protests are Not Sustained, the Impact can be Significant.***

Another lesson learned from this case is the significant impact that can occur on a program even from those bid protests that are not sustained. In this case, despite the various protests filed by GSN, none of which were sustained, the program was delayed considerably and had a significant negative impact, as a result of having to respond to GSN's repeated protests.

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<sup>9</sup> Estimate provided in email by Ruby Mixon, United States Army Contracting Officer.

## Section V: Conclusions

- ➡ *In general, bid protests are not a growing problem growing within the context of all DoD contracting.*

Based on our research we have been able to conclude the number of bid protests filed is not increasing as rapidly as the total dollars being contracted, and should not be viewed as a growing problem overall, within DoD. Based on our data analysis, there has been a real increase in the overall bid protests for DoD, from approximately 600 in 2001 to approximately 840 in 2008 (an increase of approximately 40 percent) over the studied period. However, when considered alongside the amount of DoD contract awards (adjusted for 2008 dollars), which climbed from approximately \$175 billion to approximately \$395 billion, an increase of approximately 126 percent, it can be concluded that the rate of bid protests is not occurring at nearly the pace of spending on contracts.

Additionally, the rate of protests deemed to have merit –out of the total number of protests—and, particularly, those that are sustained, decreased; even as the total dollars spent on contracts increased. Such protests maintained a negative slope during that time; and, in absolute terms, decreased 24 percent compared with the FY2001 base year. Likewise, the number of bid protests that have been sustained, as a fraction of those protests found to have merit maintained a very slight positive slope during the time period (impacted significantly by the unusually high number in 2007); and, in absolute terms, decreased by approximately 25 percent over the period examined. It should also be noted that during the FY01-FY08 period, only 1 year, FY07 was found to have an increase in sustained bid protests, as compared with the base year.

Finally, it must be noted that, despite these conclusions, bid protests still have a significant impact on those programs that are affected. Every measure must be taken to continue to reduce the number of bid protests and their impact on programs.

➡ ***When the stakes are high, bid protests are likely.***

When the stakes are high, bid protests are more likely (because of both opportunity and motive), and the data indicates that there is a good chance that these protests will be sustained. During our study period, 10 procurements had 49 sustained bid protest decisions. Given the high potential payoff for defense firms (especially true with long-term contracts, that may completely lock a firm out of a market sector), we believe firms have a strong incentive to file a protest. For example, due to the size and potential length of the LOGCAP IV contract, it was likely that there would be a protest by the losing firms, regardless of which firms were selected. It appears that firms had decided that if they did not win the award outright, they must exercise other options available, i.e. the bid protest. This same lesson can be drawn from the ITES-2S protest. In essence, the ITES-2S contract was the major vehicle for doing IT business with the Army for most of the next decade; and, as a result, the stakes, for IT providers were high. Furthermore, since these acquisitions are generally more complex (they can have volumes of documentation), there is an increased likelihood of identifying a fault, and, as a result, those protests have a greater likelihood of being sustained.

➡ ***Perception of more protests is likely a result of an increase in high-profile/high-value protests.***

We believe that the perception of more bid protests overall, is likely a result of more high-profile/high value contract bid protests occurring; such as the LOGCAP IV, CSAR-X and ITES-2S and the Air Force replacement tanker KC-X. These programs have garnered much media coverage around Washington D.C. and in the trade press because of their contract values and general political interest in the programs. As a result of the media exposure, a belief has emerged that a general trend of more protests now exists.<sup>10</sup>

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<sup>10</sup> Section 843 of the 2008 Defense Authorization Act, which now permits bid protests on task orders valued at \$10 million or more, is a significant change that has the potential to increase the number of bid protests. During the course of our research and interviews, it was made known that a general concern

From our analysis of sustained bid protests, we also found a significantly increased risk of large programs having a sustained bid protest. For our study period, there were 49 GAO sustained protests, associated with 10 procurements valued at \$1 billion or more; equating to roughly 4.9 sustained protests per procurement (several of the procurements had multiple awards).<sup>11</sup> Further, during this period there were only 61 contracts awarded for amounts of \$1 billion or more.

Our findings indicate that while an increase in bid protests does exist, the rate at which protests are increasing is very slow in comparison with the increase in contract spending. Moreover, when broken down, based on the dollar value of the contract awards and the numbers of sustained protests, the results are far from dramatic, except as noted for large procurements.

➔ ***Impacts (as combination of programmatic costs and schedule delays) for bid protests, particularly those that have merit and are sustained, are high.***

Bid protests have a significant impact on cost and schedule delays in general. Because the process is longer for those protests that are found to have merit or are sustained, the impacts are even higher. Costs borne by the agency that awarded the contract, in terms of salaries for those tasked with responding to the protest, can be significant. In the case of ITES-2S, ITEC had 3 attorneys (all at the GS-15 level) plus several other Army attorneys that were working on the bid protest response.

Furthermore, schedule delays negatively impact capabilities because, in some cases, protests could limit access to required systems or personnel. In the course of our research we found that, for very large programs, it was often the case that a sustained bid protest (which very often must be re-competed) created significant delay. For example, we examined program delays for sustained contracts valued at \$100m or

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existed because of the potential that this rule change would increase the number of bid protests. However, because this change is so recent, its impact can not yet be evaluated.

<sup>11</sup> For the purposes of our data analysis we included the potential maximum value for ID/IQ contracts if all options were exercised. For example, for LOGCAP IV the maximum contract value was \$5 billion per year, per contractor (potentially \$50 billion per contractor over the ten year contract period). We used that value as oppose to the nominal value of the signed contract.

more, and we found that of the sustained protests, the average delay was 461 days; with the longest delay being 1012 days (nearly 3 years).

Finally, an additional financial cost that is a result of delays of a bid protest is the potential cost savings that are lost when an incumbent contractor maintains its status on a current contract via an extension of the existing contract. In cases where a contract is set to expire and a new contract is competed and awarded, if the new contract had the potential to provide improved service and decreased costs, those benefits are lost during the bid protest period. Further, until the follow-on contract is actually awarded, the incumbent maintains its hold on the existing contract (as exemplified in the Iraq Translation and Interpretation Program).

➡ ***The GAO bid protest process is important to maintain the reality and perception of fairness and transparency of DoD acquisition, but the process can be abused.***

During the course of our research we discovered that retaining a bid protest mechanism is vitally important to maintaining fairness in both practice and perception. The HRsolutions case study, however exemplifies the abuse that can occur via the bid protest mechanism, as savvy contractors know how to file consecutive protests in order to prolong an award decision. In this instance, despite the fact that none of the protests were sustained, the losing bidder was able to delay the HRsolutions program nearly two years. Clearly such abuse of the system is an unintentional by-product of the bid protest process that must be addressed.

➡ ***Section 843 of the 2008 Defense Authorization Act lifted a ban on GAO protests for task orders valued over \$10M—the impact can not yet be evaluated.***

Finally, Section 843 of the 2008 Defense Authorization Act, which now permits bid protests on task orders valued at \$10 million or more, is a significant change that has the potential to increase the number of bid protests. During the course of our research and interviews, it was made known that a general concern existed because of the potential that this rule change would increase the number of bid protests. However, because this change is so recent, its impact can not yet be evaluated.

## Section VI: Recommendations

To overcome the problems we have discovered with bid protests and the bid protest process we recommend the follow actions be taken:

### *Continue to Work to Eliminate Reasons for Sustained Bid Protests.*

As was indicated by our analysis of sustained bid protests, agency misevaluation was the source of the majority of sustained protests. To overcome this problem, organizations must have the appropriate number of personnel<sup>12</sup> with the appropriate skill. We recommend providing additional education, training, and acquisition workforce development programs to ensure DoD personnel have the proper tools they need to make good source selection decisions, particularly when it comes to providing technical and cost evaluations (a major source of sustained bid protests).

Additionally, it is imperative that evaluation criteria used during source selection match criteria outlined specifically in the solicitation, and, if appropriate, the statement of work. In all of the case studies we examined, at least one cause of the bid protest being filed was a claim of unequal or inconsistent proposal evaluations, a problem that can be remedied if appropriate planning and careful attention is paid to this issue during the source selection.

Another related recommendation we have for limiting the potential for sustained bid protests is to ensure all information used during the course of award evaluations is as updated, and accurate as possible. Any information used to make an award decision must be checked for accuracy prior to its consideration in order to ensure fairness in the evaluation process. In sum, it is imperative that both offerors and the source selection authority have a uniform understanding of the evaluation process, and that it remains

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<sup>12</sup> The issue of the acquisition personnel has been address in a number of other reports. See Commission on Army Acquisition and Program Management in Expeditionary Operations. Urgent Reform Required: Army Expeditionary Contracting. Washington, D.C.: United States Department of the Army; 2007 Oct 31. and Undersecretary of Defense for Acquisition, Technology and Logistics. 2007 Human Capital Strategic Plan. Washington, D.C.: Department of Defense; 2007.

consistent throughout the procurement, to ensure all offerors are treated fairly. Such an approach will limit the opportunity for bid protests to have merit or be sustained.

***Ensure a Balance is Struck Between Program Stability and Competition.***

Related to the recommendation regarding limiting the opportunity for bid protests, is the matter of ensuring competition. The potential of a contractor being locked out of a market for an extended period of time can have a significant impact on their willingness to file a protest. The longer the contract term and the higher the potential award value, the greater share of the overall business is taken “off the market;” creating a difficult predicament for those who are left out. LOGCAP IV and ITES-2S, as two examples, are major ID/IQ contracts that offer the potential for lucrative, long-term rewards for those contractors that are selected for the umbrella contracts. While competition is maintained to some extent during the contests for task orders, one can only participate if they have been successfully chosen to be a part of the umbrella contract. As a result, if LOGCAP IV is the only way by which the Army purchases its logistics services and ITES-2S is essentially the only way the Army purchases its information technology services, if either of these is a firm’s core business, they will likely feel they must do whatever it takes to win the work. Thus, the offeror may feel a bid protest is their only opportunity at a second chance to win the work (even if it is just a part of it). To minimize the potential for such behavior a balance must be struck between maintaining program stability (i.e. having highly bundled contracts awarded for long periods of time) and maintaining a minimum level of competition by having contracts re-competed fairly regularly to reduce likelihood of bid protests.

On the other hand, maintaining a few, highly-qualified firms for the long-term competition on task orders, provides the maximum benefits of competition, while providing considerable stability. By contrast, awarding contracts to a large number of “winners” on ID/IQ contracts (to avoid protesters) may significantly reduce the effectiveness of the competition and add considerable instability and long-term costs (Gansler 1989 and Kim 1998). Recent trends to have “many winners” (e.g. up to 142 on

one ID/IQ award (United States Army 2009)) is of great concern regarding effective competition.

***Explore Disincentives for Abuse and Frivolous Protests.***

Finally, the creation of a disincentive should be explored to minimize abuse and frivolous protests. One potential solution could be the consideration of an offeror's bid protest history (e.g. unsustained protests) as part of an offeror's "past performance" evaluation during source selections. The value of including bid protest history is that a firm could be penalized in the future for having a history of many bid protests without being decided to have merit or sustained. Such an addition to evaluation criteria would make firms think twice about lodging protests that were not for genuine reasons, thus minimizing abuse of the bid protest mechanism. As can be seen from the HRsolutions case, because bid protests can be relatively low cost (in terms of time and effort for the protesting party), little disincentive exists not to protest. In this particular case, if the protestor knew that all of its numerous denied protests would be considered in all future source selections, it may result in the loss of future work; and, consequently, force the offeror to re-evaluate the merit of its protests.

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## **Appendix A - Research Methodology**

To examine the bid protests that have taken place within the DoD, we began by collecting data on all DoD bid protests during fiscal years 2001 through 2008. By measuring the number of bid protests, those decided by the GAO to have merit, and those which are sustained by the GAO, we were able to determine if indeed an increase in bid protests has occurred during this period, and the credibility behind the protests.

To get a view of the overall DoD trends for bid protests, we collected data from GAO bid protest decisions and reports, DoD reports and press releases, as well as corporate press releases and other open sources of information. Because of discontinuity in data reporting from the solicitation phase through contract award, data had to be accumulated from multiple sources and compiled by hand. Once we collected data from the GAO website on all of the bid protests, we then compared our data with GAO's, from their yearly reports submitted to Congress, to ensure completeness. It is important to note, individual contract actions can generate multiple bid protests. When counting, like GAO, we counted each bid protest (each is assigned an individual ID number) and included it in our totals. As a result however, some contracts can have two or three (or even up to eleven) protests associated with them.

We then documented information from each protest, organized by their Service (or Defense Agency). When documenting the protest decision by the GAO, we extracted specific information: the fiscal year in which the decision was made, the protest number, the original solicitation number, the protesting contractor, the contract type, the reason for the protest and, lastly, the award amount. The first four pieces of information helped us label the specific case, who was involved, and when it took place. Furthermore, we segregated the protest by fiscal year; this was important since we wanted to get a measure of the level of the growth in protests vs. in DoD contracting.

Further, the protesting contractor and original solicitation numbers, were recorded; these data were helpful in collecting more information about the solicitation, and the eventual

contract award. Figure 15 below, shows a sample excel spreadsheet data set used in our analysis.

Once all of these data were collected, a calculation was done to determine the percentage increase of growth each year after FY2001, the base year, for protests. Next a tabulation of bid protests with merit was completed, along with a calculation of growth in bid protests with merit beyond the FY2001 base year. An additional statistic we derived was the DoD merit rate. This was calculated by dividing the number of protests with merit over the number of total protests within DoD in a given FY. Finally, we tabulated DoD sustained protests from GAO bid protest decisions published via the GAO website. Once these data were gathered, we again calculated the growth rate of sustainments for each of the FY's beyond the base year, and the sustainment rate; which was done by dividing the number of sustainments by the number of protests with merit. This procedure was repeated for the Army, Navy and Air Force respectively.

| Cluster ID | FY   | Decision | Agency | Protest     | Solicitation Number | Protester                                                | Contract Type        | Business Size  | Reason for Protest      | Reason for Protest Main Category | Reason for Protest Sub Category | Award Amount    |
|------------|------|----------|--------|-------------|---------------------|----------------------------------------------------------|----------------------|----------------|-------------------------|----------------------------------|---------------------------------|-----------------|
| Army-1     | 2007 | Sustain  | Army   | B-298609    | W912PL-06-B-0008    | Miramar Construction, Inc.                               | Firm Fixed-Price     | Small Business | Agency improperly per   |                                  |                                 | \$6,391,000     |
| Army-2     | 2007 | Sustain  | Army   | B-299720    | W911S6-07-R-0007    | Carson Helicopter Services, Inc.                         | Fixed-Price          | Regular        | Agency's evaluation w   | 2                                |                                 | \$1,779,300     |
| Army-2     | 2007 | Sustain  | Army   | B-299720.2  |                     |                                                          |                      |                |                         | 2                                |                                 |                 |
| Army-3     | 2007 | Sustain  | Army   | B-298730    | W91QF4-05-R-0011    | ALATEC Inc.                                              | ID/IDQ               | Small Business | Proposals were unrea    | 2                                |                                 | \$12,600,100    |
| Army-4     | 2007 | Sustain  | Army   | B-298249.6  | W91QUZ-05-R-0004    | Multimax, Inc.; NCI Information Systems, Inc.; BAE Syste | ID/IDQ               | Regular        | Agency failed to condu  | 2e                               |                                 |                 |
| Army-4     | 2007 | Sustain  | Army   | B-298249.7  |                     |                                                          |                      |                |                         | 2e                               |                                 |                 |
| Army-4     | 2007 | Sustain  | Army   | B-298249.8  |                     |                                                          |                      |                |                         | 2e                               |                                 |                 |
| Army-4     | 2007 | Sustain  | Army   | B-298249.9  |                     |                                                          |                      |                |                         | 2e                               |                                 |                 |
| Army-4     | 2007 | Sustain  | Army   | B-298249.10 |                     |                                                          |                      |                |                         | 2e                               |                                 |                 |
| Army-4     | 2007 | Sustain  | Army   | B-298249.11 |                     |                                                          |                      |                |                         | 2e                               |                                 |                 |
| Army-4     | 2007 | Sustain  | Army   | B-298249.12 |                     |                                                          |                      |                |                         | 2e                               |                                 |                 |
| Army-4     | 2007 | Sustain  | Army   | B-298249.13 |                     |                                                          |                      |                |                         | 2e                               |                                 |                 |
| Army-4     | 2007 | Sustain  | Army   | B-298249.14 |                     |                                                          |                      |                |                         | 2e                               |                                 |                 |
| Army-4     | 2007 | Sustain  | Army   | B-298249.15 |                     |                                                          |                      |                |                         | 2e                               |                                 |                 |
| Army-4     | 2007 | Sustain  | Army   | B-298249.16 |                     |                                                          |                      |                |                         | 2e                               |                                 |                 |
| Army-4     | 2007 | Sustain  | Army   | B-298249.17 |                     |                                                          |                      |                |                         | 2e                               |                                 |                 |
| Army-4     | 2007 | Sustain  | Army   | B-298249.18 |                     |                                                          |                      |                |                         | 2e                               |                                 |                 |
| Army-4     | 2007 | Sustain  | Army   | B-298249.19 |                     |                                                          |                      |                |                         | 2e                               |                                 |                 |
| Army-4     | 2007 | Sustain  | Army   | B-298249.20 |                     |                                                          |                      |                |                         | 2e                               |                                 |                 |
| Army-5     | 2007 | Sustain  | Army   | B-299317    | W911W4-05-R-0001    | L-3 Communications Titan Corporation                     | Cost-Plus-Award-Fee  | Regular        | Evaluations of propos   | 2                                |                                 | \$4,645,000,000 |
| Army-5     | 2007 | Sustain  | Army   | B-299317.2  |                     |                                                          |                      |                |                         | 2                                |                                 |                 |
| Army-5     | 2007 | Sustain  | Army   | B-299317.3  |                     |                                                          |                      |                |                         | 2                                |                                 |                 |
| Army-6     | 2007 | Deny     | Army   | B-309751    | W91WAW-07-R-0063    | The Borenstein Group, Inc.                               | ID/IDQ               | Small Business | Agency did not presen   | 3                                |                                 |                 |
| Army-7     | 2007 | Deny     | Army   | B-299805    | W52H09-07-T-0167    | Midwest Metals                                           |                      | Small Business | Agency miscalculated p  | 2b                               |                                 | \$10,280        |
| Army-8     | 2007 | Deny     | Army   | B-299595.3  | W913FT-07-R-0018    | J&J Colombia Services MV LTDA                            | Sole-Source          | Regular        | Agency's need for the t | 6                                |                                 | \$3,480,848     |
| Army-9     | 2007 | Deny     | Army   | B-299305    | W15P7T-06-R-N204    | Mathews Associates, Inc.                                 | 2 Fixed Price ID/IDQ | Regular        | Agency rejected propo   | 6                                |                                 | \$2,900,000     |
| Army-10    | 2007 | Deny     | Army   | B-299083    | FY06.2              | Fantastic Data                                           | Fixed Price          | Small Business | Agency did not choose   | 6                                |                                 |                 |
| Army-11    | 2007 | Deny     | Army   | B-298682    | W91QV1-06-R-0033    | Global Solutions Network, Inc.                           | Firm Fixed Price     | Small Business | Agency improperly con   |                                  |                                 | \$6,500,000     |
| Army-12    | 2007 | Deny     | Army   | B-298883    | W52H09-06-R-0314    | Management Solutions, L.C. d/b/a EssTech Engineering     |                      | Small Business | Agency did not have a   |                                  |                                 |                 |
| Army-13    | 2007 | Deny     | Army   | B-298568    | W91GXQ-06-R-0002    | Brian X. Scott                                           |                      | Regular        | Proposal was miscalcul  |                                  |                                 |                 |
| Army-14    | 2007 | Deny     | Army   | B-298880.3  | W81XWH-06-T-02857   | MASAI Technologies Corporation                           |                      | Regular        | Agency miscalculated t  |                                  |                                 |                 |
| Army-14    | 2007 | Deny     | Army   | B-298880.4  |                     |                                                          |                      |                |                         |                                  |                                 |                 |
| Army-15    | 2007 | Deny     | Army   | B-299798.2  | W74V8H-06-R-0007    | Council for Adult & Experiential Learning                | ID/IDQ               | Regular        | Terms of solicitation w |                                  |                                 | \$214,334,656   |
| Army-16    | 2007 | Deny     | Army   | B-299798    | W74V8H-06-R-0007    | Savantage Financial Services, Inc.                       |                      | Regular        | protester challenges p  |                                  |                                 | \$214,334,656   |

Figure 15. Sample Spreadsheet of Bid Protest Datasheet.

Next we collected data on the total DoD, Army, Navy, and Air Force spending on contracts for FY2001 through FY2008, from the federal government website [www.usaspending.gov](http://www.usaspending.gov), and adjusted it to FY2008 dollars.

| <b>FY</b>   | <b>DoD Total</b> | <b>Army</b> | <b>Navy</b> | <b>Air Force</b> |
|-------------|------------------|-------------|-------------|------------------|
| <b>2001</b> | \$174,707        | \$40,594    | \$50,746    | \$48,541         |
| <b>2002</b> | \$202,484        | \$45,798    | \$56,484    | \$56,148         |
| <b>2003</b> | \$246,053        | \$56,831    | \$62,439    | \$59,709         |
| <b>2004</b> | \$258,401        | \$75,783    | \$68,478    | \$62,143         |
| <b>2005</b> | \$293,042        | \$95,218    | \$71,422    | \$60,683         |
| <b>2006</b> | \$312,499        | \$100,907   | \$79,074    | \$66,153         |
| <b>2007</b> | \$342,317        | \$117,987   | \$87,834    | \$72,149         |
| <b>2008</b> | \$395,061        | \$165,884   | \$95,925    | \$63,610         |

**Figure 16. DoD and Service Spending on Contracts, in Millions.**

The next important piece of information necessary to analyze trends in bid protests is discerning the reason for the protest. We collected and analyzed the reasons for those protests that were sustained by the GAO. Additionally, the reasons for the bid protests (as described by the protesting party in their filed protest) were categorized into the following groupings:

1. “Terms of Request For Proposal”
2. “Agency Mis-evaluated”
3. “Cancellation of Contract / Agency Chose to Perform Work as ‘In-house’”
4. “Competing Firm (Initial Awardee) is Outside the Criteria of RFP/RFQ”
5. “Conflict of Interest”
6. “Other Reasons” including:
  1. - *Small Business set aside/concerns not addressed*
  2. - *Elimination from selection on no good basis*
  3. - *Award was made to another firm at a higher price*

The reasons for sustained bid protests were then broken down by service, and a total of all services, as can be seen from Figure 17:

|                  | Reason<br>1 | Reason<br>2 | Reason<br>3 | Reason<br>4 | Reason<br>5 | Reason<br>6 |
|------------------|-------------|-------------|-------------|-------------|-------------|-------------|
| <b>Army</b>      | 12          | 62          | 3           | 16          | 1           | 11          |
| <b>Air Force</b> | 14          | 24          | 3           | 13          | 0           | 23          |
| <b>Navy</b>      | 4           | 32          | 4           | 10          | 2           | 4           |
|                  |             |             |             |             |             |             |
| <b>Total</b>     | 30          | 118         | 10          | 39          | 3           | 38          |

**Figure 17. Reasons for Bid Protests by Service.**

Additionally, because of the volume of protests sustained under Reason 2, we further subcategorized the Agency Misevaluation reason into the following subcategories (Because some protests had more than one subcategory identified as a reason the protest was sustained, the total number is greater).

- a. *Source selection*
- b. *Past Performance*
- c. *Technical Evaluation*
- d. *Price/Cost Proposal, Cost Evaluation*
- e. *Did not hold meaningful discussions*

The tabulations of these reasons are outlined in Figure 18 below:

| Reason 2 Sub Categories | 2a | 2b | 2c | 2d | 2e |
|-------------------------|----|----|----|----|----|
| <b>Army</b>             | 7  | 6  | 10 | 23 | 22 |
| <b>Air Force</b>        | 4  | 3  | 2  | 6  | 2  |
| <b>Navy</b>             | 3  | 3  | 19 | 22 | 2  |
|                         |    |    |    |    |    |
| <b>Total</b>            | 14 | 12 | 31 | 51 | 26 |

**Figure 18. Reason 2 Subcategories by Service.**

Once all of the data from the sustained bid protests were collected, and, the bid protest decisions were identified from the GAO website, we began collecting data on contract values for each of the sustained protests. This information is important to obtain in order to assess the amount of money at stake in sustained protests. Some award amounts were found in the bid protest decision issued by GAO. These numbers were not the final

award amount, but usually the predicted amount that the contractors put forth for their price evaluation. Basically, these numbers would be close to the actual award amount; giving us an idea as to where the price range would be. Yet, most bid protests did not contain any monetary amounts, so research had to be done in multiple fashions to track down contract award values. One location was the Department of Defense website, within the press section. Here one could search the contracts that had been awarded for the past decade. However, it was difficult to find a specific transaction, because the RFP number had changed from the one on the bid protest, and because the protesting company was sometimes not connected to the award. Furthermore, the date of the award could be months, or even years, after the protest decision had been made. In some cases, this data could be retrieved directly from GAO decision documents, in others it had to be researched via the Federal Procurement Data System (online). Below, in Figure 19, is a summary of our findings regarding contract values of sustained protests.

| FY           | Less than<br>1M | 1M - 10M  | 10M - 100M | 100M - 1B | 1B - 10B  | More than<br>10B |
|--------------|-----------------|-----------|------------|-----------|-----------|------------------|
| 2001         | 0               | 5         | 11         | 8         | 0         | 0                |
| 2002         | 1               | 1         | 5          | 4         | 0         | 0                |
| 2003         | 0               | 8         | 10         | 0         | 0         | 0                |
| 2004         | 1               | 6         | 14         | 2         | 0         | 0                |
| 2005         | 0               | 0         | 6          | 3         | 8         | 0                |
| 2006         | 1               | 4         | 15         | 5         | 2         | 0                |
| 2007         | 0               | 8         | 4          | 7         | 3         | 20               |
| 2008         | 0               | 0         | 6          | 2         | 9         | 7                |
| <b>Total</b> | <b>3</b>        | <b>32</b> | <b>71</b>  | <b>31</b> | <b>22</b> | <b>27</b>        |

**Figure 19. Contract Values for Sustained Bid Protests.**

Finally, using publically-available sources, such as the GAO bid protest decisions and corporate press releases, we tabulated the days of delay for sustained programs valued at \$100m or greater. For the purposes of our calculations we counted days of delay as the number of days from the award date of a contract until the bid protest matter was resolved.

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