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United States Government Accountability Office
Washington, DC 20548

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April 9, 2009

The Honorable Carl Levin
Chairman
The Honorable John McCain
Ranking Minority Member
Committee on Armed Services
United States Senate

The Honorable Ike Skelton
Chairman
The Honorable John M. McHugh
Ranking Minority Member
Committee on Armed Services
House of Representatives

Subject: *Report to Congress on Bid Protests Involving Defense Procurements*

This report responds to the direction from the Committee on Armed Services, House of Representatives, contained in the report on the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417 (2008) (H.R. Rep. No. 110-652, at 394-95, May 16, 2008). The committee directed the Comptroller General of the United States to review bid protests filed with the Government Accountability Office (GAO) during the last 5 years associated with procurement actions by the Department of Defense (DOD). The committee requested that we assess the extent to which bid protests may be increasing, the extent to which frivolous and improper protests may be increasing, and the causes of any identified increases. The committee further directed the Comptroller General to provide recommendations regarding actions that Congress, or the executive branch, could take to disincentivize frivolous and improper bid protests on the part of industry.

EXECUTIVE SUMMARY

This report reaches the following conclusions about the GAO bid protest process in general, and about the committee's mandate to assess the increase in protests and the extent to which frivolous protests may be increasing:

- Twenty-five years ago, the Competition in Contracting Act of 1984 (CICA), Pub. L. No. 98-369, 98 Stat. 1175 (1984), codified and significantly enhanced GAO's bid protest forum. The existing process provides a balanced approach to adjudicate and resolve challenges to U.S. government procurements.

- Despite an increase in bid protest filings in fiscal year (FY) 2008--driven in part by statutory expansions of GAO's bid protest jurisdiction--the number of protests challenging DOD contract awards in the last 5 years is relatively low when viewed historically.

- The GAO bid protest process significantly reduces potential disruptions to DOD procurements as a result of three factors:

  --GAO consistently closes more than 50 percent of all protests involving DOD procurements within 30 days of filing;

  --The remaining DOD protests must be, and are, resolved within 100 days of filing; and

  --CICA permits agencies to proceed with contract performance even before a protest is resolved when the goods or services are urgently needed, or when proceeding is in the best interests of the United States.

- GAO's regulations and procedures currently provide GAO the ability to promptly close protests that do not merit further development. GAO does not need to determine that a protest is "frivolous" to promptly close it, and, in our view, making such a determination could add substantial costs to the protest process and have the unintended consequence of discouraging participation in federal contracting and, in turn, limiting competition.

BACKGROUND

On occasion, bidders or others interested in government procurements may believe that a contract has been, or is about to be, awarded improperly or illegally, or that they have been unfairly denied a contract or an opportunity to compete for a contract. These objections to procurement actions or decisions are referred to as bid protests.

Twenty-five years ago, Congress enacted CICA. In addition to significantly reforming the federal procurement system, CICA provided a statutory basis for the bid protest forum within the Office of General Counsel in GAO.

Last year, a single protested procurement--the Boeing Company's challenge of the award of a contract by the Air Force to Northrop Grumman for a new fleet of tanker planes--generated unprecedented interest in, and questions about, GAO's role in deciding these disputes. While we welcome this interest, many of the questions we received, as well as the media accounts of the dispute, reflected a limited understanding of the protest process.

CICA's 1984 changes to GAO's bid protest forum confirmed and strengthened GAO's long-standing role as a quasi-judicial forum for objective, independent, and impartial resolution of disputes concerning the award of federal contracts. At the heart of the law's bid protest provisions is a balancing act that attempts to ensure that procurements can proceed without undue disruption, while also providing a mechanism for holding agencies accountable, and protecting the rights of aggrieved offerors to fair treatment by the government.

A discussion of the current bid protest process should begin with the concerns expressed by Congress at the time of CICA's enactment. Specifically, the report of the House Committee on Government Operations complained that the GAO bid protest process prior to 1984 was too weak to be effective; was principally advisory in nature; and depended too heavily on voluntary agency compliance--in responding to protests, in producing applicable documents, and in implementing recommended remedies.[1] In fact, the report set forth a detailed example of a protest filed by Amdahl Corporation challenging the award of an Army contract to the IBM Corporation on the basis that the equipment being offered did not comply with the solicitation's requirements, and was out of date and not in current production.[2] Although GAO ultimately sustained the protest,[3] because there was no provision for a stay of performance, the decision was issued after the equipment had been installed, and hence no meaningful relief was available.[4] The window into the procurement process provided by the *Amdahl* protest was the subject of hearings in the House,[5] and led to the above-referenced discussion of the case in the committee report.

To address concerns about the strength of the GAO bid protest forum and the voluntary nature of agency responses to protest allegations, CICA provided a

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[1] H.R. Rep. No. 98-1157, at 23 (1984).

[2] *Id.* at 24.

[3] *Amdahl Corp.; ViON Corp.*, B-212018, B-212018.2, July 1, 1983, 83-2 CPD ¶ 51.

[4] *Amdahl Corp.; ViON Corp.--Recon.*, B-212018.3, B-212018.4, Dec. 19, 1983, 83-2 CPD ¶ 703.

[5] *Competition in Contracting Act of 1984: Hearing on H.R. 5184 Before the House Committee on Government Operations*, 98th Congress. 59-60 (1984) (statement of A.G.W. Biddle, President, Computer and Communications Industry Association).

statutory basis for the protest process and set statutory timelines for agency responses. To strike a balance between the need for agencies to proceed with their procurements and the need to allow complaints to be addressed, CICA imposed a deadline on GAO for issuing its decisions. As amended, CICA requires that GAO resolve all bid protests within 100 calendar days; GAO has never failed to meet its statutory deadline for issuing decisions.

Perhaps most significantly, to address concerns about providing meaningful relief when a protest is upheld, CICA included an automatic stay of contract performance until a decision on the protest is issued. CICA's balancing of the competing interests of the government's procurement system is clearly reflected in two provisions addressing this issue of providing meaningful relief. First, the law allows agencies to "override" the automatic stay of performance with a written agency finding that the goods or services are urgently needed, or that proceeding with performance in the face of a protest is in the best interests of the United States. Second, the law requires agencies to advise GAO if the agency decides not to follow the recommendation of a bid protest decision; GAO is then required to report these instances of noncompliance to four congressional committees.[6]

In implementing the bid protest provisions of CICA, GAO has maintained the balance between allowing agency procurements to proceed and providing meaningful relief to protesters. Before a protest will be considered on the merits, GAO applies a series of tests that, as explained below, screen out a large number of cases. These tests are embodied in GAO's regulations implementing the bid protest provisions of CICA. For example, GAO applies a strict timeliness rule, set out in 4 C.F.R. Part 21, that leads to the prompt dismissal of many protests. In addition, GAO applies a standing rule, based on CICA's definition of an "interested party" with standing to protest. Again, this rule leads to the dismissal of a number of protests. If the protest meets GAO's timeliness and standing rules, GAO reviews it for legal sufficiency. In this regard, our regulations provide other grounds for dismissing protests. When a protest does not state a valid legal basis or raises issues outside GAO's jurisdiction (such as disputes during contract administration and challenges to a firm's size status for purposes of a small-business set-aside), GAO promptly dismisses it.

As discussed in greater detail below, GAO's application of these rules means that a significant percentage of GAO protests are dismissed within a short time after filing, in which case the contracting agency is free to proceed with the procurement (that is, CICA's automatic stay is lifted).

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[6] Because GAO is not a court, it cannot (unlike the Court of Federal Claims) direct executive-branch agencies to take corrective action. Instead, GAO makes recommendations. Except in rare instances, these recommendations are routinely followed. *See* GAO Annual Reports to Congress on Bid Protests for Fiscal Years 1986-2008. (The annual reports for FY 1995-2008 are available on GAO's website, *www.gao.gov.*)

For those cases that GAO does not dismiss, GAO will issue a decision on the merits, always within CICA's 100-day deadline, and typically well before it. In those cases, GAO decides whether the contracting agency complied with the statutes and regulations controlling government procurements. If GAO finds that the agency did not violate procurement law, or that any violation that may have occurred did not prejudice the protester's chances of winning the contract, GAO will deny the protest. If GAO determines that the agency did violate procurement law and the violation prejudiced the protester's chances of winning the contract, GAO will sustain the protest.

GAO's role in resolving a bid protest is an adjudicative process that differs significantly from the audits and evaluations conducted by GAO's audit teams. Protests are handled by a group of 30 attorneys within GAO's Office of General Counsel, who serve as hearing officers. Unlike GAO audit reports, bid protest decisions do not address broad programmatic issues, such as whether a weapons program is being managed effectively and within costs. Nor do our decisions evaluate which company's proposal is better. Rather, the decision produced in response to a protest addresses the specific allegations raised by the parties about whether a particular government action was contrary to procurement law or regulations, or contrary to the evaluation scheme the procuring agency established in the solicitation. Only when GAO finds--after developing a full record--that a procuring agency has not followed procurement rules, and that this failure has prejudiced the protester's chances of winning a competition, do we sustain a protest.

BID PROTEST TRENDS

Summary of Findings

As noted above, we were asked to review the number of GAO protests filed challenging procurement actions by DOD during the last 5 years (FY 2004 to FY 2008) and assess the extent to which protests may be increasing.[7] Based on our review, which shows a historical variability in the number of protest filings, the 4-year period of FY 2004 to 2007 does not reflect an upward trend in DOD protest filings.[8] Rather,

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[7] Because we were asked about protests of DOD procurements, this report generally refers only to DOD procurements. In many cases, the analysis and our conclusions would be the same for civilian agency procurements. In any event, no inference should be drawn that protest processes or trends would be different for civilian agency procurements.

[8] CICA requires GAO to report to Congress each year on the number of protests filed. GAO's long-standing approach to this requirement has been to report the docket numbers ("B" numbers, such as B-123456) assigned by our Office, not the number of procurements challenged. Thus, where a protester files a supplemental protest or multiple parties protest the same procurement action, multiple iterations of the same "B" number are assigned (e.g., B-123456.2, B-123456.3). These docket numbers accurately reflect GAO's protest filings, but they overstate the number of procurements challenged. In contrast, in recent testimony by the Secretary of

as discussed below, the number of protests filed, relative to DOD procurement spending, actually suggests a downward trend in the rate of DOD protest filings.

A single year in this 5-year period, however, FY 2008, did reflect a significant increase in the number of DOD protests filed. Our review indicates that a portion of this increase is tied to recent statutory expansions of GAO's bid protest jurisdiction, and we expect that our expanded jurisdiction will continue to result in an increased level of DOD (and non-DOD) protest filings. One important aspect of our process, however, remained constant--the rate at which DOD protests are closed early in the protest process.

We were also asked to consider the extent to which frivolous protests may be increasing. We limited our inquiry to ascertaining any trends regarding DOD protest filings as a whole, however, because, as discussed more fully in the next section of this report, while our Office tracks dismissals and grounds for dismissing protests, we do not label protest filings as frivolous, and accordingly, do not collect data on such filings.

DOD Protests: A Historical Perspective

In order to fully understand and consider the extent to which DOD bid protests may be increasing, we decided to consider the number of protests filed during this period in historical context. Thus, we reviewed not only the number of DOD protests filed during the last 5 years, but also the number of DOD protests, and non-DOD protests, filed over the past 20 years. As can be seen from Figures 1 and 2 below, while the number of DOD protests filed with GAO has fluctuated significantly over the past 20 years (FY 1989 to FY 2008), the last 5 years reflect relatively low numbers of DOD protests filed, in terms of the historical trends.

Defense, DOD characterized the effect of the protest process in terms of the number of procurement actions challenged. For purposes of this report, we are adopting DOD's recent approach. Thus, for purposes of counting the number of protests filed, we eliminated from our count multiple iterations of the same "B" number. As a consequence, the number of protests in this report reflects the number of procurements challenged in a given fiscal year.

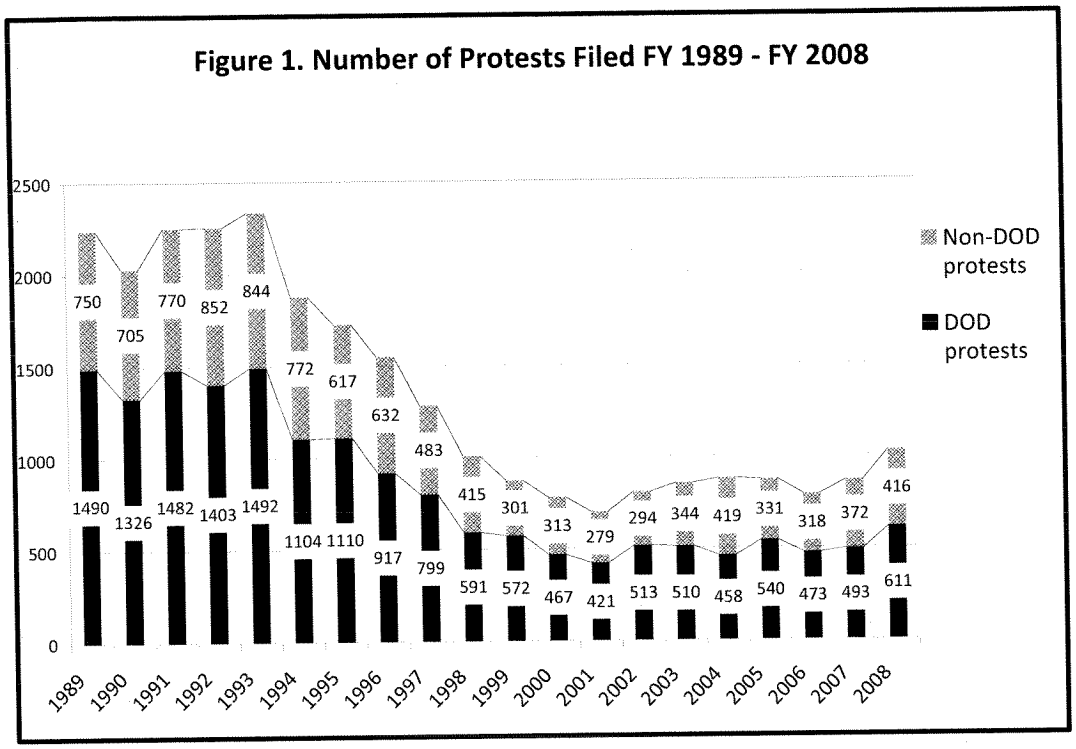
Figure 1. Number of Protests Filed FY 1989 - FY 2008
2500
2000
1500
1000
500
0
Non-DOD protests
DOD protests
750
705
770
852
844
772
617
632
483
415
301
313
279
294
344
419
331
318
372
416
1490
1326
1482
1403
1492
1104
1110
917
799
591
572
467
421
513
510
458
540
473
493
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2003
2004
2005
2006
2007
2008

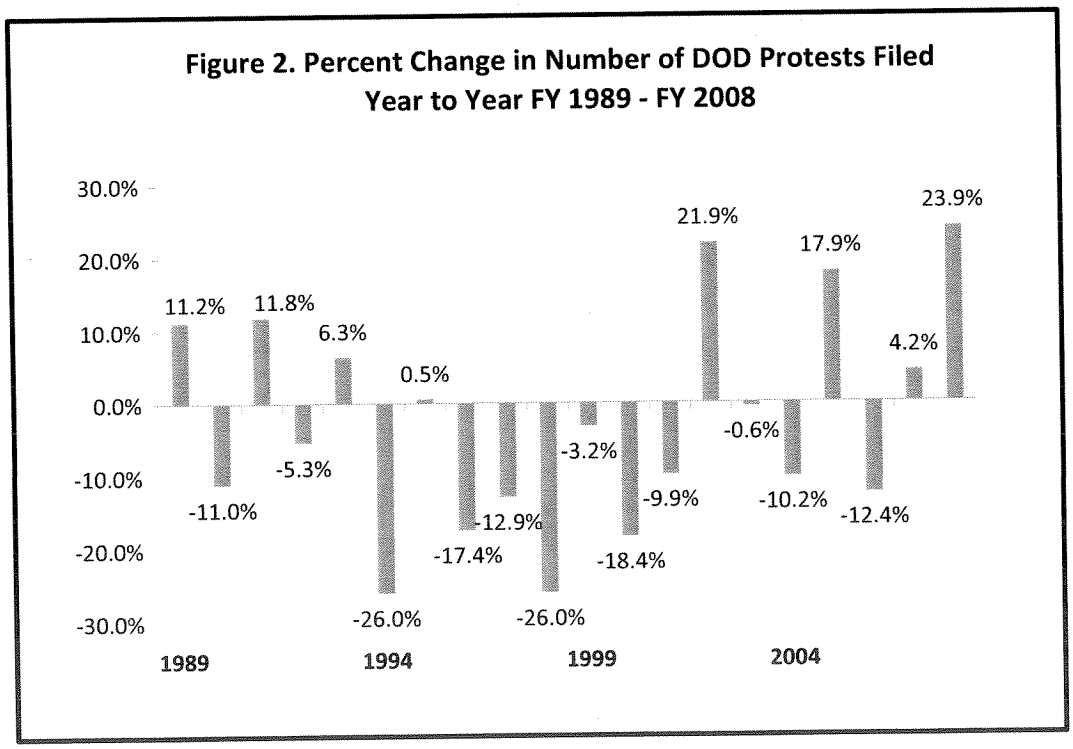
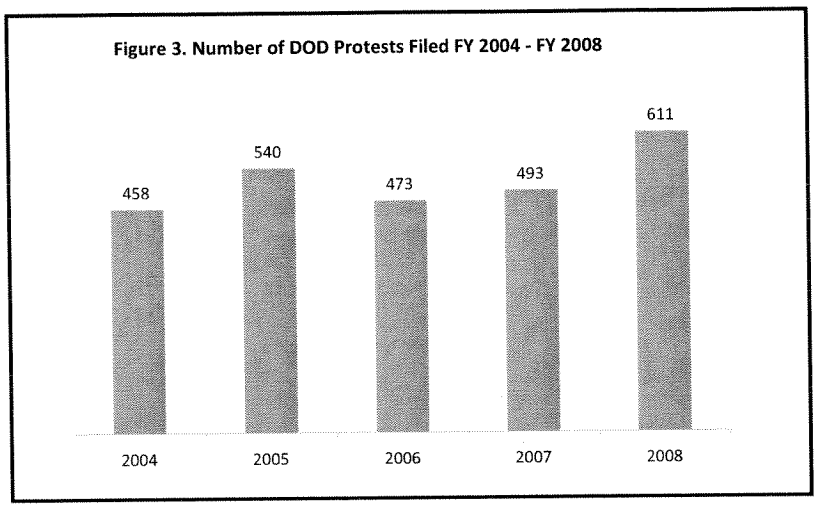
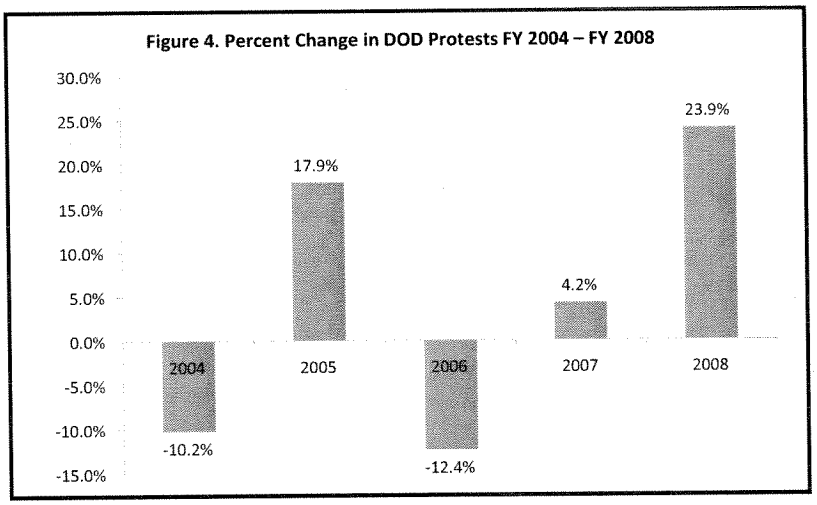


Figure 2. Percent Change in Number of DOD Protests Filed Year to Year FY 1989 - FY 2008
30.0%
20.0%
10.0%
0.0%
-10.0%
-20.0%
-30.0%
11.2%
-11.0%
11.8%
-5.3%
6.3%
-26.0%
0.5%
-17.4%
-12.9%
-26.0%
-3.2%
-18.4%
-9.9%
21.9%
-0.6%
-10.2%
17.9%
-12.4%
4.2%
23.9%
1989
1994
1999
2004

Examining only the past 5 years (Figures 3 and 4), the variability in DOD protest filings, on a year-to-year basis, has swung up and down--just as the totals of such filings have varied over the past 20 years.



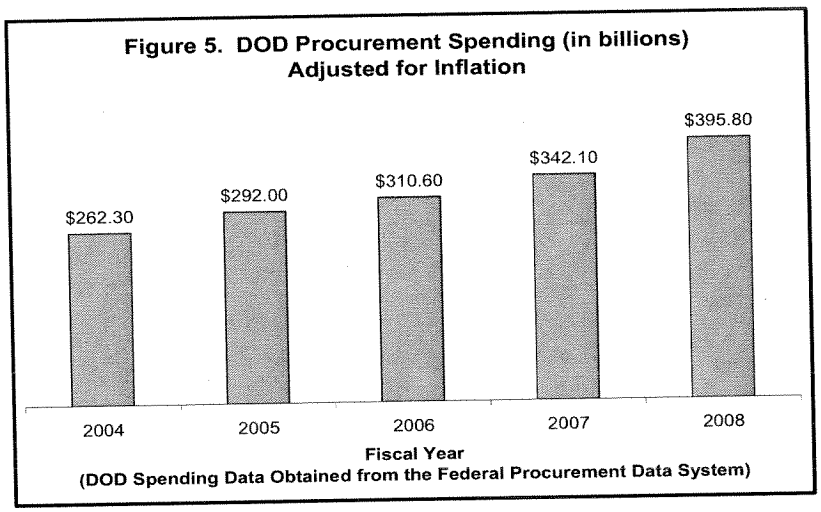


The number of filings in the 4-year period from FY 2004 to FY 2007 ranged between 458-540 per year, with an average of 491 protests filed. In FY 2008 there was a significant increase in the number of DOD protests filed. Specifically, FY 2008 brought an increase of 118 DOD protests over the previous year, to 611 (a 23.9 percent increase). A portion of this increase (30 protests, or about 25 percent of the increase in filings) was tied to recent statutory expansions of GAO's bid protest jurisdiction. As a result of the statutory changes, GAO now considers protests concerning task and delivery orders issued after May 27, 2008, provided they are valued at more than $10 million.[9] In addition, section 326 of the NDAA increased the

[9] In this regard, section 843 of the National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, 122 Stat. 3 (2008), amended 10 U.S.C. § 2304c and 41 U.S.C. § 253j to authorize GAO to hear protests of the award or proposed award of

scope of GAO's bid protest review with respect to public-private competitions conducted pursuant to OMB Circular No. A-76.[10] After removing the portion of the increase related to statutory changes in jurisdiction, FY 2008 saw an increase of 88 DOD protests, to 581 (an increase of 17.8 percent over FY 2007).

The somewhat higher number of DOD procurements protested to GAO (up 17.8 percent in FY 2008 after removing protests resulting from statutory changes) needs to be put in the context of the increase in DOD procurement spending over the past few years. From FY 2007 to FY 2008 alone, DOD procurement spending increased 15.7 percent (Figure 5). These similar rates of increase may suggest that the increase in protests was due in part to DOD's increase in procurement spending. *See GAO Bid Protests: Trends, Analysis, and Options for Congress*, Congressional Research Service, Feb. 11, 2009, at 7 (suggesting that "the recent rise in protests is primarily a result of increased government contracting activity").



The amount of DOD procurement spending over the past several years also can be correlated to the number of GAO protests of DOD procurements during those years. The result can be shown as a ratio of protests to procurement dollars. In Figure 6, we show that there have been between 1.4 and 1.9 protests filed at GAO for every billion dollars spent by DOD. Importantly, as shown in Figure 6, the number of GAO protests per billion dollars of DOD procurement spending reflects a slight downward trend during this period. In fact the recent CRS review of the GAO bid protest process shows that the number of GAO protests filed between FY 2001 and FY 2008, relative to federal procurement spending, reflects a downward trend in the number of protests filed. *See GAO Bid Protests: Trends, Analysis, and Options for Congress,* Congressional Research Service, Feb. 11, 2009, at 6-7.

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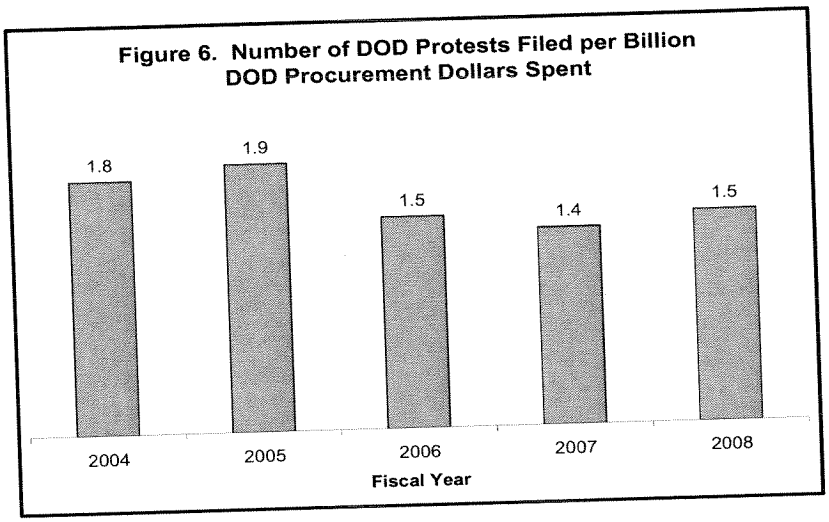
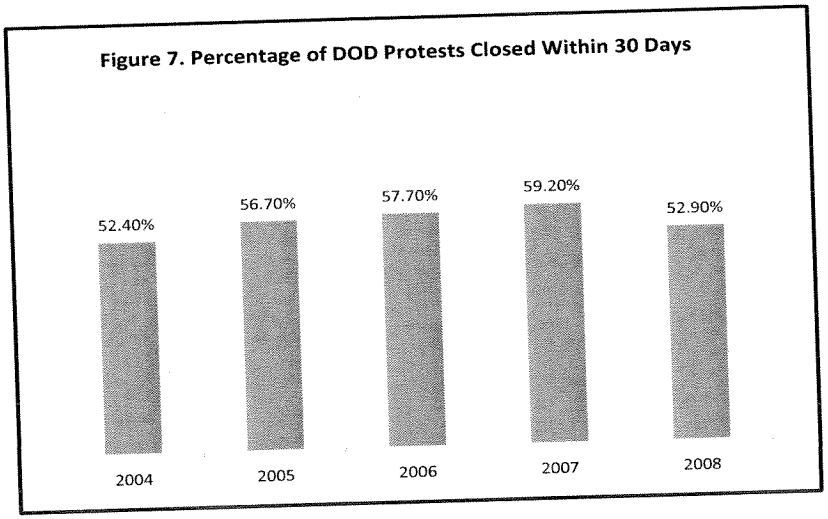
certain task and delivery orders under indefinite-delivery/indefinite-quantity contracts.

[10] NDAA, Pub. L. No. 110-181, § 326, 122 Stat. 3 (2008), amending 31 U.S.C. § 3551.



Despite the variability in protest filings from one year to the next, our Office minimizes the delay and disruption associated with protest filings by resolving protests as expeditiously as practicable. In fact, during the last 5 years, we have consistently closed more than half of all DOD protests within 30 days of when they were filed (Figure 7).



The vast majority of cases closed within the first 30 days are dismissed because the protest fails to meet one of the threshold tests (such as timeliness) explained above. Another typical basis for dismissal is where the protester withdraws its complaint, often after the agency takes corrective action to remedy the problem protested. In addition, many of our dismissals occur after an agency elects to take corrective action rather than defend its procurement--and where we agree that the corrective action renders the pending protest moot. By resolving more than half of all DOD protests within the first 30 days, our Office helps minimize the delay and disruption that protests can cause to DOD procurements.

"FRIVOLOUS AND IMPROPER" PROTESTS

In its report, the committee directed GAO to assess the extent to which "frivolous and improper" bid protests may be increasing. Because the report does not specify what is meant by frivolous and improper protests, we have looked to the federal courts for their definition of frivolous legal actions.[11]

The courts have identified two ways in which legal actions may be deemed frivolous. First, a legal action is considered "frivolous as filed" when a plaintiff or appellant grounds its case on arguments or issues "that are beyond the reasonable contemplation of fair-minded people, and no basis for [the party's position] in law or fact can be or is even arguably shown." *Abbs v. Principi,* 237 F.3d 1342, 1345 (Fed. Cir. 2001), *citing State Indus., Inc. v. Mor-Flo Indus., Inc.*, 948 F.2d 1573, 1578 (Fed. Cir. 1991); *see also International Union of Bricklayers Etc. v. Martin Jaska, Inc.*, 752 F.2d 1401, 1406 (9th Cir. 1985) ("frivolous appeal is defined as one in which the result is obvious, or where the appellants' claims are utterly meritless"). Second, a legal action is considered "frivolous as argued" when a plaintiff or appellant has not dealt fairly with the court, has significantly misrepresented the law or facts, or has abused the judicial process by repeatedly litigating the same issue in the same court. *Abbs v. Principi*, 237 F.3d at 1345; *Lawrence N. Sparks v. Eastman-Kodak Co.*, 230 F.3d 1344, 1345 (Fed. Cir. 2000); *see also Finch v. Hughes Aircraft Co.*, 926 F.2d 1574, 1582 (Fed. Cir. 1991).

The courts have repeatedly recognized, however, that a legal action found to be without merit is not necessarily frivolous. *See Abbs v. Principi*, 237 F.3d at 1345. A legal complaint that is poorly drafted, or based on weak facts, is not necessarily frivolous. *Ravens Group, Inc. v. United States,* 79 Fed. Cl. 100, 113 (2007). Likewise, a legal argument that is ultimately incorrect is not necessarily frivolous. *Ravens Group, Inc. v. United States,* 79 Fed. Cl. at 114; *Saladino v. United States*, 63 Fed. Cl. 754, 757 (2005); *see also Fed. R. Civ. P. 11* (Advisory Committee Notes on 1993 Amendments).

These judicial decisions show that a frivolous legal action must be more than simply one without merit. Rather, the court cases make it clear that the pursuing party knew, or should have known--either at the time of filing or subsequently--that the legal action was so utterly without merit that it was essentially pursued in bad faith. We think this definition is appropriate for our protest forum as well.

Applying the standards articulated by the courts, the fact that a protest is denied for lack of merit does not necessarily mean that it was frivolous. Likewise, the fact that a protest is dismissed because of a procedural deficiency does not necessarily mean that the protest was frivolous. In our view, even when a protest is dismissed for lack of a valid legal basis, it should not necessarily be considered frivolous; rather, the key

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[11] For purposes of this report, we regard the terms "frivolous" and "improper" as, in essence, interchangeable.

question is whether the protest was filed in bad faith.[12] A determination by GAO that a protest is frivolous would require determining not only that the protest is without merit or procedurally defective, but also that the protest is so utterly without merit as to have been filed in bad faith.

GAO does not categorize protests as frivolous, and thus, has not identified as frivolous any protests during the last 5 years involving contract awards made by DOD.[13] That does not mean, however, that meritless protests, or those that a reasonable third party might label frivolous, remain open at GAO, thus delaying DOD procurements. As discussed above, GAO promptly dismisses protests that do not state a valid legal basis or are otherwise procedurally defective, consistent with our broad statutory authority. Thus, GAO dismisses protests, where appropriate, without the need to resolve whether the protest was frivolous.

CONCERNS WITH MEASURES TO DISINCENTIVIZE PROTESTS

The committee directed GAO to address whether the filing of frivolous and improper protests might be disincentivized. We have two interrelated observations in this regard. First, our current procedures permit us to dismiss early in the process a significant number of protests that, for instance, are untimely, fail for lack of standing, or fail to assert a valid legal basis for protest. Our current process, we believe, permits us to identify and dismiss protests that would arguably fall under the rubric "frivolous as filed." Similarly, protests that would arguably fall under the "frivolous as argued" rubric, even were they not dismissed early in the process, would be identified later in the process and dismissed or denied as appropriate at that point. Accordingly, given our current broad authority to expeditiously dispose of a protest that does not merit further consideration and development, we do not believe that GAO requires any additional authority to dismiss protests, nor are we seeking such authority. Our second observation is that attempts to disincentivize protests that in some sense might be considered frivolous may have, on balance, the unintended consequence of harming the federal procurement system by discouraging participation in federal contracting and, in turn, limiting competition.

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[12] We think there is no dispute that a protest should not be viewed as frivolous where the protest is sustained, or where the agency takes corrective action rather than defend the procurement.

[13] Similarly, contracting agencies themselves rarely describe protests as frivolous. For example, the last reported GAO decision in which a contracting agency (the Air Force) characterized a protest as frivolous occurred in 1996. *See Bionetics Corp.--Costs,* B-270323.3, Aug. 16, 1996, 96-2 CPD ¶ 70. Undercutting the agency's position in that case is the fact that, after the agency initially asked GAO to dismiss as "frivolous" the protester's assertion that the agency had improperly deviated from the evaluation scheme set forth in the solicitation, the agency subsequently decided to take corrective action after acknowledging that its evaluation scheme was, in fact, flawed.

Imposing penalties for protesting--such as fines, a requirement to reimburse agency litigation costs, or the inclusion of a vendor's protest track record in past performance evaluations--as a means to disincentivize frivolous protests could have serious negative consequences for contractors (particularly small businesses), our Office, and the procurement process. Importantly, any system that imposes penalties on contractors for filing frivolous protests would require adequate due process protections to avoid punishing a company for filing a good-faith but unmeritorious protest.[14]

As a general matter, a determination that a protest is frivolous would require an additional inquiry beyond our current practice of determining whether a protest meets the threshold requirements for filing a protest, and then determining the merits of that protest. Specifically, finding that a protest is frivolous would require a determination that the protest was brought in bad faith--an assessment of the subjective intent of the protester. Such a fact-specific inquiry could require substantial litigation, such as declarations, affidavits, or live testimony, to assess whether the protester possessed the intent required for our Office to conclude that its protest was filed in bad faith.

In our experience, there are many instances in which protesters may file a protest in good faith that is nonetheless based on either a misunderstanding of the facts or misapprehension of the law. This may occur more commonly with small business protesters or protesters not represented by counsel.[15] We think that a careful examination of a protester's subjective intent to distinguish between good faith and bad faith arguments would require a significant diversion of our Office's limited resources--resources currently used to resolve protests as expeditiously as possible.

In addition to the resource implications for our Office, a system of penalties for frivolous protests could impose substantial costs on contractors and agencies. An inquiry into the subjective intent of a protester would require the protester to mount a potentially costly defense in order to avoid either a financial penalty, or the potentially more damaging sanction of a negative past performance rating in future competitions. The required defense could, again, potentially place a disproportionately high burden on small businesses.

Attempts to disincentivize protests ignore several valuable benefits of the current protest process. First, protesters act as "private attorneys general" who use the protest process to identify and pursue complaints concerning the procurement

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[14] *E.g., Old Dominion Dairy Products, Inc. v. Secretary of Defense*, 631 F.2d 953 (D.C. Cir. 1980).

[15] In keeping with CICA's mandate to provide "for the inexpensive and expeditious resolution of protests," 31 U.S.C. § 3554(a)(1), our regulations do not require protesters to be represented by counsel, and a significant percentage of protesters appear pro se.

system, with a resultant benefit to the public.[16] In addition, protests provide a form of indirect congressional oversight of the procurement process. *Ameron, Inc. v. U.S. Army Corps of Engineers*, 809 F.2d 979, 984 (3d Cir. 1987) ("the bid protest resolution process created by CICA is also intended to inform Congress of the operation of existing procurement laws, and to use the pressure of publicity to enforce compliance with those laws ... [by enabling] disappointed bidders to compel the executive to explain some of its procurement decisions to the Comptroller General").

In our view, potential penalties--along with the additional litigation necessary to establish the *sine qua non* for the imposition of penalties, namely, bad faith--risk discouraging good-faith protests. In addition, protests bring an important element of transparency and accountability into the federal procurement system that otherwise might be unavailable. Protests also provide guidance to agencies in the form of publicly-available decisions interpreting procurement laws and regulations.

Finally, the imposition of penalties on protesters could result in a chilling effect on the participation of contractors in both the protest process and federal procurement as a whole. As the conference report accompanying CICA stated, the availability of a strong bid protest mechanism promotes competition in the procurement system by providing contractors a measure of confidence that concerns regarding potentially unfair treatment may be addressed in a neutral forum.[17] Contractors, particularly small businesses, could conclude that the risk of being penalized for a good-faith protest--or the potential that they may have to litigate whether their protest was frivolous--outweighs the potential benefit in filing the protest. Contractors might also perceive the inclusion of penalties in GAO's statutory mandate as an indication that protests have become disfavored as a matter of policy. To the extent contractors believe that it is less likely that their legitimate concerns will be addressed, the result

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[16] *See Scanwell Lab., Inc. v. Shaffer*, 424 F.2d 859, 864 (D.C. Cir. 1970) ("Instead of designating the Attorney General, or some other public officer, to bring such proceedings, Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then, in like manner, there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals."); *Department of the Navy--Modification of Remedy*, B-284080.3, May 24, 2000, 2000 CPD ¶ 99 ("In our view, [the] protest served precisely the purpose anticipated by CICA [by] highlight[ing] a failure by GSA to properly maintain the FSS program . . . [W]e think CICA clearly anticipates that the government should reimburse DRS for acting as a private attorney general in shining the light of publicity here."); *E&R, Inc.--Claim for Costs*, B-255868, B-255868.2, May 30, 1996, 96-1 CPD ¶ 264 ("In essence, entitlement to bid protest costs relieves a protester of the financial demands of acting as a private attorney general where it brings to light an agency's failure to conduct a procurement in accordance with law and regulation.").

[17] H.R. Conf. Rep. No. 98-861, at 1435 (1984), *reprinted in* 1984 U.S.S.C.C.A.N., at 2123.

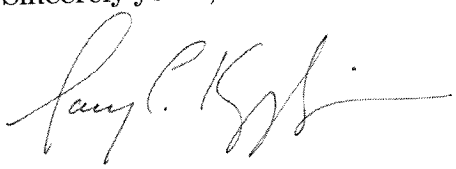
could be an increased distrust of the U.S. procurement system and reduced participation in the system--especially by small businesses. Either of these outcomes could reduce competition and impair the government's ability to obtain the best value in procuring goods and services.

CONCLUSION

GAO's existing bid protest process provides a balanced approach to adjudicate and resolve challenges brought by protesters to federal government procurements. Our existing regulations and procedures permit us to promptly close protests that do not merit further development. We do not believe that GAO requires additional authority to dismiss protests, and we are not seeking such further authority. In fact, attempts to disincentivize frivolous protests could introduce significant unintended consequences into the current system, by adding substantial costs and discouraging good-faith protests. As Congress has recognized, a robust bid protest process brings an important element of transparency and accountability into the federal procurement system and ultimately promotes competition by ensuring that concerns about unfair treatment will be addressed in a neutral forum. As our extensive track record shows, GAO currently has, and effectively uses, the tools necessary to continue our key role in the bid protest process, with due consideration of both agencies' needs to proceed with their procurements and the need to provide an avenue of meaningful relief to protesters.

We hope you find this information useful. Should you have any questions, please contact Michael R. Golden, Managing Associate General Counsel, at 202-512-8233.

Sincerely yours,



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