



GAO Bid Protests: Trends, Analysis, and Options for Congress

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Summary

Bid protests filed with the Government Accountability Office (GAO) have recently received increased congressional scrutiny due to protests of high-profile awards and reports that the number of protests is increasing. The delay of contract award or performance triggered by a GAO protest, coupled with the increasing number of GAO protests, has also prompted concerns about the potential impact of protests upon government agency operations, especially in the Department of Defense.

GAO is one of three forums with authority to hear general bid protests against the government. The GAO's bid-protest process includes some unique features—most notably, the automatic stay of contract award or performance during a GAO protest—that make GAO a desirable forum for many disappointed bidders and offerors.

In recent years, the number of protests filed with GAO has steadily increased. Excluding protests from expanded jurisdiction, the number of bid protests increased steadily from approximately 1,150 in Fiscal Year (FY) 2001 to over 1,550 in FY2008, an increase of 37%. However, most of these protests were dismissed, withdrawn by the protester, or settled prior to GAO issuing an opinion. Since FY2001, on average, GAO issued an opinion on only 22% of bid protests; on average, GAO opinions sustained the protest approximately 20% of the time.

From FY2001 to FY2008, on average 5% of bid protests were sustained; neither the number—nor percentage—of protests sustained during the period increased significantly. In FY2001, GAO sustained 66 protests, or 6% of all protests. In FY2008, GAO sustained 60 protests, or 4% of all protests filed, despite a 37% increase in the number of bid protests filed over the same period. According to GAO officials, among the most common grounds for sustaining protests are the contracting agencies not maintaining adequate documentation, errors in how agency officials conduct discussions with offerors, flaws in cost evaluations, and contracting agencies not adhering to established evaluation criteria.

Protesters can obtain relief from a protest when GAO sustains a protest or when agencies voluntarily act to correct the allegation charged in the protest. The percentage of protesters obtaining relief from an agency is called the effectiveness rate. The effectiveness rate may be a good way to measure the number of protests that have actual or potential merit. From FY2001 to FY2008, the effectiveness rate of GAO protests gradually increased from 33% to 42%, respectively. The increase in the effectiveness rate could indicate that not only are the number of protests increasing but the number of protests that have merit is increasing.

The number of bid protests filed against the Department of Defense (DOD) consistently increased, from approximately 600 in FY2001 to approximately 840 in FY2008, an increase of 38%. During the same period, on average, 60% of all bid protests involved DOD contracts even though DOD accounted for an average of 68% of all federal spending. From FY2001 to FY2008, neither the number—nor percentage—of bid protests sustained against DOD has consistently increased. According to data provided by GAO, protests against DOD were not sustained at a higher rate than the rest of government.

This report contains options for Congress related to minimizing the number of protests filed with GAO and the delay of award/execution often associated with protests being sustained.

Contents

Introduction	1
Background	2
GAO Bid Protests	3
Number of Bid Protests Filed With GAO	4
Are Bid Protests Delaying Contracts?.....	8
Bid Protests Trigger an Automatic Stay	8
GAO and the 100 Day Time Limit	9
Number of Bid Protests Sustained by GAO.....	10
Common Grounds for GAO Sustaining Bid Protests	11
DOD Contracts and Bid Protests.....	12
Options for Congress.....	14

Figures

Figure 1. Number of Bid Protests Filed With GAO (FY2001- FY2008)	5
Figure 2. Effectiveness Rate of GAO Protests (FY2001 – FY2008)	6
Figure 3. Number of Federal Government Contract Actions	7
Figure 4. Federal Contract Spending	7
Figure 5. Number of Bid Protests Filed With GAO (FY1995 - FY2008)	8
Figure 6. Number of Protests Sustained by GAO	10
Figure 7. Percentage of Protests Sustained by GAO	11
Figure 8. Number of Bid Protests Filed Against DOD.....	13
Figure 9. DOD Contract Spending	13
Figure 10. DOD Share of All Federal Contract Spending and Bid Protests.....	14

Tables

Table A-1. Bid Protests Filed Against DOD.....	16
Table A-2. Comparison of Protests Filed Against DOD vs. Civilian Agencies.....	17

Appendixes

Appendix A. Bid Protests Filed Against DOD	16
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Contacts

Author Contact Information	18
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Introduction

Bid protests filed with the Government Accountability Office (GAO), have received increased congressional scrutiny due to recent protests of high-profile awards reports and reports that the number of protests is increasing.¹ On December 22, 2008, the GAO notified Congress that it received 1,652 protests in FY2008, a 17% increase over the number of filings in Fiscal Year (FY) 2007.² Some of these protests involved high-profile procurements—such as the Air Force’s aerial refueling tankers, and combat, search, and rescue (CSAR-X) helicopters.³ In one case, the 110th Congress held hearings on a protested procurement and considered legislation that would have precluded government agencies from making a contested award.⁴ Additionally, the increasing number of protests filed with GAO, and the impact protests have in delaying contract award or performance, have raised concerns regarding the impact of protests on agency operations, especially in the Department of Defense (DOD). John J. Young, Jr., then Acting Under Secretary of Defense for Acquisition, Technology and Logistics, issued a memorandum in August 2007 in which he described bid protests as “extremely detrimental to the warfighter and taxpayer,” and said that “[t]he Defense Department must take steps in an effort to avoid these protest situations.”⁵ Partly in response to such concerns, the House Armed Services Committee, in authorizing DOD’s budget for FY2009, requested that GAO investigate and report on the impact of bid protests on DOD.⁶

This report is one of two providing Congress with background on the GAO bid-protest process. It analyzes (1) trends in bid protests filed with GAO, (2) the impact bid protests have in delaying contracts, (3) the most common grounds for GAO to sustain a protest, and (4) trends in bid protests filed against DOD. Its companion report, CRS Report R40228, *GAO Bid Protests: An Overview of Timeframes and Procedures*, by Kate M. Manuel and Moshe Schwartz, provides an overview of the GAO bid protest process, including (1) what issues can be protested, (2) who can file or be a party to a protest, (3) the procedures for bringing and resolving protests, (4) the timeframes involved in protests, (5) the automatic stay of contract award or performance triggered by a protest, as well as the basis for agency overrides of automatic stays and judicial

¹ Bid protests are formal, written objections to an agency’s solicitation for bids or offers; cancellation of a solicitation; or award or proposed award of a contract. See: 31 U.S.C. § 3551(1)(A)-(D).

² This figure includes 89 requests for reconsideration and 87 bid protests filed as a result of GAO’s expanded jurisdiction over task orders (49 filings), A-76 protests (30 filings), and Transportation Security Administration protests (8 filings). See GAO, *GAO Bid Protest Annual Report to the Congress for Fiscal Year 2008*, Dec. 22, 2008, available at <http://www.gao.gov/special.pubs/bidpro08.pdf>. Last visited, January 13, 2009.

³ See, e.g., Dana Hedgepeth & Robert O’Harrow, Jr., Air Force Faulted over Handling of Tanker Deal, *Washington Post*, June 19, 2008, at A1; Michael Fabey, Lockheed Martin Files Another CSAR-X Protest, *Aviation Week*, June 12, 2007, available at <http://www.aviationweek.com/aw/generic/story.jsp?id=news/CSAR061207.xml&headline=Lockheed%20Martin%20Files%20Another%20CSAR-X%20Protest&channel=defense>.

⁴ See, Air Force Aerial Refueling Tanker Replacement: Hearing before the House Committee on Armed Services, July 10, 2008; KC-X Tanker Re compete Act, H.R. 6426, 110th Congress, at § 2(a).

⁵ Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Under Secretaries of Defense, Aug. 24, 2007, available at <http://acquisition.navy.mil/rda/content/download/5263/23838/file/enhancing%20competition%201-18-2008.pdf>.

⁶ *Duncan Hunter National Defense Authorization Act for Fiscal Year 2009: Report of the Committee on Armed Services, House of Representatives*, 110th Congress, on H.R. 5658, at 394-95 (2008).

review of agency override determinations, (6) the basis and effects of GAO decisions, and (7) reconsideration and “appeal” of decisions.⁷

Background

The foundation of today’s federal procurement system dates back to the Armed Services Procurement Act of 1947 and the Federal Property and Administration Act of 1949.⁸ The two post World War II acts, as amended, particularly by the Competition in Contracting Act of 1984, along with the Federal Acquisition Regulation (FAR), constitute most of today’s federal procurement system.⁹ The FAR, first published in 1984, regulates how the federal government acquires goods and services by codifying uniform policies and procedures for the entire executive branch.¹⁰ The intent of the FAR is to help guide the Federal Acquisition System to “deliver on a timely basis the best value product or service to the [government], while maintaining the public’s trust and fulfilling public policy objectives.”¹¹

One of the guiding principles of the FAR is to promote competition for government contracts.¹² Competition has been an integral part of the federal procurement system since 1781, when the then Superintendent of Finance conducted the first formal open competition by advertising in a local newspaper for contract proposals to provide food for federal employees in Philadelphia.¹³ Many of the same principles that held true for the competition in 1781 hold true today.

Today, the federal acquisition process generally begins when an agency determines that it needs a good or service, and that the appropriate method for procuring the good or service is to contract with a private company. For contracts valued in excess of \$100,000, an agency generally develops a solicitation identifying what the agency wants to buy, advertises the solicitation, identifies the method for evaluating offers, and sets a deadline for the submission of bids or proposals. The agency then evaluates the bids or proposals based on the criteria set forth in the solicitation and awards a contract to the winning firm.¹⁴

In an effort to protect the integrity of the procurement system, the FAR and federal law provide mechanisms for contractors to object to contract awards. Generally, any interested party¹⁵ who

⁷ For more on GAO generally, see CRS Report RL30349, *GAO: Government Accountability Office and General Accounting Office*, by Frederick M. Kaiser.

⁸ See Pub.L. 413 and Pub.L. 152, respectively.

⁹ The FAR was established to codify uniform policies for acquisition of supplies and services by executive agencies. It is issued and maintained jointly, by the Secretary of Defense, Administrator of General Services, and the Administrator, National Aeronautics and Space Administration. The official FAR appears in the Code of Federal Regulations at 48 CFR Chapter 1. For more information, see <http://acquisition.gov/far/index.html>. Last visited January 22, 2009.

¹⁰ For a copy of the FAR, see <http://www.arnet.gov/far/>. Last visited January 5, 2008.

¹¹ FAR 1.102.

¹² *Ibid.*

¹³ *History of Government Contracting*, p. 49.

¹⁴ For more information on the federal acquisition process, see CRS Report RS22536, *Overview of the Federal Procurement Process and Resources*, by L. Elaine Halchin

¹⁵ An interested party is “an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.” See FAR 33.101.

believes that a contract has been awarded unlawfully can seek relief and contest the award by filing a bid protest.¹⁶ The Government Accountability Office has been a forum for resolving bid protest disputes for more than 80 years. Historically, however, an interested party could file a protest in a number of forums, including the General Services Board of Contract Appeals and the U.S. District Court. By 2001, Congress had removed bid protest jurisdiction from the General Services Board of Contract Appeals and the U.S. District Court, leaving GAO the sole government-wide forum for hearing administrative protests and the Court of Federal Claims (COFC) the only judicial forum for hearing such protests.¹⁷ Companies can also file a protest with the agency awarding the contract, and under certain circumstances, with specialized entities, such as the Small Business Administration or the Bureau of Indian Affairs.¹⁸ GAO, however, remains the primary forum for resolving government contract bid protests.¹⁹

GAO Bid Protests

GAO may generally hear protests alleging illegalities or improprieties in solicitations, cancellations of solicitations, or awards or proposed awards of contracts that are filed by interested parties. The procedures for bringing and conducting GAO protests are designed to ensure “the inexpensive and expeditious resolution of [bid] protests” to “the maximum extent practicable.”²⁰ Protesters need not file formal briefs or technical pleadings,²¹ can represent themselves,²² and can have protests decided without hearings.²³ All protests are required to be resolved within 100 calendar days of being filed.²⁴ The filing of a GAO protest often triggers an automatic stay of contract award or performance that can interrupt agencies’ procurement initiatives for as long as the protest is pending.²⁵

GAO may deny or sustain bid protests. A denial allows the agency to proceed with the challenged award. A sustained decision, in contrast, generally disrupts the proposed award because GAO accompanies sustainments with recommendations to the agency about the challenged award –

¹⁶ A protest is a written objection to a contract award by an interested party. See FAR 33.101.

¹⁷ See Clinger-Cohen Act of 1996, Pub. L. 104-106, 110 Stat. 679 (1996) and Administrative Dispute Resolution Act of 1996, Pub.L. 104-320, 110 Stat. 3870 (1996). See also W. Noel Keyes, *Government Contracts Under the Federal Acquisition Regulation*, 3rd ed. (West Publishing, 2003), p. 734. See 31 U.S.C. § 3556 for the authority of the awarding agency, GAO, and COFC to hear bid protests.

¹⁸ See FAR Subpart 19.3

¹⁹ GAO was established in 1921 as an independent auditor of government agencies and activities by the Budget and Accounting Act of 1921 (42 Stat. 23). Today, GAO provides a variety of services to Congress that extend beyond its original functions and duties, including oversight, investigation, review, and evaluation of executive programs, operations, and activities. For more information on the GAO, see CRS Report RL30349, *GAO: Government Accountability Office and General Accounting Office*, by Frederick M. Kaiser. See also the GAO website at [<http://www.gao.gov>].

²⁰ 31 U.S.C. § 3554(a)(1).

²¹ 4 C.F.R. § 21.1(f).

²² GAO, Office of General Counsel, *Bid Protests at GAO: A Descriptive Guide*, 8th ed. (2006), “Background,” ¶1, available at <http://www.gao.gov/special.pubs/og96024.htm>.

²³ 4 C.F.R. § 21.7(a).

²⁴ 31 U.S.C. § 3554(a)(1). The GAO must also resolve timely supplemental or amended protests within this timeframe, if possible. 4 C.F.R. § 21.9(c).

²⁵ 31 U.S.C. § 3553(c)-(d). However, in certain circumstances, a timely protests will not result in an automatic stay.

such as re-competing the contract or issuing a new solicitation.²⁶ GAO's recommendations are not legally binding upon the agency, but the agency must notify GAO if it does not fully implement GAO's recommendations.²⁷ GAO is, in turn, required to inform Congress of any instances in which agencies do not fully implement GAO recommendations.²⁸ Agencies generally comply with GAO recommendations on protested procurements.²⁹ Protesters that are disappointed with GAO's decision can seek reconsideration from GAO.³⁰ They can also effectively "appeal" GAO's decision by filing a new bid protest with the Court of Federal Claims.³¹ For more information regarding the GAO bid protest process, please see CRS companion report *GAO Bid-Protests: An Overview of Its Timeframes and Procedures*.

Number of Bid Protests Filed With GAO

As previously mentioned, GAO notified Congress that it received 1,652 protests in FY2008, a 17% increase over the number of filings in FY2007.³² However, Congress expanded GAO's jurisdiction in FY2007 to include hearing protests on task orders, A-76 contracts, and Transportation Security Administration contracts.³³ The reported number of protests filed in FY2008 includes 87 bid protests filed as a result of the expanded jurisdiction.³⁴ Excluding protests from expanded jurisdiction, the number of protest in FY2008 increased 11% over the number of filings in FY2007. From FY2001 to FY2008, the number of bid protests filed steadily increased from approximately 1,150 to over 1,550, respectively, an increase of 37% (see **Error! Reference source not found.**). Most protests are dismissed, withdrawn by the protester, or settled prior to GAO issuing an opinion. Since FY2001, on average, GAO issued an opinion on only 22% of bid protests. Of the opinions issued during this period, on average, GAO sustained the about 20% of the time. As a result, from FY2001 to FY2008, approximately 5% of all protests filed were sustained (see **Error! Reference source not found.**).

²⁶ 31 U.S.C. § 3554(b)(1)(A)-(G).

²⁷ 31 U.S.C. § 3554(b)(3).

²⁸ *Id.*

²⁹ Based on CRS Analysis of Comptroller General annual reports to Congress for FY 2001 – FY 2008. See <http://www.gao.gov/decisions/bidproan.htm> for copies of the reports.

³⁰ 4 C.F.R. § 21.14(a).

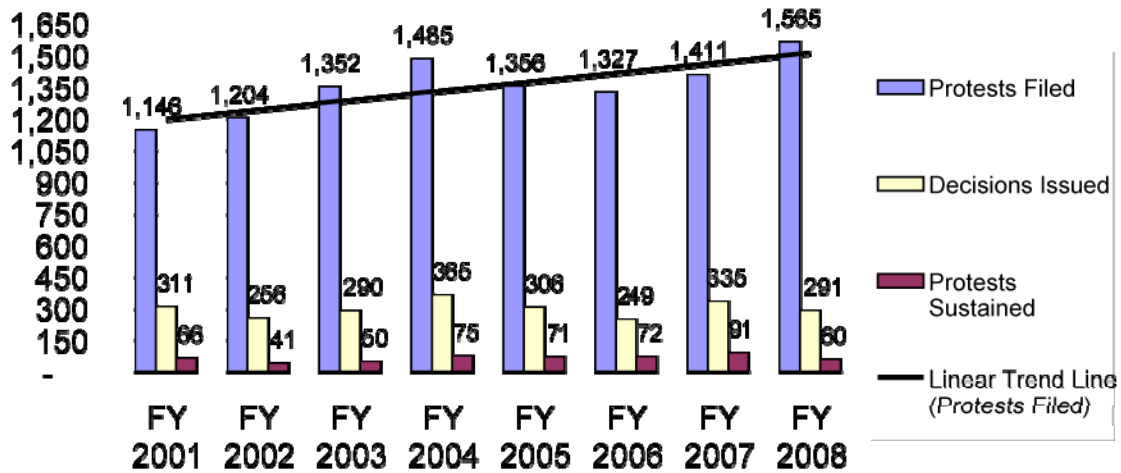
³¹ 31 U.S.C. § 3556.

³² See U.S. Government Accountability Office, *GAO Bid Protest Annual Report to the Congress for Fiscal Year 2008*, December 22, 2008, available at <http://www.gao.gov/special.pubs/bidpro08.pdf>. Last visited, January 13, 2009.

³³ For more information on GAO's expanded jurisdiction, see *GAO Bid-Protests: An Overview of Its Timeframes and Procedures*.

³⁴ *Ibid.*

Figure I. Number of Bid Protests Filed With GAO (FY2001- FY2008)



Source: CRS Analysis of Comptroller General annual reports to Congress for FY 2001 – FY 2008. See <http://www.gao.gov/decisions/bidproan.htm> for copies of the reports.

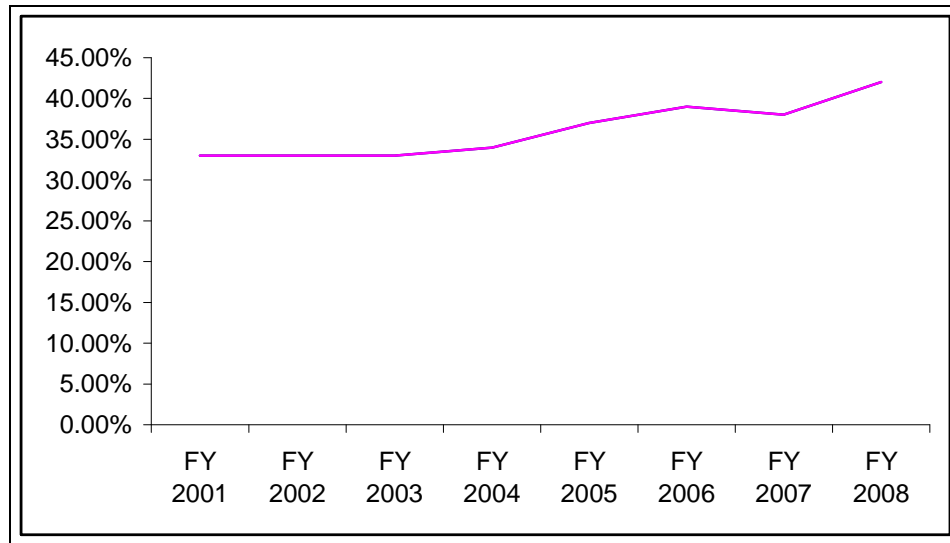
Notes: FY 2008 data exclude bid protests filed as a result of GAO's expanded jurisdiction over task orders (49 filings), A-76 protests (30 filings), and Transportation Security Administration protests (8 filings).

In statistical terms, the R^2 value for the linear trend line is 0.6418. R^2 is a statistical term used to describe the goodness of the fit between the trend line and the data points. R^2 is a descriptive measure between 0 and 1. The closer the R^2 value is to one, the better the fit of the trend line to the data.

In addition to GAO sustaining a protest, protesters can also obtain relief when a contracting agency voluntarily acts to correct the allegation charged in the protest. Many analysts consider the increasing willingness of agencies to voluntarily take corrective action as one of the most significant trends in bid protests. Such voluntary action by an agency could indicate that the agency believes that a given protest has merit.

The percentage of protesters obtaining relief – either through a protest being sustained or through voluntary action taken by an agency—is called the effectiveness rate. The effectiveness rate may be a good way to measure the number of protests that have actual or potential merit. From FY2001 to FY2008, the effectiveness rate of GAO protests grew from 33% to 42%, respectively (see **Figure 2**).³⁵ The increase in the effectiveness rate could indicate that not only are the number of protests increasing but the number of protests that have merit is also increasing.

³⁵ Some have attributed the increase in the effectiveness rate to the predictable nature of GAO opinions. If GAO decisions are sufficiently predictable to allow agencies to determine how GAO will rule in a given situation, agencies are more likely to voluntarily take corrective action than wait for GAO to sustain a protest.

Figure 2. Effectiveness Rate of GAO Protests (FY2001 – FY2008)

Source: CRS Analysis of Comptroller General annual reports to Congress for FY 2001 – FY 2008. See <http://www.gao.gov/decisions/bidproan.htm> for copies of the reports.

Notes: Based on a protester obtaining some form of relief from the agency, as reported to GAO.

Recent media reports discussing the increase in protests have fueled the debate over why the number of protests is rising.³⁶ Some analysts may take the increase as evidence that the government's ability to properly award contracts is getting worse. Others may attribute the trend to an increasing willingness of companies to file protests. Such analysts might argue that the increase in value of individual contracts and longer periods of contract performance make contractors more desperate to win each contract—and more willing to protest an award.

The number—and value—of contract actions signed by the federal government has grown at a faster rate than the number of protests filed with GAO.³⁷ According to *USASpending.gov*, between FY2001 and FY2008, the number of contract actions executed by the federal government increased by almost 600% and the value of those contracts increased over 100% (see **Figures 3 & 4**).³⁸ Even after adjusting for inflation, federal contract spending increased by approximately 80% between FY2001 and FY2007.³⁹ This compares to a 37% increase in the number of protests filed

³⁶ See Donna Borak, "GAO Says Federal Contract Protests by US Businesses Hit 10-Year High in 2008," *Associated Press Newswires*, December 30, 2008; Robert Brodsky, "Bid Protests Reach 10-Year High," *Nextgov.com*, January 5, 2009, www.nextgov.com.

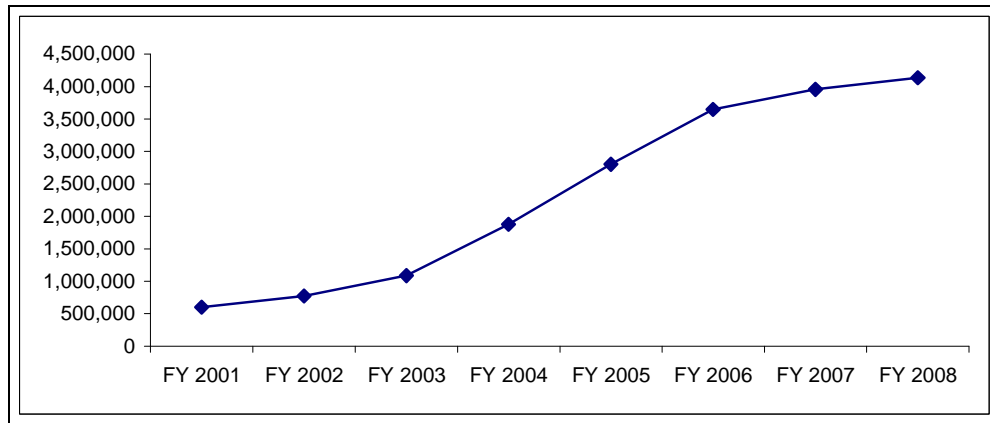
³⁷ Contract actions reported by *USASpending.gov* includes contract modifications and other actions that can not be protested to GAO. Because the data set for contract actions is more expansive than the pool of actions that can be protested with GAO, the analyses that follow are used to identify trends.

³⁸ Data is *USASpending.gov* is updated frequently; data from the website that is used in this report was accessed on February 10, 2009. FY2008 data may not be complete. OMB established *USASpending.gov* as required by the Federal Funding Accountability and Transparency Act of 2006 Pub. L. No. 109-282, 120 Stat. 1186 (Sept. 26, 2006), 31 U.S.C. § 6101 note. According to GAO, concerns have been raised over the accuracy of the data contained on the website. Given these reliability concerns, data from *USASpending.gov* is only used in this report to identify broad trends. See http://www.gao.gov/transition_2009/agency/omb/ensuring_awards.php#transition_2009. Last visited January 9, 2009.

³⁹ Deflators for converting into constant dollars derived from the National Income and Product Accounts Table, Table 1.1.4. Price Indexes for Gross Domestic Product. Last Revised on December 23, 2008. Data not yet available to convert FY2008 data into constant dollars.

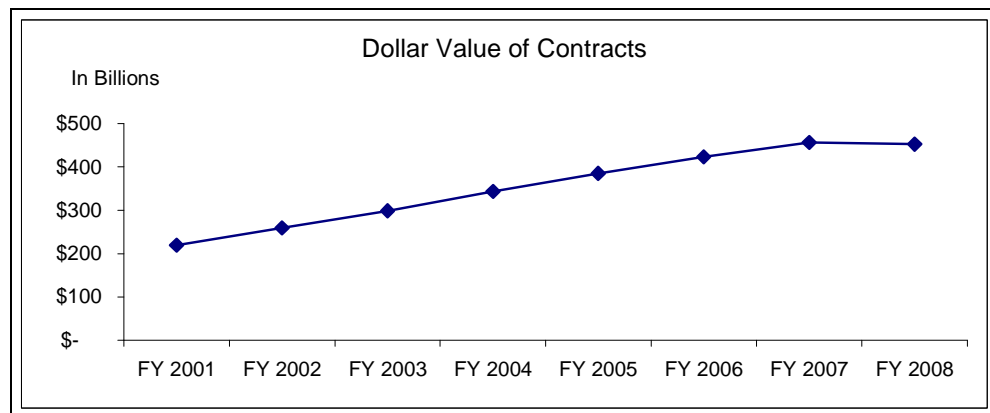
with the GAO. Even though the data reported in *USASpending.gov* does not correlate perfectly with the GAO data, some could argue that the trend in increased government contracting activity is clear—the recent rise in protests correlates to an increase in government contracting activity.⁴⁰ Others can point out that since contract actions and spending have risen at a faster rate than protests, the proportion of contracts being protested has actually decreased. Put into historical context, the number of protests filed in FY2008 is still substantially lower than the number filed from FY1995 to FY1997 (see **Figure 5**).

Figure 3. Number of Federal Government Contract Actions
FY2001 – FY2008



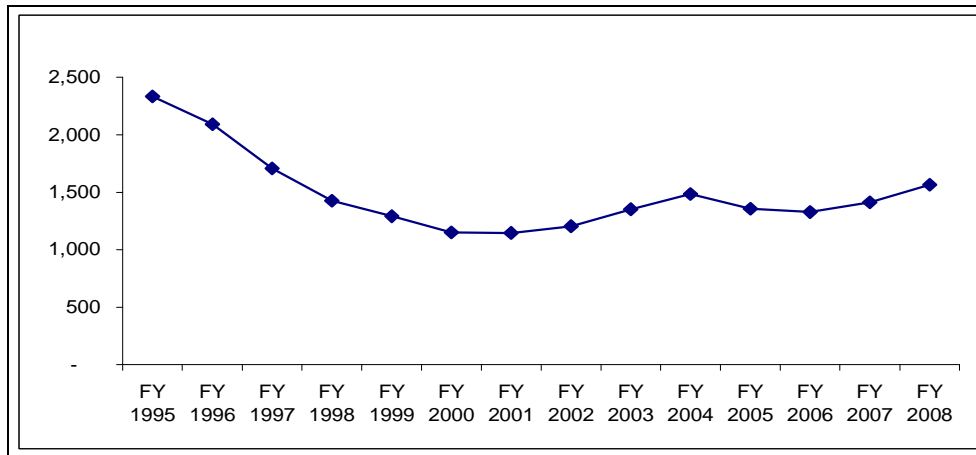
Source: CRS Analysis of Data from *USASpending.gov*.

Figure 4. Federal Contract Spending
FY2001 – FY2008 (in Billions)



Source: CRS Analysis of Data from *USASpending.gov*.

⁴⁰ Contract actions reported by *USASpending.gov* includes contract modifications and other actions that can not be protested to GAO. Therefore, the data set is more expansive that the pool of actions that can be protested with GAO.

Figure 5. Number of Bid Protests Filed With GAO (FY1995 - FY2008)

Source: CRS Analysis of Comptroller General annual reports to Congress for FY1996 – FY2008. See <http://www.gao.gov/decisions/bidproan.htm> for copies of the reports.

Notes: FY 2008 data excludes bid protests filed as a result of GAO's expanded jurisdiction over task orders (49 filings), A-76 protests (30 filings), and Transportation Security Administration protests (8 filings).

Are Bid Protests Delaying Contracts?

Many analysts and acquisition professionals are concerned that bid protests can delay contract awards for weeks and even months, costing millions of dollars and preventing government from getting the goods and services it needs when it needs them. In an August 2007 memo, John Young, then Acting Under Secretary of Defense for Acquisition, Technology and Logistics, wrote that 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....

A number of high-profile government acquisitions have experienced extensive delays as a result of GAO bid protest decisions. For example, on June 18, 2008, GAO sustained Boeing's protest of the Air Force's award of a contract to Northrop Grumman.⁴¹ More than seven months later, a new Request for Proposal has not yet been issued. Identifying which protests tend to experience the longest delays—and working to minimize such delays—could help the government save hundreds of millions of dollars and receive the goods and services it needs when it needs them.

Bid Protests Trigger an Automatic Stay

Under the Competition in Contracting Act (CICA), the mere filing of a bid protest with GAO may trigger an automatic stay, or postponement, of contract award or performance.⁴² When a protest is

⁴¹ U.S. Government Accountability Office, "GAO Sustains Boeing Bid Protest," press release, June 18, 2008, http://www.gao.gov/press/press-boeing2008jun18_3.pdf.

⁴² CICA was enacted as part of the Deficit Reduction Act of 1984, P.L. 98-369, §§ 2701-2753, 98 Stat. 1175 (1984) (continued...)

filed prior to award, an agency may not award a contested contract until the protest has been resolved.⁴³ Similarly, when a protest is filed after award, the agency must withhold authorization of performance under the contract while the protest is pending.⁴⁴ If authorization has not been withheld, the agency must “immediately direct the contractor to cease performance under the contract” until the protest is resolved.⁴⁵

If an agency believes that circumstances are such that further delay in contract execution will have severe consequences, CICA provides grounds for agency overrides of automatic bid-protest stays.⁴⁶ According to CICA, agencies may override stays when there are “urgent and compelling circumstances” that impact the interests of the United States and when performing the contract is in “the best interests of the United States.”⁴⁷ According to data provided by GAO, from FY2001 to FY2007 agencies sought to override CICA stays in over 650 contracts, or 7% of all protests filed during the period.⁴⁸

GAO and the 100 Day Time Limit

GAO is required to complete its involvement in a protest within 100 calendar days of their filing.⁴⁹ According to GAO officials, GAO has never failed to complete its work within the required time period. In many cases the protest is resolved much earlier.⁵⁰ For example, a protest can have a shortened 65-calendar day deadline if the protest is treated under the “express option.”⁵¹ GAO can also dismiss protests that do not meet filing guidelines within days of filing, and can issue a summary decision on a protest at any time.⁵² Since GAO completes its protest work within 100 days of a protest being filed, generally, any delay in contract award or execution that results from a GAO protest can be mitigated by starting the contracting process a few weeks earlier.

In FY2008, approximately 58% of all GAO protests were dismissed, withdrawn by the protester with no further action, or resolved in the agency’s favor. Generally, for reasons discussed above, these protests delayed a contract for fewer than 100 days.

In FY2008, approximately 37% of all GAO bid protests were resolved based on the protestor obtaining some form of relief from the agency subsequent to filing a protest—but prior to GAO

(...continued)

(codified, in part, at 31 U.S.C. § 3556).

⁴³ 31 U.S.C. § 3553(c)(1).

⁴⁴ 31 U.S.C. § 3553(d)(1).

⁴⁵ 31 U.S.C. 3553(c) and (d)

⁴⁶ 31 U.S.C. § 3553(c)(1) & (d)(3). See *Ameron, Inc. v. U.S. Army Corp. of Eng’rs*, 607 F. Supp. 962, 974 (D.N.J. 1985) (describing the override as a “built-in safety value to prevent undue harm” to the government).

⁴⁷ See Companion report, *GAO Bid-Protests: An Overview of Its Timeframes and Procedures*, etal.

⁴⁸ See Companion report, *GAO Bid-Protests: An Overview of Its Timeframes and Procedures* etal.

⁴⁹ 31 U.S.C. § 3554(a)(1). The GAO must also resolve timely supplemental or amended protests within this timeframe, if possible. 4 C.F.R. § 21.9(c).

⁵⁰ Based on conversation with GAO officials, December 17, 2008. According to officials, even in those cases where a supplemental protest is filed, the supplemental protest is generally resolved within 100 days of the filing of the original bid protest.

⁵¹ 31 U.S.C. § 3554(a)(2); 4 C.F.R. § 21.10.

⁵² 4 C.F.R. § 21.10(e).

issuing an opinion. For example, an agency may recognize an error in the contracting process and choose to re-compete the contract. In these cases, protests are usually withdrawn as a result of the settlement between the parties or dismissed by GAO because the basis for the protest has been resolved. While the withdrawal or dismissal of these protests occurs within 100 days, it could take more than 100 days to provide relief. For example, if the agency agrees to re-compete a contract, the new competition could take more than 100 days. CRS was unable to obtain data on the extent to which such bid protests delay the award or execution of a contract.

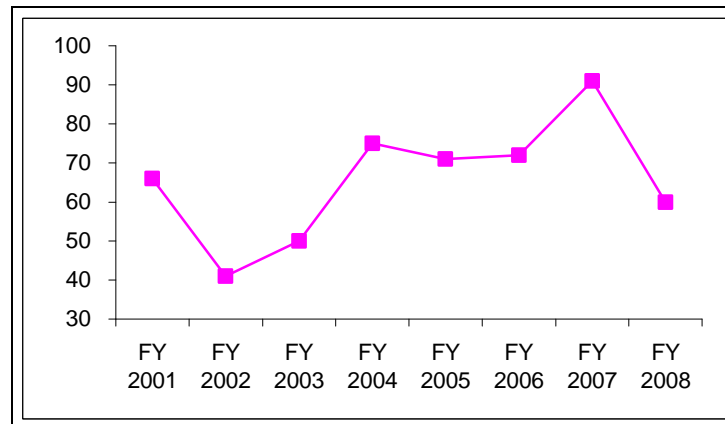
Generally, protests sustained by GAO are most likely to delay contract award or execution. Developing a mechanism for remedying the problem more quickly may benefit the government. While on average only 5% of protests are sustained, many of these protests are controversial and receive significant media attention. For example, a recent article referring to the aerial refueling tanker (KC-X), Combat Search and Rescue Replacement helicopter (CSAR-X) and HUMVEES, stated “at least three major Pentagon programs worth a combined \$70 billion were delayed this year due to protests filed by Boeing Co., Lockheed Martin Corp., Northrop Grumman Corp., and others.”⁵³

Number of Bid Protests Sustained by GAO

In recent years, neither the number—nor percentage—of bid protests sustained by GAO has increased significantly (see **Figures 6 & 7**). From FY2001 to FY2008, on average 5% of all protests filed were sustained. In FY2001, GAO sustained 66 protests, or 6% of all protests. In FY2008, GAO sustained 60 protests, or 4% of all protests filed, despite a 37% increase in the number of bid protests filed over the same period.

Figure 6. Number of Protests Sustained by GAO

FY 2001 – FY 2008

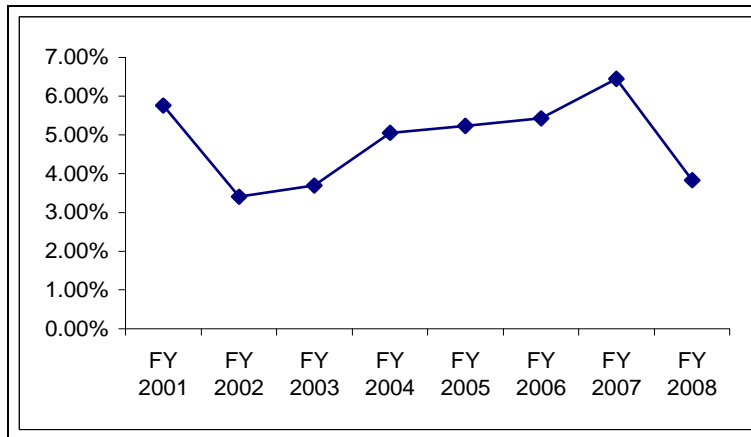


Source: CRS Analysis of Comptroller General annual reports to Congress for FY 2001 – FY 2008.

Note: The R² value for the linear trend line for the number of protests sustained during the period is 0.2578.

⁵³ Donna Borak, "GAO Says Federal Contract Protests by US Businesses Hit 10-Year High in 2008," *Associated Press Newswires*, December 30, 2008

Figure 7. Percentage of Protests Sustained by GAO
FY 2001 – FY 2008



Source: CRS Analysis of Comptroller General annual reports to Congress for FY 2001 – FY 2008.

Note: The R² for the linear trend line for the percentage of protests sustained by GAO is 0.036.

Common Grounds for GAO Sustaining Bid Protests

Knowing what aspect of the contracting process most often results in bid protests being sustained could help agencies focus on improving those aspects of contracting. Such improvements could help reduce the number of protests being filed and/or sustained.

GAO officials stated that they do not formally track the most common reasons protests are sustained.⁵⁴ Officials believe, however, that among the most common grounds for sustaining protests are

1. agencies not maintaining adequate documentation,
2. errors in how agency officials conduct discussions with offerors,
3. flaws in cost evaluations, and
4. agencies not adhering to established evaluation criteria.

For example, many of the common grounds for sustaining protests can be seen in GAO's decision to sustain Boeing's protest of the Air Force's award to Northrop Grumman for the aerial refueling tankers (KC-X).⁵⁵

Documentation

Officials stated that there are strict statutory requirements for documenting agency decisions.⁵⁶ In a number of cases, agencies failed to adhere to statutory requirements, resulting in GAO sustaining bid protests. For example, in the KC-X decision, GAO sustained the protest because

⁵⁴ Based on conversation with GAO officials, December 17, 2008.

⁵⁵ For a copy of the GAO decision, see <http://www.gao.gov/decisions/bidpro/311344.htm>.

⁵⁶ See 41 U.S.C. 262(b) (written findings), 41 U.S.C. 417 (recording requirements), and FAR Subpart 4.8 (detailed requirements implementing the regulations).

“the record must contain adequate documentation showing the bases for the evaluation conclusions and source selection decision... Nevertheless, the record does not establish that the SSAC (Source Source Selection Advisory Council)Source Selection Authority (SSA) and SSA (Source Selection Authority), in considering those strengths and weaknesses, applied the relative weights identified in the RFP (Request for Proposal) for the various SRD (System Requirements Document) requirements (under which the KPPs [Key Performance Parameters] were most important). Moreover, the record does not show any consideration by the SSAC or SSA of the fact that Boeing’s proposal was evaluated as satisfying significantly more SRD requirements than Northrop Grumman’s.”

Conduct of Discussions with Offerors

Agencies sometimes conduct discussions with offerors in an unfair manner. For example, in the KC-X decision, GAO sustained the protest because “[t]he Air Force conducted misleading and unequal discussions with Boeing, by informing Boeing that it had fully satisfied a key performance parameter...but later determined that Boeing had only partially met this objective, without advising Boeing of this change in the agency’s assessment and while continuing to conduct discussions with Northrop Grumman....” Such unfair discussions are grounds for GAO sustaining a bid protest.

Cost Evaluations

Flaws in cost evaluation models result in bid protests being sustained. For example, in the KC-X decision, GAO sustained the protest because the Air Force’s evaluation of construction costs in calculating Boeing’s costs for their proposed aircraft was unreasonable. The Air Force conceded that it “made a number of errors in evaluation that, when corrected, result in Boeing displacing Northrop Grumman as the offeror with the lowest most probable life cycle cost...”

Failure to Adhere to Established Evaluation Criteria

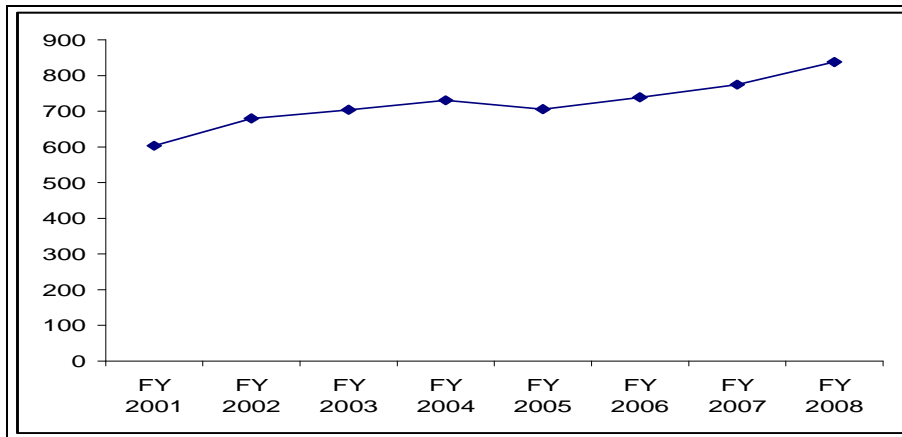
Agencies do not always adhere to the evaluation criteria set forth in the Request for Proposal (RFP). For example, in the KC-X decision, GAO sustained the protest because “The Air Force, in making the award decision, did not assess the relative merits of the proposals in accordance with the evaluation criteria identified in the solicitation, which provided for a relative order of importance for the various technical requirements.”

DOD Contracts and Bid Protests

The number of bid protests filed against DOD has increased from approximately 600 in FY2001 to approximately 840 in FY2008, an increase of 38% (see **Figure 8**). Most of the protests filed against DOD were dismissed, withdrawn by the protester, or settled prior to GAO issuing an opinion. In FY2008, GAO issued an opinion on 29% of these bid protests.⁵⁷ Fewer still are sustained by GAO. From FY2001 to FY2008, on average only 5% of protests filed against DOD were sustained by GAO (see **Table A-1** for number of protests filed and sustained, by service).

⁵⁷ Data provided by GAO.

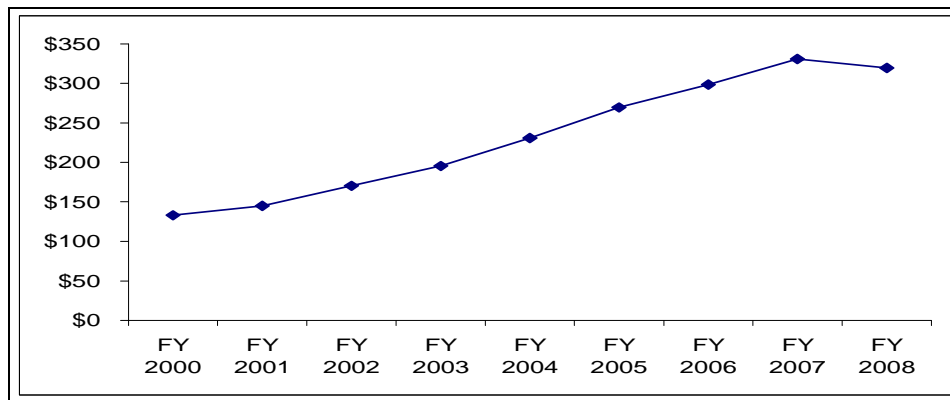
Figure 8. Number of Bid Protests Filed Against DOD
FY2001 – FY2008



Source: CRS Analysis of Comptroller General annual reports to Congress for FY 2001 – FY 2008.

The overall dollar value of DOD contracts has increased proportionally more than the number of protests filed with GAO. According to *USAspending.gov*, between FY2001 and FY2008, the value of contracts actions signed by DOD increased by 120% (see **Figure 9**). Adjusting for inflation, federal contract spending increased more than 80% between FY2001 and FY2008.⁵⁸ This compares to a 39% increase in the number of protests filed against DOD in the same period.⁵⁹

Figure 9. DOD Contract Spending
FY2001 - FY2008 (in Billions)



Source: CRS Analysis of Data from *USAspending.gov*.

⁵⁸ Deflators for converting into constant dollars derived from Office of the Under Secretary of Defense (Comptroller), Department of Defense, National Defense Budget Estimates for FY2009, Department of Defense Deflators – TOA ‘Total Non-Pay’, p. 47, March 2009.

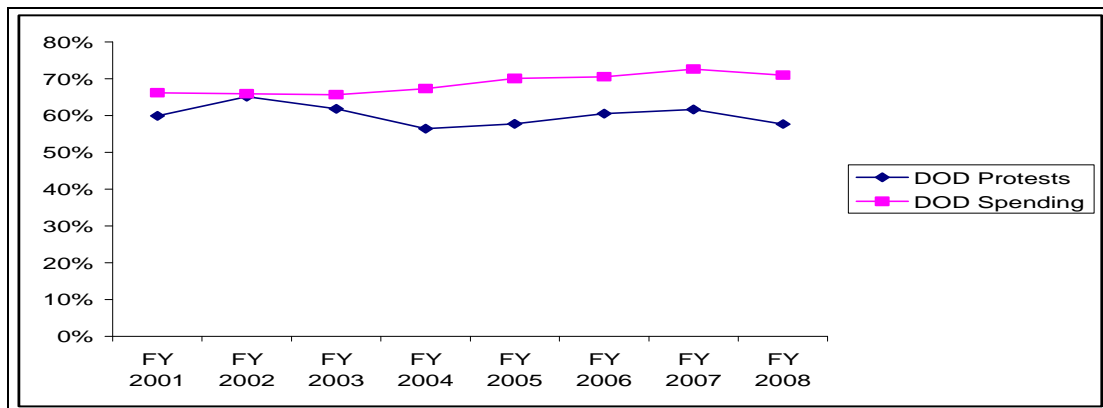
⁵⁹ CRS was unable to ascertain whether the average dollar value of a contract increased, decreased, or remained constant. Such information would help evaluate more precisely the correlation between the increase in bid protests and the increase in contract spending.

In recent years, neither the number – nor percentage – of bid protests sustained against DOD has consistently increased (see **Table A-2**). In FY2001, GAO sustained 40 protests, or 7% of protests filed against DOD, compared to 30 protests, or 4% of protests filed against DOD in FY2008.

Protests against DOD are not sustained at a higher rate than the rest of government (see **Table A-2**). From FY2001 to FY2008, just under 5% of all protests filed against DOD were sustained by GAO, compared to 6% of all protests filed against all federal civilian agencies. During the same period, on average, 60% of all bid protests filed with GAO contested DOD contracts even though DOD accounted for an average of 69% of all federal contract spending (see **Figure 10**).

Figure 10. DOD Share of All Federal Contract Spending and Bid Protests

FY 2001 – FY 2008



Source: Spending data obtained from *USASpending.gov*. Protest data obtained from GAO.

Note: Data based on federal contract awards, by funding agency.

Options for Congress

In assessing whether legislative action could help minimize the number of protests filed with GAO or the delay of award/execution often associated with a protest being sustained, Congress may consider the options discussed below.

Require agencies re-competing a contract as a result of a GAO opinion to amend or reissue the request for proposal within a specified timeframe or publish why the timeframe can not be met.

According to many analysts, the most significant delays in contract award/execution occur when agencies re-compete an award as a result of a GAO opinion. Requiring agencies to amend or reissue a request for proposal within a specified timeframe—or publish why they are unable to meet the requirement—could encourage agencies to re-compete contracts more quickly.

Require GAO to include in its annual report to Congress the most common grounds for sustaining protests.

GAO is required to submit to Congress an annual report on bid protests. The report, which is publicly available, includes the number of bid protests filed and instances where agencies did not implement GAO's recommendations. Including in the report the most common reasons bid protests are sustained could help all agencies identify those aspects of contracting that need to be improved. Such improvements could help reduce the number of protests being filed and sustained. Such a report could also help Congress get a better understanding of the weaknesses in the federal acquisition process and consider any legislative action they deem appropriate.

Appendix A. Bid Protests Filed Against DOD

Table A-1. Bid Protests Filed Against DOD

	Total Cases	Protests Sustained	Percent sustained	Total Cases	Protests Sustained	Percent sustained
	Air Force			Army		
FY 2001	145	5	3%	224	12	5%
FY 2002	136	4	3%	254	11	4%
FY 2003	154	2	1%	229	20	9%
FY 2004	132	3	2%	324	18	6%
FY 2005	127	13	10%	282	7	2%
FY 2006	148	13	9%	334	12	4%
FY 2007	136	16	12%	323	22	7%
FY 2008	154	9	6%	396	9	2%
Average	142	8	6%	296	14	5%
	Marines			Navy		
FY 2001	25	6	24%	116	7	6%
FY 2002	16	-	0%	120	5	4%
FY 2003	20	-	0%	148	1	1%
FY 2004	14	3	21%	112	11	10%
FY 2005	12	1	8%	135	5	4%
FY 2006	32	1	3%	101	4	4%
FY 2007	20	-	0%	129	8	6%
FY 2008	22	2	9%	126	9	7%
Average	20	2	8%	123	6	5%
	DLA			DOD (Misc)		
FY 2001	80	3	4%	13	7	54%
FY 2002	119	0	0%	35	2	6%
FY 2003	107	1	1%	46	8	17%
FY 2004	115	1	1%	34	0	0%
FY 2005	121	0	0%	29	2	7%
FY 2006	70	3	4%	54	5	9%
FY 2007	97	0	0%	70	16	23%
FY 2008	87	1	1%	53	0	0%
Average	100	1	1%	42	5	14%

Source: CRS analysis of data provided by GAO.

Notes: Data is based on cases closed and does not include requests for reconsideration; therefore data may not reconcile with information contained in GAO's annual report to Congress.

Table A-2. Comparison of Protests Filed Against DOD vs. Civilian Agencies

	Civilian		DOD		Civilian + DOD					
	Total Cases	Decisions Sustained	Total Cases	Decisions Sustained	Total Cases	Total Sustained	Percent Sustained Civilian	Percent Sustained DOD	% Cases from DOD	% Sustain from DOD
FY 2001	404	26	603	40	1,007	66	6%	7%	60%	61%
FY 2002	365	19	680	22	1,032	41	5%	3%	65%	54%
FY 2003	435	18	704	32	1,139	50	4%	5%	62%	64%
FY 2004	565	39	731	36	1,296	75	7%	5%	56%	48%
FY 2005	517	43	706	28	1,223	71	8%	4%	58%	39%
FY 2006	483	34	739	38	1,222	72	7%	5%	60%	53%
FY 2007	483	27	775	62	1,258	89	6%	8%	62%	70%
FY 2008	616	30	838	30	1,454	60	5%	4%	58%	50%

Source: CRS Analysis of data provided by GAO.

Notes: Data does not include requests for reconsideration and therefore may not reconcile with information contained in GAO's annual report to Congress.

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