The Bid-Protest Mechanism: Effectiveness and Fairness in Defense Acquisitions?

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Abstract

We studied bid protests to identify procedural changes that might make them more effective or mitigate the burdens they impose upon government's suppliers, public contracting officials, and, ultimately, taxpayers. Participants perceive the protest process to be essentially fair with errors resulting from inexperience in the acquisition workforce and from challenges inherent in contracting for complex products and services. The process is prone to frivolous protests that arise more from market competition rather than a desire to correct errors. Analyzing DOD contracts and Government Accountability Office protest decisions reveals that contracts with more and smaller bidders and with international winners are more likely to be protested. Protests by large companies where there have been many bidders on complex projects are more likely to be sustained. We also found a relationship between the protest decisions and congressional constituency interests, which interview respondents perceive but GAO denies: GAO decisions appear to favor domestic producers and a fortiori the constituents of pertinent congressional leaders in a way that the decisions of the courts do not. We conjecture that Congress designated the GAO, a congressionally affiliated agency, to execute the bid-protest process not because Congress trusted the executive branch or even the courts to avoid conflicts of interest but because Congress distrusted them to attend to the right interests.

Keywords: Bid protests, GAO, Defense acquisitions, Procurement, Fairness

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The bid-protest mechanism used by government agencies, which gives interested parties the right to contest the procedure or outcome of a contract award, is standard practice in the United States, familiar in the United Kingdom and its former dominions, and present in the European Union. Two sets of questions about it ought to intrigue both students of mechanism design and students of government. First, is the bid-protest mechanism effective? Since it gives rejected suitors *standing to protest* government's choice of a partner and often the *power to delay* execution of contractual relationships, is it worth it? What changes, if any, might make it more effective or mitigate the burdens it imposes upon government's suppliers, public officials charged with executing government contracts, and, ultimately, taxpayers?

Second, is the bid-protest mechanism fair? Does it help "to establish justice, ensure domestic tranquility, provide for the common defense, or promote the general welfare" or is it merely an artifact of interest group power? In other words, the mechanism says that fairness to *all* potential suppliers matters, not only to the winners, but to the losers as well. Why?

We begin by stipulating that contracting involves three basic processes: supplier search, contract negotiation, and monitoring and enforcement of compliance with the resulting contract's terms (Maser 1998). In government contracting, these processes are sequential. The first two processes together comprise source selection. Because source selection takes place within the penumbra of the third process, both supplier search and contact negotiations take into consideration the compliance issues that follow.

In turn, these processes address three governance problems that are inherent to any cooperative enterprise, private or public. The first is the coordination problem, matching the capabilities and interests of a supplier with the needs of the acquirer. The second is the division problem. The parties must reach an accord, which is largely a matter of fairness, since neither the supplier nor the acquirer will agree to a bargain they think unfair or inequitable. The third is the enforcement problem. The prerequisites for enforcing agreements include the ability to monitor compliance and to sanction noncompliance. Solutions to the enforcement problem are costly, which necessarily impinges on solutions to the division problem—who will bear the costs of compliance—and to a more limited extent on solutions to the coordination problem—whether the costs of reaching an accord and of ensuring compliance exceed the benefits of cooperating.

This paper focuses on the effects of the bid protest mechanism on the nature of the *division problem* and source selection decisions as solutions to it. Just as this mechanism is unique to government, so too is its logic. As a matter of governance, we want to know how it works. As a matter of mechanism design, how it affects the fairness of government contracting decisions.

One might think that there would be a substantial body of literature addressed to these issues. And, in fact, Google Scholar identifies 20,800 documents featuring the following

terms: fairness, contracting, acquisition, and defense. However, that number drops to 226 with the addition of bid protest and none of those sources include fairness in their title or abstract. In fact, the issue is rarely if ever confronted directly in the literature. That may reflect the presumed difficulty on the part of students of defense acquisition of studying fairness or, perhaps, an implicit, but erroneous, assumption that it is not central to the bid-protest question.

However, there is an extensive academic literature on fairness in social relations (Homans 1961; Leventhal 1980; Kahneman, Knetsch and Thaler 1986; Moorman 1991; Babcock *et al*. 1995). Two basic approaches to fairness feature in this literature, both of which bear upon the bid-protest issue: the procedural and the distributional. Procedural rules are judged in terms of consistency, absence of bias, and equal representation. Distributional rules follow criteria that are relative to the individual's position within the particular setting and usually go to contribution, effort, or status. Our research shows that both approaches, but especially the former, inform our understanding of bid protests.

Bid Protests and the Rule of Law

As a first cut, the bid-protest mechanism can be said to reflect the aspiration that government be law governed, the basic philosophy of the rule of law, and, in the United States, the language of the Bill of Rights. According to rule of law doctrine, official duties are supposed to be defined neither primarily by enterprise purpose nor political pressure, but by law. As James Fesler and Donald Kettl (2005: 10) explain: “Public organizations exist to administer the law, and every element of their being – their structure, staffing, budgeting, and purpose – is the product of legal authority.” This doctrine also implies the following normative imperative: government must give notice and fair warning about the rules governing its actions, which means that, in source-selection case, government must make its standards reasonably clear and apply them impartially and in a manner consistent with their meaning. The Federal Acquisition Regulations (FAR) and the Defense Federal Acquisition Regulation Supplement (DFARS) prescribe the steps that public officials must follow to comply with these imperatives.

But what if they do not? The First Amendment of the U.S. Constitution says, in part: “Congress shall make no law… abridging… the right of the people…to petition the Government for a redress of grievances.” In the case of public procurement, the U.S. government honors the First Amendment by providing *any* person with a pecuniary interest in the outcome of a source-selection with a venue for protesting the decision, and a device for redressing a grievance. The primary venue is the Government Accountability Office (GAO), the audit, evaluation, and investigative arm of the U.S. Congress.

Like an audit, which places the burden on the auditor to identify an agency’s failure to comply, the bid-protest mechanism, which places the burden on the party who bears the consequences of an agency’s failure to comply, promotes transparency and accountability. Protests are costly to agencies. When a protest is filed, progress on the project in question is arrested until GAO issues a decision, which ties up resources that

could have been allocated to other high value projects (waivers to continue work for national security reasons are rarely requested or granted). If the protestor prevails, these costs may increase. Agencies must also expend resources directly responding to protests. By holding contracting officials accountable, threat of protest, therefore, provides incentives for them to design and operate source-selection processes that are effective, in terms of maximizing net benefits to the government; fair in terms of access to contracting opportunities and the terms of any agreement; and transparent in terms of promoting compliance.

Expanding the Bid Protest Mechanism

Bid protests are rare. They are, for the greater part, pursued only where the plaintiff has a good case. Consequently, the costs they impose on government tend to be small. Prior to 1984, that was true in the U.S. Then, only the awarding agency, the U.S. Court of Federal Claims (COFC), and U.S. District Courts had statutory authority to decide bid protests. Protesting to the agency making the source-selection decision was rarely if ever successful and filing complaints, applications, and motions with COFC or a U.S. district court implied a protracted, costly struggle.

The reason that protests have increased in the U.S. is not hard to discern. In 1984, the *Competition in Contracting Act* (Public Law 98-369, sec. 2701; 31 U.S.C. 3553) extended that authority to the GAO, which has substantially reduced the cost of protesting a source-selection decision. The GAO must hear the protest and announce its findings within 100 days of filing and its rules and procedures are relatively informal (Metzger and Lyons 2007). Testimony in a GAO administrative hearing, for example, is not given under oath and witnesses cannot commit perjury (although they can be prosecuted for violations of the False Statement Statutes, which can lead to one year in jail and a fine). The rules governing precedent, discovery and evidence are equally informal. Moreover, GAO applies a standard of reasonableness in its bid protest decisions and works diligently to maintain that standard. GAO attorneys discriminate frivolous from legitimate claims—those that point out an error in a contracting agency's processes. They also discriminate among legitimate claims those that are material—meaning the outcome of the source selection might have been different but for the agency's error—from those that are immaterial. Consequently, to an outsider, the GAO's bid-protest mechanism looks more like arbitration that adjudication.

Not only is the GAO's process faster and less expensive than the courts', it is often alleged that its decisions are more predictable. We don't really know if that is true, but the GAO takes pains to ensure that it is. To obtain consistency in its decisions, an assistant director reviews the work of the drafting attorney and the associate general counsel signs every decision. Of thirty GAO drafting attorneys, half have been at GAO for over twenty years, affording them considerable experience. It is reasonable to assume that the 100-day statutory requirement for issuing decisions forces GAO to be highly systematic. As a result, GAO believes its decisions are consistent; practitioners in the legal and contracting community have been known to take exception.

In any case, the 1984 act initially produced a substantial increase in bid protests, mostly heard by the GAO. Shortly thereafter Congress made debriefing mandatory.[1] This allows losers to request information from the agency about the basis for its source-selection decision and contract award, after which the rate of protests declined as a proportion of protestable actions and has, subsequently, remained stable (Gansler and Lucyshyn 2009). Nevertheless, the rate at which protests have been sustained (both in the courts and before the GAO) dropped after 1984. Consequently, it is not clear that, despite increases in the rate and absolute number of protests, more contracts and contract actions are now *successfully* protested than prior to 1984.

In other words, giving the GAO authority to decide bid protests might not have made a significant difference in the total cost of dealing with bid protests. Almost everyone involved believes the GAO process is a substantial improvement over COFC and district court actions. However, futile, although not necessarily frivolous, protests increased. The average cost per protest has probably dropped. But the number of protests is higher than pre-1984. Consequently, total costs may be about the same or higher.

So, to the question of 'why did Congress create the bid-protest process,' we can add the following, 'and why did it designate a Congressionally affiliated agency as the appellate court?' Franck, Lewis, and Udis (2008) believe that the answers are straightforward: Congress did not trust the executive branch to make "sensible" awards. In this case it seems reasonable to read "sensible" as fair. This brings us to the purpose of our paper: exploring the effectiveness and fairness of the bid protest mechanism.

[1]Federal Acquisition Regulations give the contracting officer considerable discretion in the content of debriefings. The content and process vary across agencies. A vendor might receive a ten-minute review, scripted by an agency attorney, with a contracting official showing one or two Powerpoint slides containing the minimal amount of information required by the FARs and minimal opportunity for the rejected offeror to ask questions. Or, the vendor might receive an analysis of what the contractor did or did not do that was problematic. Or, the vendor might receive a two-day review by multiple members of the source selection team, including engineers and attorneys, presenting essentially the same information conveyed to the Source Selection Authority; the winner will be asked permission for the agency to explain to rejected offerors why the agency selected the winner, albeit with competitive information redacted; the rejected offeror has ample opportunity for the rejected offeror to ask questions.

FAR 15.506 (b) Debriefings of successful and unsuccessful offerors may be done orally, in writing, or by any other method acceptable to the contracting officer. (c) The contracting officer should normally chair any debriefing session held. Individuals who conducted the evaluations shall provide support. (d) At a minimum, the debriefing information shall include: (1) The Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal, if applicable; (2) The overall evaluated cost or price (including unit prices) and technical rating, if applicable, of the successful offeror and the debriefed offeror, and past performance information on the debriefed offeror; (3) The overall ranking of all offerors, when any ranking was developed by the agency during the source selection; (4) A summary of the rationale for award; (5) For acquisitions of commercial items, the make and model of the item to be delivered by the successful offeror; and (6) Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.

Methodology

To explore the issues of procedural and distributional fairness, we engaged in a two-stage process. First, we reviewed an extensive literature on bid protests, interviewed participants in the acquisitions community, and read GAO protest and COFC decisions and, then, having formed some tentative hypotheses about the causes of protests and their outcomes, we proceeded to test these hypotheses statistically.

We conducted interviews during the last quarter of 2009 and the first quarter of 2010. Respondents included attorneys and staff at GAO; executives and in house counsel at four large prime large contractors; four outside bid protest counsel; government contract managers at two smaller companies who typically are subcontractors; current and former executives in the Office of the Secretary of Defense; officials and in house attorneys at three military commands: Air Force Material Command, Naval Air Systems Command, and the Defense Logistics Agency; Senate Committee staff; and executives at industry trade associations such as Aerospace Industries Association, the National Contract Management Association, the Professional Services Counsel, and TechAmerica.

These interviews are not a representative sample of the acquisitions community, nor were they intended to be. They constitute a network, initiated through people we knew professionally and expanded as respondents recommended others who could share interesting and different perspectives. They offered their perceptions as individuals in the system, not as representatives of the organizations with which they are associated. Agencies use different processes; contracts differ on myriad dimensions; protests differ. People have different experiences with the system, which colors their perceptions. Their insights are suggestive, not definitive.

We based the questions in our interview protocols on a conflict management audit designed by Ury, Brett, and Goldberg (1988, Ch. 2), supplemented by questions generated from a review of literature on DOD procurement. A conflict management audit explores the sources, patterns, and resolutions of conflicts within an organization or process. Experienced contracting officers at three military commands reviewed and commented upon drafts of the protocols, which we then revised.

We also analyzed bid protests posted on the Government Accountability Office's website. We coded all digested decisions issued in calendar years 2001 through 2009. This gave us protests involving the Air Force, Army, Marines, Navy and the Department of Defense, not including the Army Engineer Corps because it operates under different Federal appropriations statutes.

Given the potential for management processes at contracting agencies to trigger conflicts that generate protests based upon procedural or distributive unfairness, we focused on protests that GAO concluded had merit. We excluded from our analysis:

- Decisions associated with the Small Business Innovation Research (SBIR) program because these were grants and did not go comply with the standard process for acquiring products and services;
- Decisions about requests from a vendor for reconsideration by GAO of its decision, typically requesting that GAO recommend awarding the vendor its bid protest costs;
- Decisions to dismiss a protest on procedural grounds, such as the protestor missing a filing deadline or failing to provide factual basis for a claim; the protestor selecting the incorrect venue, often when the protestor should have protested to the Small Business Administration under an SBA contract set aside program; or the protestor not having standing, often when the protestor was not entitled to represent a government agency that submitted a bid in competition with bids from one or more private companies (A-76 program). We excluded these protests because they indicate protestor error or insufficient understanding of the bid protest process. GAO reaches the decision to dismiss on procedural grounds without significant delay and without asking agencies to expend time and resources on responding to the protest. GAO has at times digested protest decisions on procedural grounds as a way to revisit and affirm its procedures for protesters, especially bid protest attorneys.

We coded cases in terms of whether GAO denied or sustained them. We treated as single decisions situations where GAO issued reports simultaneously on multiple protests associated with one solicitation. In other words, we treated as a single decision a case where a protestor filed addenda or supplementary protests, or, where multiple bidders responding to a solicitation filed protests that were combined by GAO in issuing its decision.

Information about cases before the Court of Federal Claims (COFC) came from a search of the Lexis/Nexis database for 2001-2009. We coded cases in terms of whether the protestor or the government was supported by the Court. At the GAO, a decision to deny means that the protestor loses the protest; a decision to sustain means that the protester wins the protest, although not necessarily the contract, and the GAO recommends remedial action to the contracting agency. A protesting plaintiff can bring suit at COFC and the government defendant can make a motion for dismissal. If the Court grants the motion, the case will not be coded as a "sustain" because the protesting plaintiff has lost.

Three students at Willamette University's College of Law coded the decisions. Legal details matter. Different interpretations of the requirements for a debriefing, for example, even though agency officials are reading the same sections of the Federal Acquisition Regulations (FAR) that govern them, lead to different behavior. Government procurement rules and regulations are affirmative law, which means: as opposed to private contracting, the government can impose a requirement if it chooses; the contractor can not be held accountable for failing to satisfy a requirement if the government has not imposed it, and holding a contractor responsible for failing to meet a requirement that has not been imposed can be grounds for a protest. Understanding law and how to spot issues in GAO and COFC opinions requires legal skills.

Information about the financial characteristics of contract winners and protestors came from FEDMINE.US, an advanced database-driven web application that aggregates data from disparate but authoritative federal government sources, as did information about the political jurisdiction in which bidders are headquartered. Additional and confirming information about the contract solicitation numbers, values, types and contracting commands came from databases such as FedBizOpps (fbo.gov), the Federal Procurement Data System (fpds.gov), and fedspending.org, a project of the nonprofit OMB Watch.

Coding decisions affect the presentation of results. We coded as weaponry products to be used or to support combat operations in the battle space. Items that can be used directly by the Armed Forces to carry out missions (Defense Acquisition University Glossary of Defense Acquisition Acronyms and Terms 2010), such as platforms and munitions, are weapons, as are tanker aircraft and amphibious ships. Services, including security and K-9, and information technology and fuel, are coded as nonweapons.

Studying GAO decisions proved to be a nontrivial exercise. First, information about protests with merit that are sustained or denied generally include the same basic information but they do not always include information that would interest us: the source solicitation number for the contract being protested, which is the key to unlocking other information from public databases; the name of the contracting agency, which might allow us to determine whether some agencies tend to be involved in more protests than others; and when GAO recommendations for remedial action are taken by the agency and the results of the action. Missing information is a significant problem.[2]

Second, out of necessity, we sampled on the dependent variable, decisions protested. To make sense of these data, we required information about the universe of protestable contracts in each calendar year, which is not so readily available. We report analyses based on two approaches. First, we used information about the total number of contract actions per fiscal year from FEDMINE, which varies from zero to hundreds per contract, as a proxy. After reviewing samples of all contract actions in selected military services, we estimated on average 2.5 contract actions per contract per year; and applied this to data about the lengths of contracts actions to estimate the number of contracts involved.[3] This allowed us to look at all the variables we were interested, but an inferior set of observation. Second, we obtained information about DOD contracts with source solicitation numbers and listed in FedBizOpps for fiscal year 2004-2009, which approximates the universe of protestable contracts, which we matched our GAO bid protest decisions from October 2003 through September 2009. This provided us with an accurate description of all protestable source selections and allowed us to accurately distinguish those that were protested from those that were not, but provided us with data on only a portion of the variables with which we were concerned.

[2] We encourage GAO to include source solicitation numbers on all if its decisions.

[3] One cannot get scientifically-strong causal inferences from observational data alone without strong theory; it is hopeless to throw a data matrix at a computer program and hope to learn about causal structure. Nevertheless, we report our full correlation matrix of Chi-square coefficients in Appendix 1.

Interview Evidence

Based upon our interviews, we noticed several things. First, the members of the acquisition community, broadly defined, generally agree that source-selection procedures, while often onerous, are basically fair. At the same time, they do not trust each other. Inadequate information contributes to each attributing nefarious motives to the others, generating a conflict spiral (Carpenter and Kennedy, 2001). Most believe that greater transparency on the part of government results in better, fairer source selections and reduces bid-protests, although not necessarily successful protests.

Many of our interviewees were especially complimentary of steps taken by acquisition officials to increase the transparency of the source-selection process. These included agencies disclosing draft RFPs and thoroughly debriefing unsuccessful bidders to help them understand how they could do better the next time (see also Thompson 2009, p. 165). Several cited examples where clear explanations of why they were not selected pre-empted bid protests.

Second, the acquisition community does not believe the process is entirely free of bias. Many members perceive that Democratic administrations favor some firms, Republicans others, that defense agencies have their pets, and that the GAO decisions reflect congressional preferences. A few cited specific examples that confirmed their suspicions, but most were based on little more than hearsay. What is remarkable about these responses is the distrust the participants expressed about the acquisition process, despite the fact that, when queried about their own experiences, they often described the officials they had direct contact with as open, helpful, and informative.

More sophisticated observers tend to attribute unfair results to inexperience or to bad judgment on the part government acquisition officials rather than to bias. We heard complaints from experienced contractor executives about the competence of the acquisition workforce. Some of the acquisition officials we interviewed echoed these concerns. For example, one senior acquisition official told us:

> My office can't do with more people. We need more expertise. If I could hire twenty more people tomorrow, I wouldn't do it. I can't absorb them. I have no source-selection expert pool to select from. I'd love to have a team leader. I'd love to have people with backgrounds in systems engineering. I have to teach them source selection, even for some team leaders. We need experience. Just knowing the FARs isn't sufficient.

Third, bidders protest for a lot of reasons, not all of them have much to do with the merit or even the fairness of the source-selection process. Our interviews confirm the results of an informal survey of contractors conducted ten years ago (Roemerman 1998). Contractor executives and bid protest attorneys report that they protest to:

- Win and thereby be competitive in a successive solicitation or to recover costs
- Send the agency a message, be heard, seek justice, when they believe they have

been wronged because government erred, even against advice of counsel that their protest is unlikely to be sustained given past precedents or that, if their protest is sustained, the protestor is unlikely to become the eventual winner
- Obtain information to help them improve their future bids
- Obtain competitive intelligence
- Hurt the winner by delaying the award
- Retain a revenue stream for the duration of the protest at GAO (in the case of an incumbent who loses)
- Demonstrate resolve to board members or senior executives at the rejected bidder that everything that can be done to pursue a contract is being done
- Be granted work under the contract, either by the agency or by the awardee
- Improve the protestor's chances of getting future contracts

In other words, our interviewees tell us that many protests are in the strict sense of the term, frivolous. They are often made on meretricious grounds. It is not clear to what degree this behavior exacerbates mistrust of the fairness of the source-selection process or is encouraged by the ease and low cost of the GAO bid-protest mechanism.

Fourth, where protests are concerned, size matters, both the size of the contract and the size of the bidder. According to several of our interviewees, larger, more experienced bidders were less likely to make unsustainable bid protests than smaller, less-experienced bidders. Agency and contractor officials perceive that larger, more experienced bidders protest more strategically; that is, the decision to protest becomes a cost-benefit calculation. It takes into account the bidder's portfolio of contracts with government agencies and its competitive position rather than its desire to "be heard" or to "have a day in court." It also takes into account the effectiveness rate, which combines the rate of sustained bid protests with the rate at which agencies respond to a protestor's concerns so that the protestor withdraws the protest; at almost 50 percent the effectiveness encourages protests.

Fifth, project uncertainty and complexity invite protests, this is inherent to the process, and it is, perhaps, unavoidable. Aspects of complexity that were mentioned prominently include the inventiveness of the work required, the amount of systems integration called for, the need for investment in project-specific assets, the duration of the project, and the anticipated difficulty of assessing performance at project completion. Complex projects necessitate complicated RFP's, which increases the likelihood that unsuccessful bidders will perceive that they have been treated unfairly and also the likelihood that the agency will trip up (Snider & Walkner 2001).

In sum, our interviewees acknowledge that bid protests can be effective in terms of promoting fairness in source solicitation. At the same time, the increasing complexity and, perhaps, judicialization of the process has become a source of frustration and even distrust of the system. The lower cost of GAO protests compared to COFC admits a greater number of protests.

Hypothesis Testing

The interviews we conducted inform the hypotheses we test. We used the interviews to identify norms followed by participants in the source selection process and factors specific to this process that are likely to be implicated in their perceptions of its fairness (Babcock *et al*. 1995). Consequently, our findings could be put down to everyday causal intuition. Indeed, a critic might say that this effort lacks the full quality of scientific reasoning. Practical causal inferences are really only as good as the substantive models that underlie them. However, we are not entirely without theory. Transaction cost theory led us to focus on the importance of the division problem in government contracting and perceptions of fairness, which are clouded by the cost of information. Social norms and context profoundly influence those perceptions (Homans 1961).

When are bidders likely to believe they have been treated unfairly? Obviously, one answer is when they have been. But, most protests are not sustained. We are inclined to infer from this fact that most protestants have not been treated unfairly. However, we can test this hypothesis directly. If protests are largely a matter of perception and, given that perceptions are less certain than reality, it follows that the greater the number of bidders on a contract, the greater the likelihood one will be aggrieved. Obviously, if only meritorious protests are sustained, the number of bidders should have no effect on the the likelihood that a protest ill be sustained. This conclusion implies hypothesis 1 and its corollary.

> H1: Contracts with more bidders are more likely to be protested than contracts with only two bidders.
>
> Corollary 1: There should be no relationship between the number of bidders and the likelihood the protest will be sustained.

If hypothesis 1 is correct, the issue of perceived fairness is obviously crucial to an understanding of bid protests.

Fairness theory tells us that bidders will see the process as unfair when their payoff is incommensurate with their efforts (Leventhal 1980; Moorman 1991). We cannot test this presumption directly, but we can infer that those project proposals that are likely to impose substantial sunk costs on the bidder are more likely to lead to results that are perceived as incommensurate with efforts than projects that do not. By sunk costs we mean the acquisition of project-specific assets that must acquired to respond to a request for proposals or an invitation to bid and that cannot easily be redeployed to other projects. In turn, we infer that project complexity (design-work requirements, etc.) will be positively related to the acquisition of project-specific assets. These inferences imply hypothesis 2. Based upon our interviews, we think it likely that the more complex the project, the more likely it is that a material procedural error will be found in the source selection process. This implies Corollary 2.

> H2: The more complex the project the greater the number of bid protests.

Corollary 2: The more complex the project, the greater the sustain rate.

In the analysis that follows we use contract pricing, contract duration, project stage, and object of contract, service vs. product and weapon vs. other, as proxies for complexity.

Moreover, we can infer that perceptions of unfairness will be moderated by experience with defense contracting, since experience should help calibrate expectations (Kahneman, Knetsch and Thaler 1986). We can infer further that small firms, with fewer defense contracts, will tend to be less experienced than large firms, with more contracts, which implies hypothesis 3.

H3: Small bidders are more likely to protest source selections than large bidders.

Corollary 3: Bid protests from small bidders are less likely to be sustained than are protests from large bidders.

Finally, fairness theory tells us that status matters to perceptions of fairness. What is perceived as just depends not only on effort but on relative desert (Leventahl 1980). One observation, which struck us most forcibly during our interviews, is that domestic businesses believe they should be advantaged in this process *vis å vis* foreign businesses. This gives us hypothesis 4.

H4: American bidders are more likely to protest when they lose a source-selection competition to a foreign bidder than when they lose to a domestic bidder.

To test these hypotheses we first set up an ordinary least squares regression where the dependent variable was the protest rate in each month during our time period. The independent variables were business size (number of employees); contract pricing (1, cost plus; 0, fixed price,); number of bidders; winner's nationality (1, foreign; 0, otherwise); stage of project (1, R&D; 0, production); object of project (1, weapon; 0, non weapon and 1, service; 0, product); contract duration; and a set of dummy variables for the contracting agencies.

We then used data mining software (Clementine and MiniTab, both produced identical results) to construct a series of stepwise models, starting with the strongest explanatory variable and continuing until all significant variables ($p < .05$) had been exhausted. The results are shown in Table 1.

Table 1
The Determinants of Bid Protests FY2004-2009

Step	1	2	3
Constant	0.000357	0.000337	0.000316
Number of bidders	0.5	0.5	0.6

T-Value	-5.67	-13.6	4.74
P-Value	0.005	0.001	0.042
Foreign winner		0.4	0.6
T-Value		4.25	23.82
P-Value		0.024	0.002
Business size			-0.5
T-Value			-17.76
P-Value			0.003
R-Sq	**78.94**	**88.42**	**89.99**

The results shown in Table 1 unambiguously suggest that we cannot reject hypotheses 1, 3, and 4. This analysis does not support hypothesis 2. Increased project complexity does not add significant value to this model.

To check these results, at least in part, we used information on protestable contracts from FEDMINE's database on 65,000 contracts with solicitation numbers and identified as listed in FedBizOpps, matched to the protested contracts in our database of GAO decisions. That allowed us to conduct a logistic regression where the dependent variable is dichotomous: 1, if protested, 0, otherwise. Unfortunately, the data from FedBizOpps included information only on the type of contract, the contracting agency, and the contract winner. Consequently, we could say nothing about hypotheses 1 and 3.

The results of this exercise are shown in Table 2.

Table 2
Protests in FY2004-2009

Logistic Regression Table					
Predictor	**Coef**	**SE Coef**	**Z**	**P**	**Odds Ratio**
Foreign Winner	1.4803	0.2056	0	0.009	0
Size of Contract Winner	0.3472	0.2786	1.25	0.003	1.42
Contract Pricing	1.5052	0.3336	4.51	0.000	4.53
Service vs. Product	0.2825	0.2133	1.32	0.009	1.32
Navy	-0.6747	0.2005	3.37	0.001	1.96
DLA	-1.3110	0.1459	8.98	0.000	3.71

These results are consistent with hypotheses 2 and 4. They tell us that bid protests are more likely with cost plus than with fixed price contracts and with services than with products: more complex products and services generate more protests. And, as above, that awards to international firms are more likely to be protested. They also suggest that Navy and DLA contracts are somewhat less likely to be protested than Army, DOD, or Air Force Contracts.

What about the corollaries? See Table 3, a logistic regression on 635 protests between 2004 and 2009, where the dependent variable is 1 if sustained and 0 if denied. Corollary 1 is disconfirmed. The number of bidders is significant and has a positive correlation, which means that the greater the number of bidders the greater the likelihood that a protest will be sustained. Corollary 2 cannot be disconfirmed.

Table 3
Logistic, Stepwise Regression of Sustained Protests FY2004-2009

Step	1	2	3	4
Constant	0.1524	0.1441	0.1203	0.1295
Protester Business Size	0.137	0.131	0.134	0.131
T-Value	3.1	2.98	3.05	2.98
P-Value	0.002	0.003	0.002	0.003
Project Stage		0.115	0.121	0.112
T-Value		2.06	2.18	2.02
P-Value		0.039	0.03	0.044
Number of Bidders			0.064	0.064
T-Value			2.05	2.06
P-Value			0.04	0.04
Number of Criteria				-0.102
T-Value				-1.85
P-Value				0.045
R-Sq	**25.3**	**52.3**	**68.7**	**73.4**

The chi-square table shows that there is a strong correlation between staging (level of complexity of the contract) and GAO decision. Further, corollary 3 cannot be rejected. A strong and highly significant relationship exists between the size of the protestor and the sustain rate. However, we cannot discount the possibility that the sustain rate of domestic firms against foreign firms is the same as the sustain rate of domestic firms against domestic firms or that there is no difference between the sustain rates of the various defense agencies. An interesting fact, which we had not earlier noted, is that foreign-headquartered firms rarely if ever protest source-selection decisions.

The surprising result with respect to corollary 1, which does not seem to be entirely consistent with GAO impartiality, together with the absence of evidence that foreign winners are disadvantaged relative to domestic winners in GAO hearings, which is, is somewhat puzzling. Our interviews suggested one possible resolution of this conundrum: losers who think they have a political advantage before the GAO are simply more likely to protest. This is manifestly the case with respect to domestic losers and foreign winners. But it may also be the case that where there are a large number of bidders, since it is more likely that one or more will perceive that they have a political advantage in this venue.

To investigate possible political bias in GAO decisions we confronted the issue directly, looking at the effect of congressional influence on bid-protest decisions handed down by the GAO versus those handed down by COFC.[4] In Figure 1 we show the GAO sustain rate for bid protests by type of protestant (large, small) and by the protestant's representation on House and Senate Defense authorizing and appropriations committees. In Figure 2 we show the COFC sustain rate by type of protestor (large, small) and by the protestor's representation on House and Senate Defense authorizing and appropriations committees. Both show that bid protests by large firms are more likely to be sustained than protests from small firms. Further, using a X^2 test, we cannot reject the null hypothesis that there is no difference between the sustain rate for small firms in the two venues. That is not the case with respect to large firms. Representation on a greater number of defense-related committees is associated with a higher sustain rate at the GAO but not at COFC. The X^2 value is 8.98, which is greater then the critical value of 7.82 (with degree of freedom equal to 4 and alpha level of significance equal to percent). This was further confirmed by analysis of the standard error of the difference in skewness.

One would expect bid-protest decisions in COFC to be largely immune from political influence, because of the relative independence of the judiciary. Figure 2 is consistent with that expectation. It shows no evidence of a relationship representation of the protesting company on military-related committees and sustain rates. That, of course, does not mean that COFC has no political biases, merely that there is no evidence that it is responsive to congressional influence.

Moreover, regression analysis showed that losers from politically influential districts were more likely to protest and to prevail before the GAO, but not the COFC, than losers from less politically influential districts or foreign firms.

Certainly, defense agencies buy a lot of stuff from private businesses. And, they have a lot of discretion about where defense dollars go and who gets them. This affects local economies and cuts across political jurisdictions. Employees are voters. Many Americans fear that that politics affects contracting agency decisions. Ostensibly, Congress

[4]For each bid protest, we coded the geographical location of the headquarters of the winning contractor by state and Congressional district for every winner and protester. We then recorded whether the Senator or Congressperson representing each of these locations sat on one of the four Congressional committees or subcommittees with direct oversight responsibility for DOD. The range was 0 to 3, meaning some protesters effectively had no elected representatives on any of these committees; others had representatives on as many as three.

authorized GAO as a countervailing force to offset agency bias, serving as an impartial arbiter of bid protests.

Furthermore. GAO steadfastly maintains that its decisions are independent of Congress and political pressures. Indeed, according to the former associate general counsel, elected officials welcome GAO's independence because they can direct a complaining constituent to GAO for an independent review. At the same time, elected officials can take credit for assisting a company with its complaint by directing it to file a protest at GAO. If GAO sustains the protest, it is in the nature of electoral politics that the senator or representative will take credit for that assistance, even though taking credit undermines the perception of GAO's neutrality that elected officials value.

While members of the business community value GAO's role in resolving bid protests quickly and effectively, they also have difficulty believing that GAO is indifferent to congressional interests. It would be no surprise to learn that Congress created the GAO bid-protest mechanism to serve its concerns and we have some evidence that it does.

Conclusions and Implications

Regarding the effectiveness and fairness of GAO's bid protest mechanism, our review of the literature, interviews and analysis of the data suggest ways to reduce costs of the system while retaining its benefits. It would be fairly easy to reduce the number of protests. One could require protestors to post a bond that would be forfeit if their protests were not sustained. Or, one could require any protestor, and perhaps every bidder, to provide evidence of understanding the source solicitation and bid protest process so that procedural, frivolous protests are less likely. However, a better strategy would focus on the causes of protests and the perceived unfairness of agency source selection decisions. That means learning what bidders think about the fairness of the process.

For example, agencies should seek feedback on the quality of the source selection process. A Source Selection Joint Action Team in the Office of the Secretary of Defense is looking at the consistency of debriefings. Taking steps to increase consistency and to serve contractors would appear to be worthwhile to the extent that rejected bidders protest when debriefings provide insufficient information to allow them to conclude that the process was fair and to identify ways to improve their performance. Part of the process should include an opportunity for agencies or OSD to collect systematic data on the quality of the debriefings to compare performance with expectations and, thereby, to continue to improve. The key is to generate actionable information at low cost and get it to the decision-maker who can act upon it and who has incentives to do so. These recommendations reflect good practice in total quality management programs.

Moreover, this effort should not be restricted to unsuccessful bidders. As one former company official put it, "if we win, lots of ills are washed over…unless a losing company protests." Acquisition officials should seek information about errors committed during a successful solicitation, meaning one without bid protests, to inform changes in the process that might preclude an unsuccessful one.

A related recommendation is to mitigate the adversarial tone in a debriefing. Agencies should always be prepared to explain to a bidder why their proposal was not selected. If the agency cannot do that in a debriefing, then it will not be able to defend itself in a protest.

Procurement contracting agencies should be more aggressive in implementing alternative dispute resolution systems (Nabatchi 2007). This is a relatively new concept to defense agencies and acquisition officials are not convinced that it serves their organizational interests. Moreover, few internal pressures exist to use it and external actors are not clamoring for it. But it has potential, enough anyway to justify a coherent program of experimentation to test its merits.

Best practice in dispute systems design suggests that disputes should be resolved at the lowest level because the parties at that level will have the best information, be able to respond most quickly, and be more likely to focus on underlying interests (Ury, Brett, Goldberg 1988). That would be an agency review. Protestors could be required to go to the agency before going to GAO. The agency's response could become part of the record reviewed by GAO.

DLA provides an interesting model of agency level review, although the efficacy of the model for bigger, more complex procurements like development contracts remains to be studied. To make agency level reviews more credible, agencies should use staff trained in negotiation, preferably using parties different from those engaged in the initial decision (Toff 2005 145-149), although that might increase the costs and, thereby, mitigate the benefit of agency level review. It might make sense to encourage pre-award agency reviews but to encourage GAO reviews post-award.

Parties should be able to loopback to the lowest cost dispute resolution systems, which suggests incorporating alternative dispute resolution mechanisms, such as mediation, into agency level reviews. Source solicitation processes that provide multiple opportunities for consultation before, during and after decisions with feedback after the decision follow good practice, but good practice in dispute systems design envisions substantive decision experts engaging in this process, not attorneys. If low-level dispute resolution fails, then dispute systems design calls for parties to move to the next higher cost mechanism, presumably GAO and, after that, COFC.

GAO should monitor and be transparent about its standards of materiality and reasonableness and the processes by which they are assured. A higher standard might be appropriate for incumbents, either in terms of a the agencies providing a rationale for changing suppliers or in terms of GAO's standard of the reasonableness of an incumbent's claim. If an agency has had experience with an incumbent and still believes a new contractor is preferable, GAO could afford greater deference to the agency. This offsets, in part, the incumbent's informational advantage in the competition.

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Figure 1

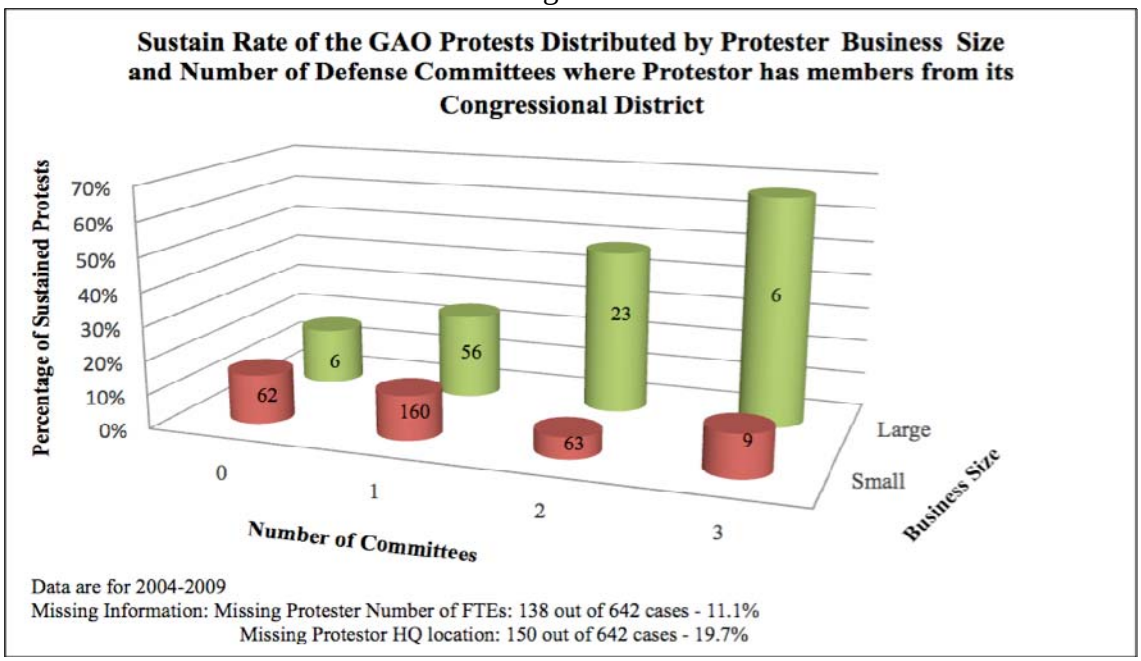
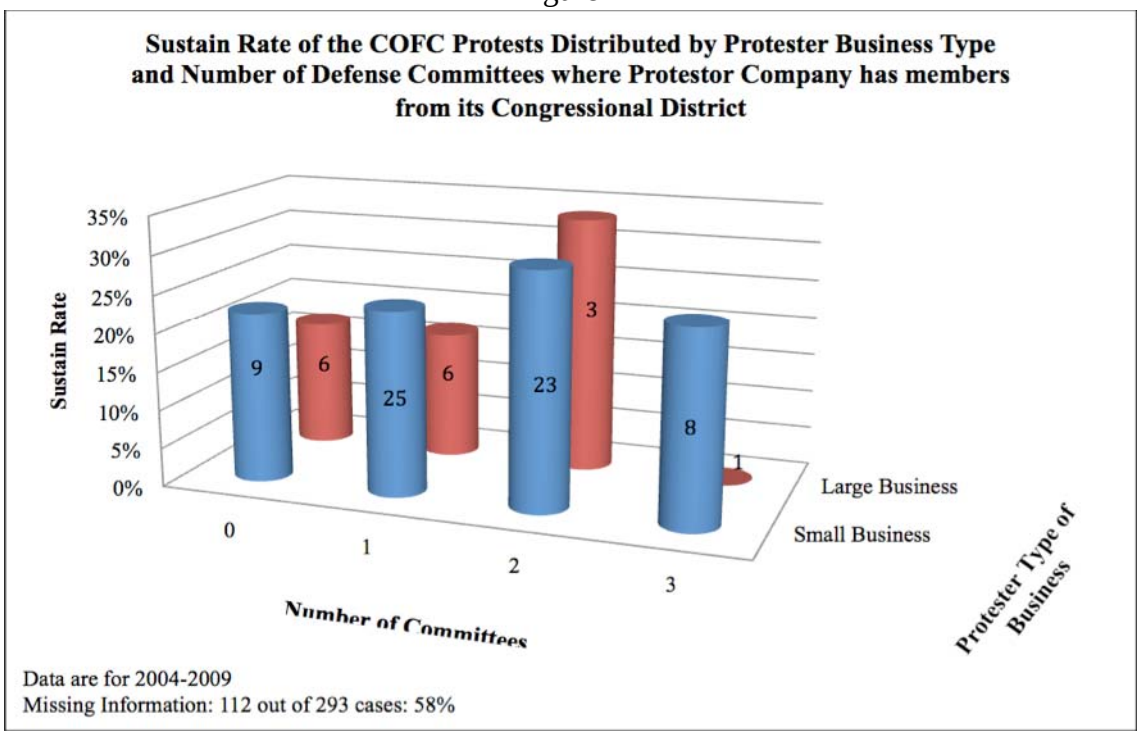

Sustain Rate of the GAO Protests Distributed by Protester Business Size and Number of Defense Committees where Protestor has members from its Congressional District
Percentage of Sustained Protests
70%
60%
50%
40%
30%
20%
10%
0%
62
6
160
56
63
23
9
6
0
1
2
3
Number of Committees
Large
Small
Business Size
Data are for 2004-2009
Missing Information: Missing Protester Number of FTEs: 138 out of 642 cases - 11.1%
Missing Protestor HQ location: 150 out of 642 cases - 19.7%

Figure 2


Sustain Rate of the COFC Protests Distributed by Protester Business Type and Number of Defense Committees where Protestor Company has members from its Congressional District
Sustain Rate
35%
30%
25%
20%
15%
10%
5%
0%
9
6
25
6
23
3
8
1
0
1
2
3
Number of Committees
Large Business
Small Business
Protester Type of Business
Data are for 2004-2009
Missing Information: 112 out of 293 cases: 58%