

# **Improving Government Contracting: Lessons from Bid Protests of Department of Defense Source Selections**

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## Foreword

On behalf of the IBM Center for The Business of Government, we are pleased to present this report, *Improving Government Contracting: Lessons from Bid Protests of Department of Defense Source Selections*, by Steven M. Maser, Professor of Public Management and Public Policy at Willamette University.

Government administrative processes often receive criticism for focusing on inputs and not outcomes. A specific example of this criticism has been registered by members of the acquisition community regarding source selection processes used for contracting that could be improved to reduce bid protests, the appellate process for contracting. Protests do not occur frequently, but when they do occur the costs are significant—and when sustained, they can impact the process for many subsequent contracts. Bid protests and source selection processes continue to receive attention: a recent GAO study reported a government-wide increase in the number of protests by government contractors.

Professor Maser's research is based on interviews with members of the acquisition community, and on analyses of bid protests submitted to the Government Accountability Office (GAO) involving Department of Defense (DoD) agencies between 2001 and 2009. His work yields nine findings with recommendations for changes that can improve the source selection process. While the data collected for this report are from DoD, many recommendations apply to all government agencies.

Professor Maser posits that agencies should increase the transparency of government contracting by disclosing more information about the contract process. This recommendation aligns with the Obama administration's emphasis on increased transparency and openness. Other key steps that agencies can take to improve the process include simplifying solicitation requirements, investing in training the source selection workforce, and increasing agency monitoring.

Implementing the report's recommendations can bring three related and positive consequences. First, source selections will be more efficient and effective, generating greater value for taxpayer dollars. Second, relationships between government agencies and contractors will be less contentious and more productive. Third,



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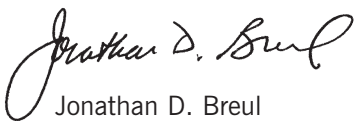


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costly bid protests will be reduced; the government will save money by not having to respond to as many protests.

Responding to bid protests is costly, in terms of both dollars spent and staff time devoted to preparing the government's response to the bid protest. In addition, bid protests delay the award of contracts, which poses a problem when an agency wants to award a timely contract to fill an important objective. As a result of an improved source selection process, the contracting community will be able to devote more resources to providing products or services as opposed to anticipating or engaging in bid protests. Contractors would likely welcome a less contentious system that they perceive to be more fair and transparent.

As federal agencies across government attempt to improve their administrative processes, including the bid process, this report provides useful insights and recommendations on how to reduce the number of source selection protests. And in an era of tight budgets, reducing costs associated with bid protests in government will save key resources for mission-critical activities.



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# Executive Summary

Federal statutes, executive orders, administrative rules, and judicial rulings govern the source selection process in acquisition. The process includes opportunities for bidders to protest decisions by contracting agencies, using the U.S. Government Accountability Office (GAO) as the primary venue for resolving protests. Contractors filed 2,353 protests during the fiscal year 2011, an increase of over 18 percent compared to fiscal 2009 when federal spending on contracts peaked, suggesting that protests will become more common as the federal budget declines. This report will focus on acquisition in the Department of Defense (DoD), although the recommendations merit consideration by any agency with contracting authority.

The benefits of allowing protests include more competitive and accountable procurements. The costs of protests include the resources expended by DoD and GAO in responding to protests, both legitimate and without merit. These protests result in delays in awarding and executing contracts. Delays have consequences for contract costs, defense policy, and national security; agencies prefer to avoid them.

A bid protest arises because the offeror perceives an error in the decision-making process defined by the agency. Protests sustained by GAO therefore shed light on the agency's management. This report presents the lessons learned by studying the source selection process and GAO decisions. The findings point to contracting agency process improvements that can mitigate the number of protests.

## Findings and Recommendations for Improvement

### **Finding One: Risk, including risk of a bid protest, is inherent in selecting a source**

Risk is inherent at every step in the source selection process. Bidders may fail to understand the acquisition process and file a protest believing the agency erred when, in fact, the protester erred. Bidders protest for a variety of reasons other than to learn why an agency rejected their bids. When agencies bundle contracts, combining several smaller contracts into a larger one, fewer small contracts imply fewer opportunities to protest; but because the stakes are higher, a rejected bidder has a greater incentive to protest the bundled contract. Indefinite delivery-indefinite quantity (IDIQ) contracts also reduce the number of protestable contract actions, but, again, a rejected bidder has a greater incentive to protest the IDIQ contract.

### **Recommendation One: Institutionalize risk management in source selections**

A risk, once identified, is no longer a risk. It is a management issue. As a matter of policy, agencies run acquisitions with attention to financial, technical, and scheduling risk, but more so in contract execution than in source selection. Although source selection

authorities—the parties ultimately responsible for the decisions—might play a role akin to that of a chief risk officer (CRO) in a private company, it is not always obvious who has a CRO's authority at DoD's contracting agencies. Nor is it clear that decision-makers take into account the wide range of risks that affect the success of a source selection, including reputational risk, bid-protest risk, etc. Contracting agencies should assign a person with appropriate training the responsibility for identifying, managing, and mitigating the risks in each source selection.

### **Finding Two: Agencies do not provide sufficient information to vendors**

Members of the acquisition community generally agree that source selection procedures, while often onerous, are basically fair and effective. Nevertheless, the parties often distrust each other. Inadequate information, inconsistent decisions, and perceptions of bias contribute to parties attributing nefarious motives to the other participants in the process, generating spirals of conflict.

### **Recommendation Two: Increase agency transparency by documenting and disclosing**

To increase transparency means, ironically, that agencies should assume rejected offerors will protest. When debriefing rejected offerors, agencies should provide the same information provided to the people who make the final award decisions—to the level of detail where specifics about the winner must be redacted. This is the same level of detail that the agency would provide in responding to a protest.

To do this effectively, agencies should systematically document their decisions at every step so they have the information available to disclose. To mitigate the fear that company attorneys will mine disclosures for opportunities to protest, debriefings could be recorded and entered into the record that GAO reviews should a protest follow.

### **Finding Three: Agency practices can be perceived as biased**

The acquisition community's perception of bias takes several forms. For example, vendors hear agencies say that protests are part of the source selection process and they do not and legally may not treat a protester with prejudice during a subsequent selection. But, as a consultant to many offerors puts it: "The contracting community lives in fear of retribution for protesting." Or, vendors experience retribution for poor performance in the business world and project the experience onto the government world. Offerors believe that protests impact careers in the agency, leaving its decision-makers with prejudice. Indeed, agencies have opportunities within the rules to treat offerors with prejudice.

### **Recommendation Three: Mitigate perceptions of bias with clear, justifiable, documented procedures**

Factors outside an agency's control contribute to perceptions of bias in decisions and are operational risks inherent in any source selection. Agencies can take steps to avoid but not eliminate them. Transparency and consistency can rebuild trust. Government agencies also have a responsibility not to exact retribution upon a rejected offeror who files a protest. One defense against a claim of bias is to ensure that the need for a product or service is well-defined, that the requirements follow logically from the need, and that associated decisions and their justifications are well-documented.

**Finding Four: Smaller companies generate most of the protests and larger companies protest more strategically**

Smaller companies, which are the majority of offerors and make a disproportionate number of protests, are less sophisticated than larger companies. They might not devote resources to obtaining contracting expertise or in-house or outside counsel. Larger companies tend to be more strategic in their decisions about when to protest, given that they may lose a contract at one agency but are likely to be successful at another, so do not want to anger their customers. The data are also consistent with smaller companies fighting harder in an increasingly competitive marketplace for government contracts.

**Recommendation Four: Hold vendors accountable for their protest decisions**

Companies that participate in source selections and bid protests need the knowledge, skills, and aptitudes appropriate to their responsibilities. If voluntary participation in government or trade association educational programs is insufficient, government contractors could be required to have staff certified in source selection and qualified to participate in bidding and in a decision to protest, including alternative dispute resolution. This is analogous on the source selection side of acquisition to the expectation that certified project managers will work on the program side.

If a rejected offeror lodges multiple protests with one or more agencies, if all of the protests are found to have no merit, and if GAO subsequently agrees, then after a specified number of protests, such as three in three years, GAO could be empowered to require the rejected offeror to begin compensating the agencies for their costs associated with responding to the protests. Failing Congress authorizing GAO to do that, GAO could begin documenting protests repeatedly found to have no merit as part of offeror past performance data that agencies consider in making awards. This makes transparent and systematic something contractors already believe transpires episodically and in obscurity.

**Finding Five: More complex source selections generate more protests**

Complexity makes it easy for the agency to trip up, presenting targets for bid protest attorneys. More contracts involve products than services, but more protests involve services than products. Especially for service contracts, it is difficult to do performance monitoring. The more difficult it is to define outcomes, the more likely the agency will set input requirements. More input requirements lead to more evaluation criteria. More evaluation criteria create more opportunities for protestable errors.

**Recommendation Five: Simplify requirements**

Requirements, and thereby evaluation criteria, should be clear and simple, which means defining the need correctly. If contracting officials do not understand the requirements, they can set up a protestable situation without realizing it.

**Finding Six: Training for the source selection workforce is not adequate**

The number of procurement personnel has remained unchanged while the dollar volume of purchases has increased. One response is “over-promotion,” which means moving people into positions for which they lack the knowledge, skills, and aptitudes required to fulfill their responsibilities. Knowing the rules and regulations is not the same thing as understanding business sufficiently to interact with offerors. Changes in the size of the acquisition workforce are not always coordinated with targeted training so that those engaged in source selections can perform well in their jobs.

**Recommendation Six: Invest in training the source selection workforce**

Decision-makers engaged in selecting sources need the legal, financial, and engineering knowledge to be conversant with major stakeholders in the process. If the DoD can develop and use simulations of battles, wars, budgeting, and logistics to train war fighters in combat, surely simulations of source selections can be developed and used to train people who supply the war fighters with the products and services they use in and in support of combat. The kinds of mistakes that lead to bid protests are mistakes that can be mitigated by experience; simulations, despite their limitations, provide opportunities to gain experience other than through on-the-job training. Structured on-the-job training can be valuable, as well. Someone serves on a source selection as an evaluator at least once, then earns increasing levels of responsibility, and ultimately chairs an evaluation board.

**Finding Seven: Performance systems do not always reinforce workforce motivation**

Working on a source selection can require a commitment to long hours over long periods of time, something members of the workforce undertake as a matter of professional responsibility. Some contracting commands recognize, monitor, and reward performance in source selections, attracting the best and brightest employees. Others do not.

**Recommendation Seven: Create incentives to excel on source selections**

Employees should be incentivized to work on source selections. At minimum, recognition programs could distinguish the relative performance of acquisition versus technical professionals. A related initiative would track employee participation in source selection activities, creating a database to support decisions contracting officers make when putting together source selection teams.

**Finding Eight: An agency's decision-making structure can create conditions conducive to bid protests**

Management and strategy personnel come up with great ideas and give them to acquisition personnel to implement without paying sufficient attention to whether the idea is feasible. Unfamiliarity with the requirements of source selection puts source selection officials in positions where their decisions invariably expose them to bid protests. Contracting officials are not always involved in strategic decision-making, nor are they consistently involved in design and development decision-making.

**Recommendation Eight: Align decision-making authority with agency strategy and information**

Contracting officers should be involved in the early stages of setting requirements, if not in determining need. Contracting officials understand substantive issues having to do with the feasibility of producing goods and services and the capacities of the firms that provide them. They might have an overview across agencies and be aware of opportunities for joint purchasing that can make possible an otherwise cost-prohibitive product or service. Taking advantage of this expertise means incorporating principles of strategic supply chain management and bringing acquisition expertise to bear on decisions throughout the process.

**Finding Nine: Monitoring can be misguided and time-consuming**

At the agency level, workers debate measures of performance. Some officials say, "We don't do any good if we don't survive a protest. So, we ought to manage to minimize protests."



Others respond, “That’s terrible. Our job is to [deliver warships, fly planes, transport soldiers] and to protect the country, not to avoid protests.” Agencies measure their performance in different ways, not all of them appropriate.

DoD has created internal monitoring mechanisms, including procedural reviews. The level and types of reviews applied to source selection depend on the size of the project, but could include, for example, reviews by a contract review board, a legal review board, and peers. By bringing in an outside group to ask the source selection team to explain what it is doing, reviews force a pause in the action. If an agency’s documents are in order, the pause might last only a few days. But peer reviews, despite their value, inevitably consume time and resources, and are inherently limited because even decisions that adhere closely to rules and regulations cannot guarantee against a protest.

### **Recommendation Nine: Agencies should monitor more, monitor smarter**

It is good practice to have multiple performance measures. Compliance with a proposed source selection schedule, completing the source selection on budget, and having no sustained bid protests provide a place to start. DoD and Congress can improve upon the data they are collecting to monitor performance of the acquisition process. They should have information about specification of need through contract award, taking into account bid protests or the Court of Federal Claims (COFC) lawsuits, as well as the time required for an agency to amend or reissue a request for proposal and complete the selection. The number and dollar volume of protestable contract actions can be tracked, as can corrective actions and protester reasons for withdrawing protests. Finally, agencies should request feedback on the quality of the source selection process and act on the information they obtain.

# Introduction

Statutes, executive orders, administrative rules, and judicial rulings govern the procurement of goods and services by the U.S. government. They grant interested parties—those who do not win contracts for which they competed—the right to contest agency procedures and outcomes. Called protests, these typically trigger a review and administrative hearing by the U.S. Government Accountability Office (GAO), the quasi-independent audit and investigatory arm of Congress. Contractors filed 2,353 protests during the fiscal year 2011, an increase of over 18 percent compared to fiscal 2009 when federal spending on contracts peaked, suggesting that protests will become more common as the federal budget declines (White 2011).

The Court of Federal Claims (COFC), a formal judicial venue, is an alternative but protestors typically go first to GAO, a less formal dispute resolution forum. The number of DoD protests filed annually at GAO each year is in the hundreds, sometimes over 1,000; the number filed at COFC is in the tens. COFC is like any other court except that it specializes in hearing contract disputes between vendors and the federal government; it has extensive rules of procedure, evidence, etc. The bid protest mechanism at GAO is known as an “alternative dispute resolution” mechanism. Although it has become increasingly judicialized in terms of the rules governing its decision-making process, Congress created the bid protest mechanism at GAO to be faster, less costly, and less adversarial than a judicial proceeding.

The basis for a protest must be a claim that an agency failed to follow the source selection process it established for itself. When source selection decisions trigger recurring protests and GAO’s review process deems them legitimate, there are lessons for agencies to learn about their procedures.

Protests are a mixed blessing. Their costs are tangible. Once a protest has been filed with GAO, work on the contract ceases until GAO issues its decision. Waivers from GAO allowing work to continue are rare, and from COFC more rare. Delays can increase the costs of the

## Findings

1. Risk, including risk of a bid protest, is inherent in selecting a source
2. Agencies do not provide sufficient information to vendors
3. Agency practices can be perceived as biased
4. Smaller companies generate most of the protests and larger companies protest more strategically
5. More complex source selections generate more protests
6. Training for the source selection workforce is not adequate
7. Performance systems do not always reinforce workforce motivation
8. An agency’s decision-making structure can create conditions conducive to bid protests
9. Monitoring can be misguided and time-consuming

contract and undermine a strategy or program that relies upon acquiring the product or service. If the protester prevails, these costs can increase as the agency remedies the problem. GAO and COFC expend resources to process protests. The rejected offeror also incurs costs in filing the protest, as might an awardee that supports the awarding agency. Both business and government organizations have human and financial capital in limbo pending resolution.

The benefits of bid protests are less tangible. In theory, they include more competitive and accountable procurements. Competitive procurements induce more contractors to participate in bidding, bringing the best expertise to the process and encouraging efficient, low-cost production. Accountable procurements follow from the possibility of bid protests, which induce agencies to design and operate source selection processes that:

- Are fair and transparent
- Minimize the possibility of selecting an inappropriate vendor

In effect, government procurement, given its public nature, relies upon interested third parties to monitor the source selection process. As the GAO and COFC issue opinions, they educate the acquisition community about acceptable and best practices.

Not surprisingly, most agencies would like to prevent bid protests, even though protests take place in only a small fraction of all contracts, protests with merit are a smaller fraction, and protests that GAO sustains are a smaller fraction still. Federal government procurement occurs in the shadow of the bid protest process. Current and former agency officials generally agree with industry executives that source selection procedures, although often onerous for everyone involved, are basically fair and the bid-protest processes effective. They also agree that what agencies do to create good source selection processes mitigates protests.

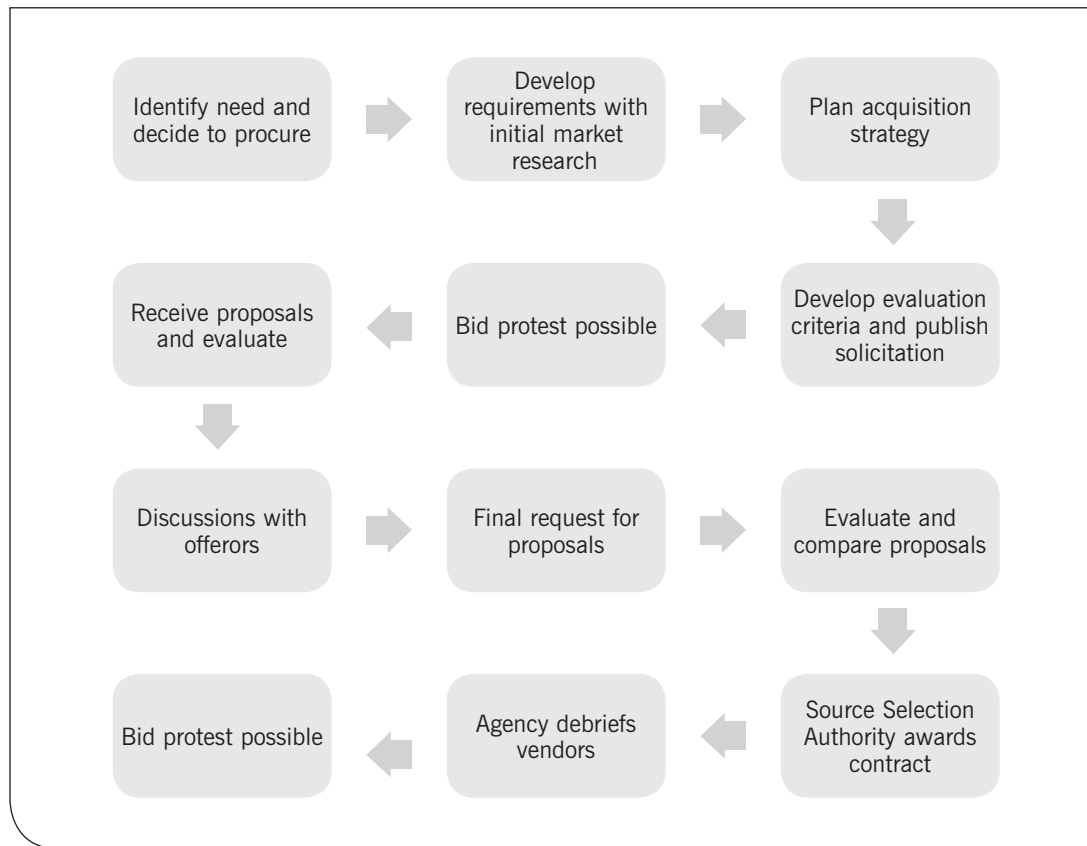
This report focuses on the lessons that can be learned from protests in order to improve agency decision-making and potentially mitigate protests. The study was conducted at the U.S. Department of Defense (DoD), the largest procurement agency in the world. Members of the acquisition community were also interviewed (see *Data Sources* box on page 13), and GAO decisions about protests at DoD between 2001 and 2009 were analyzed. (See Appendix I for details on the methodology.)

## Steps in Selecting a Source

Improving source selection begins by ensuring that the process includes basic steps. Figure 1 outlines DoD's process. Variations exist across contracting agencies. More complex procurements have more steps; less complex procurements have fewer.

### Recommendations

1. Institutionalize risk management in source selections
2. Increase agency transparency by documenting and disclosing
3. Mitigate perceptions of bias with clear, justifiable, documented procedures
4. Hold vendors accountable for their protest decisions
5. Simplify requirements
6. Invest in training the source selection workforce
7. Create incentives to excel on source selections
8. Align decision-making authority with agency strategy and information
9. Agencies should monitor more, monitor smarter

**Figure 1: DoD's Process**

Assume, for example, a decision to acquire a weapons system:

- Senior staff identify a need and decide to address it
- Program executive officer sets the requirements with input from combat commanding officers in the field
- Program office works with the contracting office to develop a requirements plan
- Program and contracting offices decide the type of contract and the acquisition strategy
- Contracting office translates the requirements into proposal instructions and evaluation criteria
- Contracting officer decides whether the item should be competed; under the rule of two, if there is more than one potential provider, it must be competed
- Source Selection Advisory Board checks that competition has been obtained and reviews and approves the evaluation standards
- Contracting office, authorized by the Source Selection Authority, publishes a request for proposals (RFP)
- Contracting office receives the proposals, drawing on technical experts to help evaluate them
- Source Selection Evaluation Board submits its evaluation to the Source Selection Advisory Board, which makes its recommendation to the Source Selection Authority, who selects the winner.

Process reviews or approvals may occur along the way, especially if the contract is sole source. After the award decision, rejected offerors may request a debriefing from the agency about the basis for its award.

Bidders have two opportunities to protest:

- The decision-making process that led to issuing a solicitation
- The decision-making process that led to making an award

Agencies have procedures for bidders to protest to them directly, some more formal than others. When this fails to resolve a disagreement or when a bidder does not expect it to be helpful, the dispute typically goes to GAO. GAO must issue its decision within 100 days (Manuel and Schwartz 2010). The rate at which GAO sustains protests hovers around 25 percent; typically these sustained protests validate claims of procedural errors. However, the effectiveness rate, which combines the rate of sustained protests with the rate at which agencies take corrective actions before the protest has been decided, approaches 45 percent.<sup>1</sup> This gives bidders a significant incentive to protest.

Some of the decisions made in the course of selecting a source are protestable; others are not. For example, after an agency issues a solicitation, a potential offeror can protest the inclusion of a requirement that the offeror believes to be inappropriate or that biases the decision to award a contract. After an agency awards the contract, a rejected offeror can protest the application of an evaluation criterion to its proposal. These are contracting decisions, which are protestable. The strategic decision to acquire a product with particular features is a programmatic decision and is not protestable.

Contracting decisions occur in the context of program decisions. The source of a protestable error might be traceable to the way in which an agency manages both types of decision-making. As a consequence, this report focuses on steps agencies can take to improve the entire source selection process as depicted in Figure 1 and to reduce the number of bid protests.

## Data Sources

Over 50 interviews were conducted during the last quarter of 2009 and the first quarter of 2010. Respondents included:

- Attorneys and a manager at GAO
- Executives and in-house counsel at prime contractors
- Outside bid-protest counsel
- Government contract managers at smaller companies that are typically subcontractors
- Current or 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 (DLA)
- A Senate committee staff member
- Executives at professional and industry trade associations, including the Aerospace Industries Association, the National Contract Management Association, the Professional Services Council, and TechAmerica

Bid protests involving DoD source selection decisions posted on GAO's website were also analyzed here.

1. For detailed analysis of patterns and trends in bid protesting, see also Schwartz and Manuel, 2009; Gansler, Lucyshyn, and Arendt, 2009; and Maser, Subbotin, and Thompson, forthcoming.

# Findings and Recommendations for Improving Source Selections

## Finding One: Risk, including risk of a bid protest, is inherent in selecting a source

Despite the well-intentioned efforts of skilled professionals throughout the acquisition community, errors, real or perceived, are inevitable. Asked to describe the factors critical to the success of a source selection, executives in government contracting agencies list:

- Defining requirements
- Attracting adequate proposals that address the requirements
- Defining evaluation appropriate for the requirements
- Holding meaningful discussions
- Obtaining appropriate price information
- Conducting the evaluation according to agency-specified rules and criteria
- Complying with a schedule
- Not triggering a bid protest

Risk is inherent in these activities. As one contracting agency official put it,

As more people become involved in setting requirements, as more stakeholders participate, which is not necessarily a bad thing, you start to have more problems. Everyone involved has their pet criteria and wants them included. And as you add people to help, you have to add reviews, and the more reviews you add, the more time required to answer questions from the reviewers, which takes you away from your task. If the standard for the acquisition process is zero errors, that will never be met. The question is one of reasonableness. If one puts in place processes to 'perfect' the source selection so as to minimize protests, you'll create delays in producing the award that may exceed the delays caused by the protest process.

Bidders might fail to understand the acquisition process and file a protest believing the agency erred when, in fact, the protester erred. When agencies bundle contracts, combining several smaller contracts into a bigger one, fewer contracts imply fewer opportunities to protest; but because the stakes are higher, a rejected bidder has a greater incentive to protest the bundled contract. Indefinite delivery-indefinite quantity (IDIQ) contracts reduce the number of protestable contract actions, but, again, a rejected bidder has a greater incentive to protest the IDIQ contract.

In some cases, everyone knows from the outset that one offeror or another will protest a contract, especially when the contract involves large dollar values. Protests become more likely when those dollar values are a significant percentage of offeror revenues. Indeed, the largest number of protests is from rejected offerors for contracts whose total value is between 100 and 500 percent of the company's annual revenue.

In other cases, agencies implement procedures for sound managerial reasons that invariably increase the risk of protests. For example, an agency can reduce its costs of contracting by contracting less frequently for a given product or service. However, protests involving contracts with a duration of longer than five years are more common than protests involving shorter ones.

A reason for protesting longer contracts is the fear of “lock out.” In a dynamic acknowledged by vendors and bid protest counsel, the disappointed offeror will not be able to participate in the government segment of the market for the product or service, perhaps for a decade. The rejected offeror, especially an incumbent supplier, may find it too costly to mothball people, capital, and other resources awaiting another opportunity to win the business. The contract need not be large for the fear of lock out to encourage a protest if it is delivered in a smaller geographic area where alternative government contracts are not available. From this perspective, it appears cost-effective to invest resources in a bid protest, or at least to threaten one.

Even honoring the First Amendment to the U.S. Constitution (“Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances.”) by allowing protests introduces risks. Companies protest for reasons other than obtaining corrective actions, benefiting the protester at the government’s expense. Contractor executives and bid protest attorneys report that they will protest to (Roerman 1998):

- Win to be competitive in a new selection or to recover costs
- Send the agency a message, be heard, or seek justice when they believe they have been wronged because government erred, even against advice of counsel that the protest is unlikely to be sustained given past precedents and that if it is sustained, the protester 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 to a losing offeror’s board members or senior executives 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 protester’s chances of getting future contracts

Only the first three serve a public purpose. The others result from competitive pressures in the marketplace.

## **Recommendation One: Institutionalize risk management in source selections**

Contracting out will continue, and given the inevitability of human error, good source selection processes will not eliminate protests. The bid-protest system helps agencies find mistakes and correct them while working to treat contractors fairly and consistently. It puts the decision to identify errors in the hands of the most motivated, best informed parties. An alternative is to increase resources to inspectors general. Both alternatives are subject to the same weakness: the damage has already been done. It is better to improve the source selection process, including bid protesting.

The source selection process is about managing risks, for example:

- **Performance or technical risk:** the ability of the product or service to perform to specifications
- **Cost or financial risk:** the ability to deliver the product or service for the price paid
- **Schedule risk:** the ability to deliver the product or service on time
- **Sustainment risk:** the ability to maintain the product or service within budget
- **Congressional risk:** the extent of political support for or interest in the product or service
- **Appropriation risk:** the ability of Congress to continue funding the product or service
- **Reputational risk:** the ability of the agency to execute a successful source selection or of a contractor to be a responsible firm
- **Bid-protest risk:** the likelihood of drawing a protest

DoD has developed a methodology for risk management, lodging primary responsibility with the program manager (Department of Defense 2006). It focuses primarily on the first three risks: performance, cost, and schedule. While it claims to apply to the entire acquisition process, it focuses more on contracting and contract execution after source selection.

A risk, once identified, is no longer a risk (Kennett and Raanan 2011). It is a management issue (Hardy 2010). The position of chief risk officer (CRO) is increasingly common at companies doing business with government, such as the larger members in the Professional Services Council, an advocacy group for professional and technical service firms serving government. Contracting agencies do not have CROs.

According to one former contracting official, in the source selection process, no one is responsible for overall management of risk, for identifying the complete range and extent of risks, and for apprising decision-makers of their options and tradeoffs for managing risks.<sup>2</sup> Who asks whether the heightened risk of a protest outweighs the reduced contracting and management costs from bundling multiple contracts into one? Someone—a contracting or program officer, the Source Selection Authority (SSA), or the Source Selection Advisory Committee—should be authorized and responsible for asking this sort of question. With proper training, this agent could take into account all of the variables central to the success of a source selection. The idea is to create a counterpart to the chief risk officer (CRO) in a private company, someone to focus on process, asking how the agency is conducting itself and whether the agency is doing it correctly. It would be an *ex ante* approach, designed to do the job correctly the first time, that might cost-effectively replace the *ex post* approaches that identify and require corrections.

The creation of a CRO position, like other management decisions, might have unanticipated consequences. According to John Young, formerly under secretary of defense for acquisition, technology, and logistics, saying something is important does not necessarily mean an agency should put someone in charge of it.

Having a CRO might absolve people who are responsible and accountable for dealing with the risk issues. Each team in a source selection makes a risk assessment in its area and the source selecting authority might be tasked with aggregating it. Who should second-guess the subject experts? Who has the skills to do this?

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2. Some believe the Source Selection Advisory Committee identifies risks for the Source Selection Authority. The Cost Analysis and Program Evaluation (CAPE) combines program analysis and an evaluation unit, giving an independent assessment of risk along with the program officer's assessment. In this view, the Source Selection Authority plays the CRO role from the outset. Establishing the acquisition strategy goes through all of the areas of risk and risk mitigation, and the acquisition plan is approved during a milestone review.



However, a CRO could be responsible for identifying the range of risks and putting processes in place to ensure that risks are addressed, rather than for making the substantive risk assessment.

Even without a CRO, agencies can do more to manage risk in source selections. Minimally, they could create checklists, preferably based on best practices, at key stages of the source selection process. Airplane pilots use checklists before taking off. Hospitals use them before, during, and after medical and surgical procedures. Good operational risk management practices call for creating event logs, regularly seeking expert opinions, conducting simulations and process audits, and comparing risk events across agencies. While there is no intent to intrude upon the exercise of competent discretion by acquisition professionals, the selection process has sufficiently routine sources of errors for checklists and other operational risk management techniques to be cost-effective.

## **Finding Two: Agencies do not provide sufficient information to vendors**

An offeror, who is making a significant investment in the process, seeks additional information or acknowledgement from the agency that a problem exists with it. The contracting agency, which is also making a significant investment, often resists. Negotiating does not resolve the problem. The offeror perceives the agency to be stonewalling. The agency perceives the offeror to be seeking a competitive advantage.

After protesting informally, an offeror might protest formally within the contracting agency or skip the formal, agency-level review and go directly to GAO. Especially if the dispute occurs before the agency issues the formal solicitation, the offeror might protest informally within the contracting agency. If the agency does not provide the information the vendor requests or the information the agency provides does not satisfy the vendor, the vendor might protest formally within the contracting agency. Especially if the dispute occurs after the agency awards the contract, an offeror might skip the formal, agency-level review and go directly to GAO. Other parties begin to take sides. Elected officials, for example, step in, perhaps directing affected constituents to pursue the protest at the GAO. The contract winner may step in to support the agency.

GAO procedures, which are fairly well defined and managed, often resolve the dispute. However, a company dissatisfied with GAO's decision can go to the Court of Federal Claims (COFC) or pursue the matter in Congress or with other decision-makers at DoD or elsewhere in the executive branch—a relatively unmanaged process.

As the conflict escalates, communication becomes fraught; misunderstandings multiply. Zealots replace moderates and invest resources to win rather than to resolve disagreements. Perceptions distort, parties lose objectivity, and gray areas become black or white. Seemingly innocuous behaviors can become meaningful as distrust and suspicion grow. In sum, informal disagreements arising from a lack of clarity can spiral into formal protests and sometimes into unmanaged conflicts outside of the formal process (Carpenter and Kennedy 2001).

To generate more complete and accurate information, Congress, in the Federal Acquisition Streamlining Act of 1994, made agency debriefings mandatory upon request by a rejected offeror. A potential benefit of conducting a debriefing is to prevent a bid protest. By learning the reasons for agency decisions, the rejected offeror will see that the agency acted within the bounds of its discretion and consistent with its evaluation plan.

The Federal Acquisition Regulation (FAR) and the Defense Federal Acquisition Regulation Supplement (DFARS) govern the acquisition process at DoD. The FAR gives contracting officers discretion in the content of debriefings.<sup>3</sup> At one agency, a vendor might receive a 10-minute review, scripted by an agency attorney, with a contracting official showing one PowerPoint slide containing the minimal amount of information required by the FAR and minimal opportunity for the rejected offeror to ask questions. At another agency, the vendor might receive an analysis of what the contractor did or did not do that was problematic. At a third agency, 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 (SSA); the agency will ask the winner for permission to explain to rejected offerors why the agency selected the winner, albeit with competitive information redacted. The rejected offeror has ample opportunity to ask questions. Even within the same agency, decision-makers can disagree about which debriefing approach to use.

If an agency gears its standard of disclosure to surviving the protest at GAO, which can result in the agency sharing less information, the offeror, anticipating this, starts bringing attorneys to debriefings to elicit more information. The engineers, attorneys, or head of a business unit want to explain to the team that spent time working on a proposal why the company lost. Executives to whom they report want to know, as well. The agency perceives the presence of attorneys as a threat. In a classic illustration of a conflict spiral, the dissatisfied offeror files a protest and contracting agency executives have to explain to their team members, who also invested time working on the source selection, why the company filed a protest, and, potentially, why GAO sustained it.

When an agency discloses as much in a debriefing to rejected offerors as it would to the SSA, some offerors will be grateful and satisfied. However, some rejected offerors will comb the information to find bases for challenges. An executive with a large consulting company says, "Even if you give a contracting officer a script for the debriefing, written by an attorney, a rejected offeror can find a problem in a gesture or a phrase." A prime contractor executive says, "If the agencies are becoming paranoid because attorneys are involved earlier so agency people become more cautious in what they say, remember the old saying: 'Just because you're paranoid doesn't mean someone isn't out to get you.'"

Rejected offerors cannot always predict an agency's approach to disclosure. If the bid protest targets a particular part of the selection process, an agency might focus its disclosure on only the protested part. If a rejected offeror is unable to distinguish an agency that will disclose more post-protest from one that will disclose less, it has an incentive to challenge multiple, interrelated parts. It makes more claims than it would make pleas if it filed in a court. Prior to that, it mines debriefings for information that could provide the basis for protests, increasing the costs to the agency and irritating its decision-makers.

Agencies cannot always discriminate among the motives of rejected offerors. Agencies fear rejected offerors will exploit their every word, so utter fewer of them. Businesses, fearing agencies will utter fewer words, try to pry more out of them. In a spiral of conflict, perception

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3. 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

matters more than substance. Reciprocating reactions create an adversarial tone. Indeed, a protest attorney believes that agencies build three months into their schedules for large contracts to account for bid protests, and companies build the expected cost of a protest into their overhead. Filing and defending against bid protests have become routine features of doing business with the government.

Aside from differences in agency disclosure strategies, a root cause of the information problem is a failure by agencies to document their decisions. Anticipating a protest, one agency might have documented every step it took from the outset and prepared to reveal all. Another agency might not create a file, as in a legal discovery process, until the protest has been filed.

## Recommendation Two: Increase agency transparency by documenting and disclosing

Good management practice is to provide multiple opportunities for consultation with contractors before, during, and after decisions, with plenty of opportunity to provide feedback. To promote disclosure means, ironically, that agencies should assume rejected offerors will protest. In debriefings, agencies should supply them the same information provided to the SSA, to the level of detail where specifics about the winner must be redacted—the same level of detail that the agency would provide in responding to a protest. Agencies should be able to explain to the offeror why that offeror was not selected; if the agency cannot do that in a debriefing, then it will not be able to defend itself in a protest.

An agency cannot provide more information if it does not have it. The obligation in public procurement is to be as transparent as possible. It dictates that agencies document their actions and decisions thoroughly throughout the source selection process.

Increasing consistency within and across agencies to serve contractors would help. That could include collecting data about the quality of the debriefings to compare performance with expectations and thereby to continue improving them. With so many selections conducted annually, a random sample could be sufficient. Anonymous feedback might be best, which could be difficult in source selections with few competitors. The key is to generate actionable information at low cost and to get it to a decision-maker who can act upon it and who has incentives to do so.<sup>4</sup>

A related recommendation is to mitigate the adversarial tone in debriefings. First, rather than explaining how the rejected offeror erred and would have to change so as to help the agency, the debriefing official should describe what the offeror would have to do better to help itself. The offeror knows his or her company best, of course, so debriefing officers must leave it to the offeror to manage its proposal preparation better.

Second, record debriefings. This might obviate the need for attorneys to attend debriefings. It also obviates the need for protesters to solicit affidavits from any company employees who attend the debriefings. It supports GAO's job as third-party intervener. A contracting official can say the same thing in debriefings to two different protesters; depending on the attitudes and interests of the protesters, one will find the contracting official unresponsive and the other will not. GAO can judge.

A bid-protest attorney offers this advice: Pre-protest, "do not admit a lawyer into any forum where the agency is on the other side, even the debrief, unless [a company has] already

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4. See Maser and Thompson (2011) on the merits of requiring alternative dispute resolution at the agency level to nip protests in the bud.

decided to file a protest.” This is a case where the logic is compelling to mitigate the chill in the room and to encourage more complete revelation of information. However, where operating policies and legal rules in the form of the FAR and DFARS are almost one and the same, this is untenable because, absent a lawyer, the rejected offeror might not understand agency decisions. An agency can restrict the number of people that attend a debriefing, but it cannot preclude the rejected offeror from bringing an attorney.

### **Finding Three: Agency practices can be perceived as biased**

The perception that an agency may be biased against a vendor takes several forms. For example, vendors hear agencies say that protests are part of the source selection process and they do not and legally may not treat a protester with prejudice during a subsequent selection. But, as a consultant to many offerors puts it: “The contracting community lives in fear of retribution for protesting.” A vendor protests, then loses a subsequent contract and attributes the failure not to its unresponsive bid, but to the agency’s seeking retribution. Or vendors experience retribution for poor performance in the business world and project it into the government world. Offerors believe that protests can negatively impact careers of civil servants in the agency, leaving its decision-makers with potential prejudice against a vendor.

The business executives’ fears are not necessarily misplaced. A former contracting official described the ease with which an agency can exact revenge. Suppose a contracting official wishes to punish a vendor who protested and subsequently plans to bid on a contract to be performed outside its geographical area in competition with vendors close to the location of performance. The contracting official specifies in the solicitation that expenses will not be reimbursed for travel in excess of 50 miles, effectively denying the target offeror an opportunity to bid.

Some members of the acquisition community perceive that administrations may favor particular firms and that defense agencies have their pets. 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 source selection 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.

Several factors might explain this. First, a rejected offeror, not having achieved its objectives, will blame the process. This is human nature, a “self-serving attribution.” As a trade association official puts it: “When you’ve lost, you distrust the system and believe the decision was wired for someone else.”

Second, the inherent subjectivity of the decisions made by agencies induces distrust of the process by business participants. Evaluating “best value,” for example, requires balancing price, performance, and other characteristics, which is problematic. A contracting agency official says: “Even big companies believe government looks only at lowest price, not at best value.” Businesses executives concur. This is especially of concern with A-76 programs, where government considers competitive outsourcing for goods and services already being provided by a government agency.

Third, a small company might protest because it perceives a bias based solely on size, a view expressed by a business executive at a smaller firm who says, “No one gets fired for hiring Raytheon, but someone can get fired for hiring [my company].” In contrast, a large company with multiple product lines makes a business decision to protest based on assessing the potential outcome versus the cost of pursuing the protest.

Given the high cost of understanding these processes, a visible, sustained protest on a high-value contract, like the KC-Tanker, sends a signal throughout the contracting community (Sanders 2010). According to a bid protest attorney: “Lots of contractors think that if they work hard, turn in a good bid, and protest vigorously, they might win, as Boeing did. [My firm] has handled twice as many protests during the past two years as in the previous two.” Decision-makers assign outsized significance to low-probability events with significant impact, like a sustained protest on a high-value contract.

Fourth, companies create advantages for themselves, sometimes in ways that undermine confidence in the contracting process. For example, a company buys expertise about the contracting process by recruiting contracting officers from government agencies. Competitors believe that these contracting officers will trade not only on their expertise, but also on their relationships with decision-makers in the contracting commands, the organizational units within DoD authorized to engage in contracting.

Fifth, contracting commands need expertise from their suppliers to define requirements. Not all suppliers have the access, experience, and resources to provide it. The result can be requirements that preclude some suppliers from qualifying. Regulations designed to create fairness can have the opposite effect if they increase complexity. According to a business executive, people who know how to play the game will prevail.

### **Recommendation Three: Mitigate perceptions of bias with clear, justifiable, documented procedures**

Factors outside an agency’s control that contribute to businesses perceiving bias in its decisions are among the operational risks inherent in any source selection. Agencies can take steps to avoid but not eliminate them. They are particularly difficult to counter once distrust has developed. However, transparency and consistency can rebuild trust.

Of course, government agencies have a responsibility not to exact retribution upon a rejected offeror who files a protest. The process being human, that is easier said than done. One defense against a decision-maker’s appearing to exact retribution is to ensure that the need for a product or service is well-defined, that the requirements follow logically from the need, and that the associated decisions and their justifications are well-documented. This also addresses concerns that the source selection process is biased or flawed.

Agencies fear the perception of favoritism resulting from their meeting one-on-one with potential vendors. To mitigate that perception, whether an agency is collecting information prior to releasing its request for proposals or it is responding to a question after, a former contracting official suggests holding one-on-one conferences with clear rules and if anyone asks a question that is germane to all, publish it. Sunlight remains the best disinfectant for distrust. It is not a cure, however, because just asking a question can reveal proprietary or competitive information about an offeror’s business processes or products. Either the company will not ask, and the missing information can become the basis for a protest, or it will ask and the agency’s handling of the question can become the basis of a protest.

### **Finding Four: Smaller companies generate most of the protests and larger companies protest more strategically**

The size of the rejected offeror plays a role in its decision to protest. Smaller companies, which are the majority of offerors and a disproportionate source of protests, are less sophisticated

than larger companies. They might not devote resources to obtaining contracting expertise or in-house or outside counsel. An agency contracting official expresses a sentiment echoed by others:

Mom and pop companies are protesting. They don't understand the system and how it works, so they protest when they lose. The big guys are juggling a portfolio of projects, so protesting is a business decision. Depending on what other contracts they've won, protesting a particular project might not make sense.

Most protests involve contracts with comparatively small value—under \$100 million—where protesting companies are relatively small—fewer than 500 employees. Most protests are from small companies protesting awards to other small companies. (See Charts 1 and 2 in Appendix II.)

Federal Procurement Data Systems (FPDS) makes information available only about contract actions. Assumptions are made here about the average number of contract actions per contract to try to understand the overall population of contracts from which protests arise. The average number of contracts per larger company has increased, while it has remained about the same for smaller companies, but the number of protests from larger companies has declined while the number from smaller companies has increased. (See Chart 3 in Appendix II.)

This might be because larger companies absorb smaller companies that have been successful in government contracting, although firms that have a tradition of protesting sometimes become subsidiaries of larger companies that do not. The evidence is consistent with larger companies being more strategic in their decisions about when to protest. They may lose a contract at one agency but are likely to be successful at another, so do not want to anger their customers. The data are also consistent with smaller companies fighting harder in an increasingly competitive marketplace for government contracts.

A bid-protest attorney expresses the conventional wisdom: “Protesting organizations tend to lose to big firms, unless the protester is a big firm. Medium firms protest medium firms; big firms protest big firms.” Moreover, the rate of sustained protests is higher for larger companies than for smaller ones. The absolute number of sustains is not large, but regardless of the value of the contract, larger companies achieve more sustained protests, and the larger the value of the contract, the greater the likelihood that a large company's protest will be sustained. Indeed, large protesters achieve a higher rate of sustained protests, regardless of the size of the winning contractor. (See Charts 4 and 5 in Appendix II.)

## **Recommendation Four: Hold vendors accountable for their protest decisions**

A strategy of contracting out presumes that all vendors are equally capable offerors. They are not. Despite efforts by government agencies to facilitate access to procurement opportunities, to simplify contracting procedures, and to educate potential offerors, smaller firms may not have sufficient understanding of the contracting and bid-protest processes.

Companies that participate in source selections and bid protests need the knowledge, skills, and aptitudes appropriate to their responsibilities. If voluntary participation in government or trade association educational programs is insufficient, government contractors could be required to have staff members certified in source selection and qualified to participate in bidding and in a decision to protest. These staff members need not be attorneys; whether or not they are, they should be trained in alternative dispute resolution. This is analogous to the expectation

on the contract execution side that government agencies and contractors have certified project managers. This requirement increases the costs to potential offerors, especially smaller ones. However, smaller ones are responsible for the lion's share of the protests, especially those without merit. A pilot project might show whether, like debriefings, the cost is worth it.

Finally, if a rejected offeror lodges multiple protests with one or more agencies, all of whom conclude that the protests have no merit, and if GAO subsequently agrees, then after some number of protests, such as three in three years, GAO could be empowered to require the rejected offeror to begin compensating the agencies for their costs associated with responding to the protests. Should Congress not authorize GAO to do this, GAO could begin documenting repeatedly ineffective protest behavior as part of past performance data that agencies consider in making awards. This merely makes transparent and systematic something contractors already believe transpires in obscurity and episodically.

### **Finding Five: More complex source selections generate more protests**

Complexity makes it easy for the agency to trip up, presenting easy targets for bid protest attorneys. Says one, "The agency lists all sorts of requirements, including some that are very low priority, but they do something wrong on a low-priority requirement and it exposes them to a bid protest." Evaluators might not be trained adequately, so the agency does not do what it told contractors it would do.

A review of the distribution of protests across products and services supports this. More contracts involve products than services, but more protests involve services than products. As a former agency contracting official, now with a trade association, reports, "... especially for service contracts, it is difficult to do performance monitoring. The agencies focus on design features in service contracts." In other words, the more difficult it is to define outcomes, the more likely the agency is to set input requirements. Because more requirements mean more evaluation criteria, the risk of a sustained protest based on mis-evaluations increases. Finally, bid protests are more likely with cost-plus than with fixed price contracts; agencies tend to use cost-plus with, for example, research and development projects, which have greater risks. In sum, more complex acquisitions generate more protests (Snider and Walkner 2001).

### **Recommendation Five: Simplify requirements**

Requirements, and thereby evaluation criteria, should be clear and simple, which means focusing on defining the need correctly. According to a contracting agency official,

I could run a good source selection, prevail in a protest, but pick the wrong vendor if the requirements are not specified correctly. And I won't know about my mistake until later. If I don't understand the requirements, I can set up a protestable situation without realizing it. Developing the RFP ... is like installing tracks for a train. At the evaluation stage, you're riding the train on the tracks.

This reinforces Recommendation Three: ensure that the need for a product or service is well-defined, that the requirements follow logically from the need, and that the associated decisions and their justifications are well-documented.

## Finding Six: Training for the source selection workforce is not adequate

Asked about the acquisition workforce, many interviewees cite the reports showing that the number of procurement personnel remained unchanged while the dollar volume of purchases increased. An agency official describes “over-promotion,” which means people are moved into positions for which they do not have the necessary knowledge, skills, and aptitudes, as the response to insufficient hiring: “Over-promotion leads to poor judgments being made. You can’t create enough rules to deal with poor judgment.”

Anticipating an increase in the acquisition workforce, a contracting official says:

My office can’t do with more people. We need more expertise. If I could hire 20 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 FAR isn’t sufficient.

With as little as one week of training in business skills, technical professionals in government can be handicapped in setting evaluation criteria, which is where protests often originate, and in communicating with stakeholders in the business community.

Government staff involved in source selections are seen by those in the private sector as dedicated professionals, but they are challenged by rotating through positions in 12–18-month intervals while being asked to do things they have not had to do before, such as developing performance specifications. One business manager sees in the rotation an intention by agencies to mitigate favoritism by cutting off relationships that might develop among parties who work together over time. The knowledge, skills, and aptitude of the replacements varied. A senior contracting agency official makes the same observation. Another notes that reorganizations happening as frequently as every six months, moving experienced people out.

Validating this perspective, one of the business people interviewed believes most contracting officers try to do a good job when they write solicitations, but they are young and inexperienced; they do not understand the nuances of each solicitation. She uses a quote, attributed by some to Will Rogers: “Good judgment comes from experience. Experience comes from bad judgment.” A contracting agency official says, simply: “I have too many green people.”

In the view of a GAO official, the multiplicity of contract vehicles, with Congress changing the rules, challenges contracting officers and puts them in a state of constant crisis. They have insufficient time to understand the law, the vehicle, the market, and the evaluation. Yet time spent on training is time spent away from the office. With certain types of procurement lessening, how are contracting officers to get hands-on experience?

## Recommendation Six: Invest in training the source selection workforce

The source selection workforce needs legal, financial, and engineering knowledge to be conversant with major stakeholders in the process. Contracting agencies could develop and use a simulation program for training. The DoD uses simulations of battles, wars, budgeting, and logistics. Indeed, the military acquisition community uses DoD’s Modeling and Simulation Information Analysis Center ([http://education.dod-msiac.org/ms\\_primer.asp?a=s4&view&cl=272](http://education.dod-msiac.org/ms_primer.asp?a=s4&view&cl=272)):



(1) to evaluate requirements for new systems and equipment; (2) to conduct research, development and analysis activities; (3) to develop digitized prototypes and avoid the building of costly full scale mockups; and (4) to plan for efficient production and sustainment of the new systems and equipment when employed in the field.

If simulations can be used for these purposes, and if simulations can be used for training war fighters in combat, surely simulations about contracting can be used to train people who supply the war fighters with the products and services they use.

The kinds of mistakes that lead to bid protests can be mitigated by experience. Simulations, despite their limitations, provide opportunities to gain experience other than through on-the-job training, where a mistake might become the basis for a bid protest. This is not to disparage the value of structuring on-the-job training. Someone can serve on a source selection as an evaluator, then earn increasing levels of responsibility, and ultimately chair an evaluation board.

Creating source selection simulations could support the peer review process as well. Source selection peer review teams use people with, on average, twice the years of experience of people conducting acquisitions. However, the assumption that someone who has extensive experience with source selections knows how to examine and investigate them is potentially untenable. Standards exist for the proper execution of a source selection, which means peer review teams can be trained and provided with checklists to supplement their experiences.

The Professional Services Council worked with the Defense Acquisition University on a training module dealing with the risk environment for procuring services. It is a simulation of a company's internal bid meeting. Government acquisition professionals are asked to play the roles of company decision-makers to understand how company people assess risks. The Council offered to do this on a broader basis, an offer that should be pursued, especially if "broader basis" includes training government source selection professionals to assess and manage the full complement of risks unique to their environment.

DoD appears to be addressing turnover of experienced workforce personnel. Acquisition policy now requires program managers to sign tenure agreements so their tenure corresponds to the next major acquisition milestone review closest to four years. If this can be applied to other key members of the source selection teams, especially for complex products and services, it should help reduce errors that can lead to protests.

## **Finding Seven: Performance systems do not always reinforce workplace motivation**

People respond to incentives. Even within the civil service and the military, we find managers attempting to reinforce the behaviors they desire by using as incentives such as recognition, compensation and bonuses, promotion, greater responsibility, greater challenge, and awards. However, practices vary across agencies and contracting commands. Below is a discussion of performance systems at three different organizations.

At Agency A, the contracting officer is assigned full-time to source selection, at least for big projects, so his or her personnel records will reflect performance in that domain. Even for a contract specialist on temporary assignment to a source selection, performance on the source selection is part of a performance review. To be promoted within the agency, a contracting official says,

... it helps to have a competition under your belt ... You can't get promoted to a senior position in contracting [at this agency] without having been on a source selection

team or managed a competition. When you apply for a more senior position with 50 others, you have to distinguish yourself. So serving on a source selection team or managing a competition is something you want to do if you're ambitious. Hence, we tend to get our best and brightest on our teams.

Agency B strikes a middle ground, acknowledging that appraising performance in source selection is challenging, made more so by the dismantling of the National Security Personnel System (NSPS). If source selection activity is a significant part of an employee's responsibilities, it can be called out as an appraisal element. However, few people other than the employee and supervisor see the performance appraisal; it is not used in merit promotion. A supervisor can always use good work in a selection as the basis for a performance award nomination, but this is discretionary, not systematic.

Agency C recruits members informally to be on each of its source selection teams. Until very recently, personnel records made no mention of that. The agency had no useful tracking system to help match knowledge, skills, and aptitudes with responsibilities. Good performance on a successful selection might garner a letter of commendation that will look good on a resume, but places nothing permanent in an employee's file and has little or no recognized impact on an individual's career. The agency relies on a sense of professional duty to staff its selections.

Even at senior levels, the challenge of aligning the knowledge, skills, and aptitudes of decision-makers with the responsibilities of the jobs in a source selection intersect with the challenge of providing appropriate motivation. People rising through the ranks of combat commands move to acquisition. Can good operational officers be good managers? According to John Young, a former deputy secretary at DoD, military operators, those on the combat side, disrespect the acquisition side.

Military operators think they're born leaders. The military believes that if it just puts contracting professionals around the military operator who is assigned to run acquisitions, that will work. The army has over the years had a handful of acquisition flag officers. Military operators who do not think much of acquisition officers control promotion boards. Until you show acquisition people that they have a good vertical potential, you won't get the best people in acquisition.

In sum, the incentives for participating in source selections do not always align with their strategic importance.

## **Recommendation Seven: Create incentives to excel on source selections**

Members of the source selection workforce should be incentivized. At minimum, recognition programs could distinguish performance of acquisition versus technical professionals. Better still, performance in each activity that is part of a source selection would be identified and assessed as part of an employee's regular performance review, potentially affecting compensation and promotion decisions. A related initiative would track employee participation in source selection activities, creating a database to support the decisions contracting officers make when composing source selection teams.

## Finding Eight: An agency's decision-making structure can create conditions conducive to bid protests

Looking at acquisition throughout government from a 30,000-foot level, a Senate staffer described a misalignment:

... between strategy and acquisition. The management and strategy people come up with a great idea and chuck it to acquisition to implement without sufficient attention to whether the idea is feasible. Acquisition people are not involved in strategic decision-making. Historically, contracting was seen as mechanical and boring.

An example closer to the ground level is a field command knowing the desired product, specifying a company to make it, selecting that company's design, starting to purchase it—a good product, but expensive and manufactured overseas—and handing it to the acquisition agency to buy. The agency could not do a sole source contract without justification. It is put in the position of reverse engineering the product or doing a competitive procurement process. The field command, especially under time pressure, wants a product, and leaves the acquisition agency “on the ropes,” potentially exposing itself to a bid protest no matter what it does. Here, a misalignment of strategy—decide in favor of contracting out—with structure—who decides—exposes the agency to a protest because people with information key to the decision were not involved at the appropriate points. One contracting agency official says,

We're more effective if we're brought in early [setting requirements]. Often, we're presented with a solution in search of a problem ... Sometimes we struggle to get the outcome to fit the acquisition strategy and, in that context, seams can gap and maybe generate a protest.

## Recommendation Eight: Align decision-making authority with agency strategy and information

With an under secretary of defense for acquisition, technology, and logistics, DoD appears to have its strategy and structure aligned. Further down the chain of command, however, contracting officers may not be involved in setting requirements as early as they could be. The root cause of the problem is partly operational decision-makers who see source selection decision-makers as clerks who take orders and buy things.

Source selection officials develop expertise germane to the initial definition of need and the decision to fulfill it. Beyond their understanding of the process of purchasing goods and services, they understand substantive issues having to do with the feasibility of producing goods and services and the capacities of the firms to provide them. They may have an overview across agencies and be aware of opportunities for joint purchasing that can make possible an otherwise cost-prohibitive activity. Taking advantage of this expertise means incorporating principles of strategic supply chain management and bringing acquisition expertise to bear on decisions throughout the process, not just on selecting a source.

## Finding Nine: Monitoring can be misguided and time-consuming

Measures of performance are debated at the agency level, with some officials saying, “We don't do any good if we don't survive a protest. So we ought to manage to minimize protests.” Others respond, “That's terrible. Our job is to [deliver warships, fly planes, transport soldiers] and to protect the country, not to avoid protests.”

Agencies measure their success in different ways. At the Defense Logistics Agency (DLA), if the customer is happy, DLA contracting officials see themselves as having done their job. They break that down to component parts to track their success: turnaround time of documents or responsiveness (whether documents make it through review with few changes). These surrogate measures work with the commodity-like materials that DLA supplies.

Agencies procuring materials that are less commodity-like—often with extensive research and development components—have greater challenges. To deal with these, DoD has created internal monitoring mechanisms, including procedural reviews. GAO provides an external one. The level and types of reviews applied to a source selection depend on the size of the project, but could include, for example, reviews by a contract review board, a legal review board, and a peer review. In a memorandum dated September 29, 2008, the under secretary of defense for acquisition, technology, and logistics created a system for conducting peer reviews of contracts exceeding \$1 billion for supplies and services. It directed contracting organizations to design peer reviews for contracts valued at less than \$1 billion. Some agencies already have constructed a series of internal reviews to manage risk.

Peer reviews take time and consume resources. According to the Office of the Secretary of Defense (OSD), peer reviews force a pause in the action by bringing in an outside group to ask the source selection team to explain its actions. If an agency's documents are in order, which OSD believes should not impose an additional burden on the agency, and the members of the peer review team read them in advance, then the peer review should add two to three days to the schedule for issuing the source selection strategy, the same before publishing the RFP, and about the same before announcing the award.

At least at one agency, reviews for projects valued at less than \$1 billion have proven effective but not foolproof because of the difficulty in catching errors through the review process. According to a contracting agency official:

Reviewers ask whether acquisition personnel followed the evaluation criteria and of course they say yes. But later, perhaps through a protest, when the details are even more closely examined, errors surface. It is hard to catch errors in a review due to the large volume of documents involved, many of which are not even part of the review package. Sometimes pricing errors can be easier to catch, but even there, that depends on what the reviewers have access to and how fine-toothed a comb they use. Certainly, oversight is important, but Total Quality Management says to focus on quality at the front end, not “inspect it” via later reviews. The person at the top has to rely heavily on the analysis and conclusions of the lower level staff, so the accuracy of the initial conclusions is critical.

## **Recommendation Nine: Agencies should monitor more, monitor smarter**

Measuring the success of a source selection will be challenging. Good practice is to have multiple measures. Asked how he knows whether a source selection was successful, a contracting officer answered only half in jest: “Well, I wouldn't have a professor asking me what I do and why I do it.” However intangible that might be as an assessment, worse measures exist. Complying with a proposed source selection schedule, completing the source selection on budget, and having no sustained bid protests could be better ones.

The Department of Defense and Congress can improve upon the data they are collecting to monitor performance of the acquisition process. They should have information about stages

from need specification through contract award, taking into account bid protests or COFC lawsuits, as well as the time required for an agency to amend or reissue a request for proposal and complete the selection. The number and dollar volume of protestable contract actions can be tracked, as can corrective actions and protester reasons for withdrawing protests. This expands a recommendation offered by the Congressional Research Service to require GAO to include in its annual report to Congress the most common grounds for sustaining protests (Schwartz and Manuel 2009). Tracking this information will allow decision-makers to understand the dynamics of the system and to try to improve it.<sup>5</sup> It also will induce decision-makers to manage to the measures being monitored.

Agencies should request feedback on the quality of the source selection process. For example, as one former company official put it, “if we win, lots of ills are washed over ... unless a losing company protests.” Even information about errors committed during a successful source selection can, if put in the right hands, prevent an unsuccessful one later.

Whether mitigating protests or reducing delays or costs, part of the challenge is putting dimensions on the problem and its potential solutions. Six Sigma, Total Quality Management, Enterprise Resource Management, Business Process Engineering: all of these rely upon identifying a system, collecting information about operational features that reflect its performance, and then studying the data to make recommendations for improving it. Beginning with inadequate information results in inadequate improvements.

One way to improve the information that supports agency decision-making is to consider the efficacy of the databases that agencies use to judge company past performance, especially now that commercial databases on government contracting, like FEDMINE, have become available. The objective would be to use web technologies to ensure that the most independent, current, comparable, and reliable information becomes part of the past performance evaluation. More generally, this reinforces the notion of periodically promulgating and updating best practices with respect to using past performance, supplementing the FAR and GAO decisions (Snider and Walkner 2001).

A final improvement would be to require agencies that re-compete a contract, as a result of taking corrective action or as a result of a GAO recommendation to amend or reissue the request for proposal, to do so within a specified timeframe, to publish why the timeframe cannot be met, or to request an exemption from the limit. This assumes that Congress or Pentagon decision-makers are in the best position to estimate the time required to reassemble the selection team, whose members typically will have taken up other tasks once an award has been announced and GAO processes a protest. Monitoring the amount of time required with OSD-issued guidelines might be sufficient to secure agency attention to crafting the most efficient responses to sustained protests and corrective actions.

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5. GAO could track and report more fully to Congress on the outcomes of agency decisions in response to successful bid protests. If, for example, an agency takes corrective action by initiating a new solicitation, that can be viewed as a positive outcome. If the agency takes years to do so, devaluing the investments made by the contract winner and putting other offerors on hold, the result is not necessarily positive. Congress, like agencies, should have better feedback on what works and what does not.

## Conclusion

These findings and recommendations highlight a classic choice among management practices. If the objective is to mitigate bid protests, solutions include:

- Making selections correctly in the first place, which means, among other things, investing in acquisition workforce recruitment and training
- Anticipating protests and preparing for them by documenting selection decisions thoroughly, which might as a side effect identify errors sufficiently early to be corrected at low cost
- Investing in better monitoring

If the objective is to mitigate the costs of bid protests—resources consumed and delays in delivering products and services—the appropriate solution should be governed by evidence about which alternative minimizes the sum of the costs of protests and the costs of avoiding them.

# Appendix I: Research Methodology

We reviewed an extensive literature on bid protests, interviewed participants in the acquisition community, and read and coded GAO protest and COFC decisions. Interviews were conducted during the last quarter of 2009 and the first quarter of 2010. Respondents included four attorneys and a manager at GAO; executives and in-house counsel at four large prime contractors; four outside bid-protest counsel; government contract managers at two smaller companies that are typically subcontractors; three current or former executives in the Office of the Secretary of Defense; officials and in-house attorneys (as few as two, as many as 14) at three military commands: Air Force Material Command, Naval Air Systems Command, and the Defense Logistics Agency; a Senate committee staff member; and executives (one or two at each) at professional and industry trade associations such as Aerospace Industries Association, the National Contract Management Association, the Professional Services Council, and TechAmerica.

These interviews are not a representative sample of the acquisition community. They constitute a network, initiated through professional contacts and expanded as respondents recommended others who could share different and thought-provoking perspectives. They offered their perceptions as individuals in the system, not as representatives of the organizations with which they are associated. Different experiences with the system can color perceptions; the insights discussed in the report are suggestive, not definitive.

Questions in the interview protocols are based on a conflict management audit designed by Ury, Brett, and Goldberg (1988), supplemented by questions generated from a review of literature on DoD procurement. Experienced contracting officers at three military commands reviewed and commented upon drafts of the protocols, which were then revised.

We also analyzed bid protests posted on GAO's website. All digested decisions issued in calendar years 2001 through 2009 were coded.<sup>6</sup> This resulted in data on protests involving the Air Force, Army, Marines, Navy and the DoD, not including the Army Corps of Engineers because it operates under different federal appropriations statutes.

Given our focus on the potential for management processes at contracting agencies to trigger conflicts that generate protests, 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 comply with the standard process for acquiring products and services

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6. Search Criteria for the GAO database: ["unrestricted" in Product Classification] AND ["Issued by GAO's Comptroller General and the Office of General Counsel. Address matters of federal law brought to GAO's attention. Include Bid Protests and Appropriations Decisions" in Product Type] AND ["All Topics" in Topic] AND ["01/01/2001 - 12/31/2008" in Publication Date] AND ["All" in Strategic Goal] AND [{"department of defense" in Organization Concerned} OR {"air force" in Organization Concerned} OR {"army" OR "navy" in Organization Concerned}]

- 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 protester missed a filing deadline or failed to provide factual basis for a claim; the protester selected the incorrect venue, often when the protester should have protested to the Small Business Administration under an SBA contract set-aside program; or the protester did not have standing, often when the protester 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). Protests dismissed on procedural grounds were not included because these indicate protester 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.

Information about cases before the COFC came from a search of the Lexis/Nexis database for 2001–2008. Cases were coded according to whether the protester or the government was supported by the court.

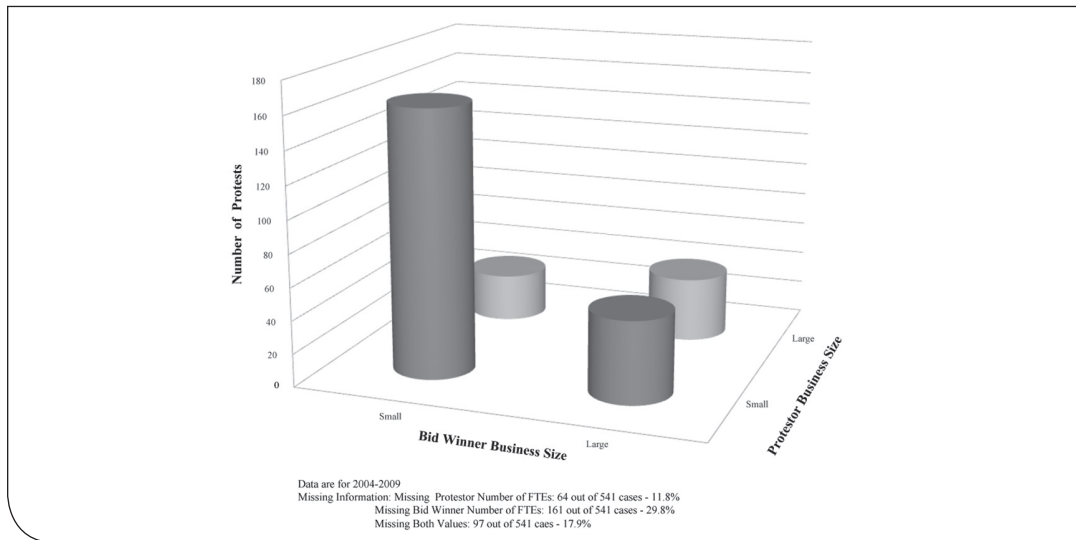
Three students at Willamette University's College of Law coded the decisions. Legal details matter. Different interpretations of the requirements for a debriefing, for example, lead to different behavior even though agency officials are reading the same sections of the Federal Acquisition Regulations that govern them.

Information about the financial characteristics of contract winners and protesters 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 offerors are headquartered. Additional and confirming information about the contract solicitation numbers, values, types, and contracting commands came from databases such as FedBizOpps ([fbo.gov](http://fbo.gov)), the Federal Procurement Data System ([fpds.gov](http://fpds.gov)), and [FedSpending.org](http://FedSpending.org), a project of the nonprofit OMB Watch.

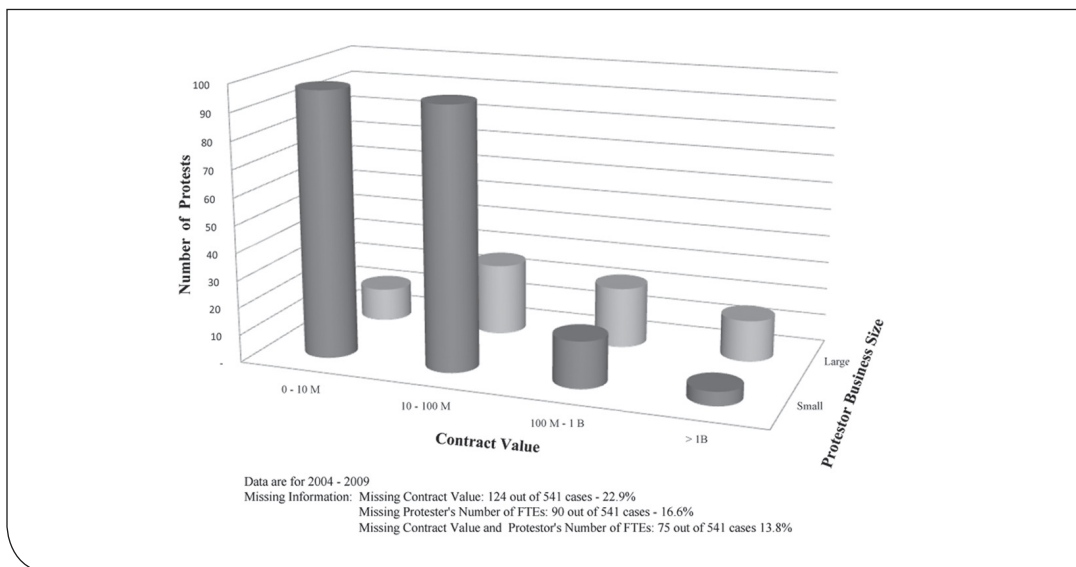


## Appendix II: Supporting Charts

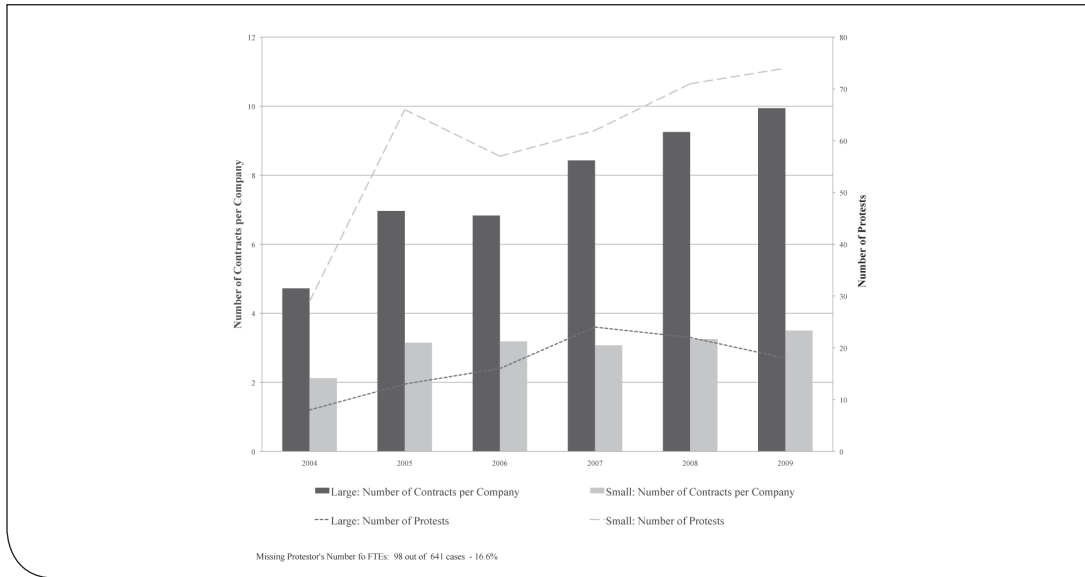
**Chart 1: Distribution of Protests by Protestor Business Size and Bid Winner Business Size**



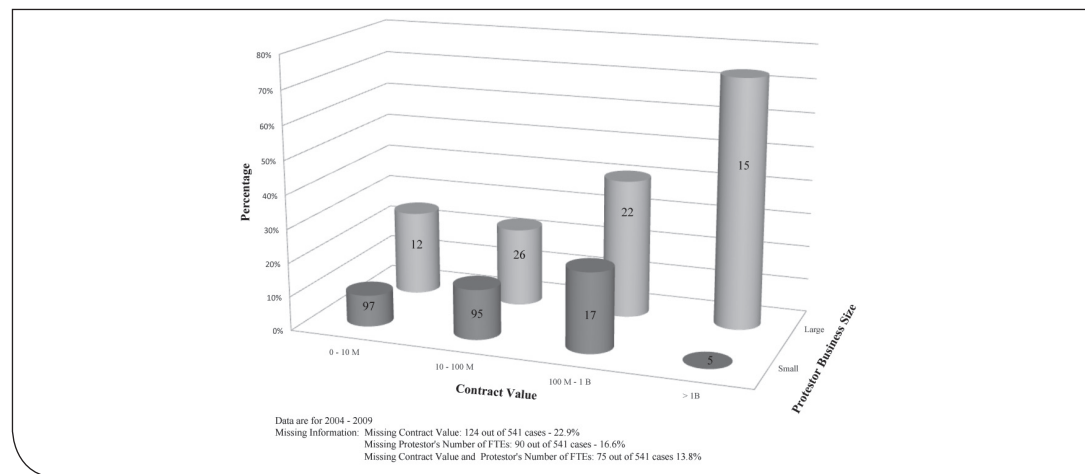
**Chart 2: Distribution of Protests by Contract Value and Protestor Business Size**



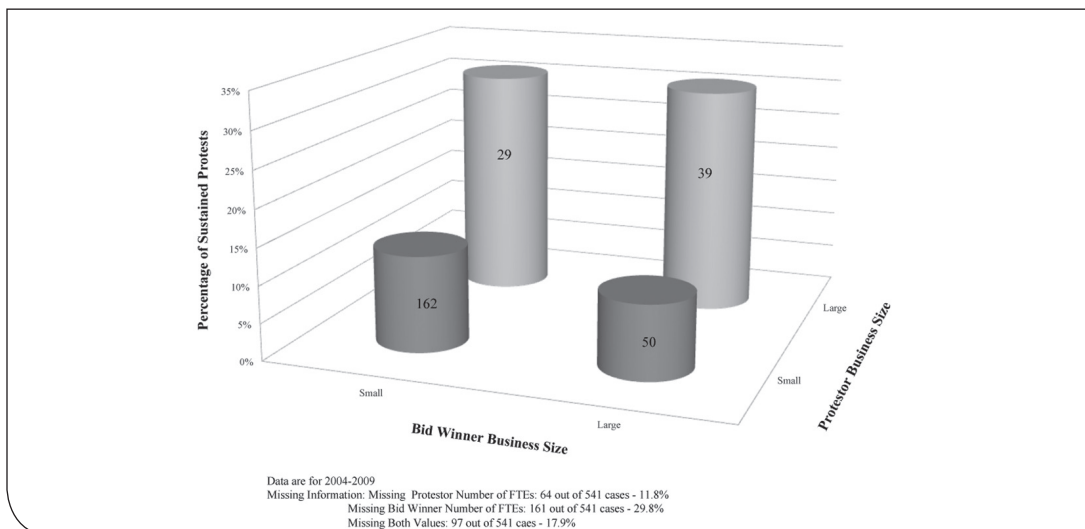
**Chart 3: Concentration of Contract Awards by Business Size**



**Chart 4: Sustain Rate of Protests Distributed by Contract Value and Protestor Business Size**



**Chart 5: Sustain Rate Distributed by Protestor Business Size and Bid Winner Business Size**



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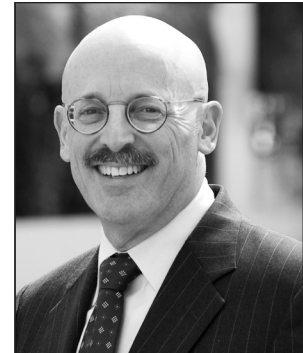
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