

I Protest!

Former Air Force JAG and D.C.-based contracting attorney tells you how to protest a government contract award.

by John Dowling

FOR FOUR YEARS RON PERLMAN “whet his appetite” for government contracting as a staff judge advocate for the Air Force at Eglin and Bolling Air Force Bases back in the mid-1970s. Today, his passion for helping government contractors remains strong as a shareholder attorney and chair of the Government Contracts Section for the firm of Buchanan Ingersoll & Rooney in Washington, D.C. NaVOBA asked Perlman for his advice on when and how to successfully protest a government contract award.

NaVOBA: What are the most common grounds for protesting a contract?

RP: The most common grounds for protests include:

1. Defects in the evaluation or source selection regarding a proposal (either with respect to the proposal submitted by the awardee or the proposal submitted by the disappointed contractor, the protester) (the defects can be either regarding evaluation of the technical or cost aspects of the proposal);
2. Ineligibility of the awardee based on size (e.g. that the awardee was other than small business even though the competition was supposed to be set-aside for small businesses) or status (e.g. that the awardee is not a SDVOB even though the procurement was set-aside for SDVOBs); and
3. An Organizational Conflict of Interest (OCI) that was ignored (e.g. that the awardee had an unfair competitive advantage such as unequal access to information).

NaVOBA: When should a small business owner protest a contract?

RP: A protest should be filed only when it makes good business sense – e.g. that the customer is NOT ab-

solutely firmly entrenched with the awardee – and when the mistake made by the procuring agency was really totally unquestionable. If it is a close call, or a subjective determination, do NOT file a protest because the discretion afforded to the government will prevail.

NaVOBA: What are the signs that you might have a case for a contract protest?

RP: First and foremost, I would say that most companies have a good sense for whether the ‘right’ thing has been done. If they sense that the right thing has not been done, then they owe it to themselves (and to the government customer) to follow up. Ask good questions in the debriefing if you are notified of a non-selection. If solid questions about a non-selection are asked, and no good answers come back, that often signals a weakness in the selection decision. Always remember the protest function is designed to serve both the interests of the disappointed contractor and of the war fighter. If there is a reason to protest, it must be in the interests of both or you shouldn’t do it.

Expert Info

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NaVOBA: What are the keys to successfully protesting a contract?

RP: Timeliness is critical. There are some exceptions, but if you do not ask for a debriefing on time or file the agency or GAO level protest on time then regardless of the merits the protest will be probably be dismissed. Commitment is also critical. Listen to what is being said, and be ready to pull the plug if it is the right thing to do, but do NOT start a fight that you don't mean to finish.

NaVOBA: What are the most common misconceptions about protesting contracts?

RP: One of the most common misconceptions is that government personnel do everything perfectly. Another is just the reverse – that government personnel cannot do anything the right way. Neither is true. Most government personnel are honest, hard-working, professional employees who try to do things the right way. Most, but not all.

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NaVOBA: What happens during a contract protest? What can people expect?

RP: Agency rules for protests are usually set out on the web at the site for the procuring agency. The GAO rules and a good guide to protests are set out at: www.gao.gov/decisions/bidpro/bid/d06797sp.pdf. A protest can also be filed at the United States Court of Federal Claims (COFC), but this is very, very expensive. Both the agency and GAO rules allow a company to make decisions about continuing the protest at various milestones. Agencies will often take corrective action if the filing of a protest illuminates a mistake that has been made.

NaVOBA: How long does this process take?

RP: Protests filed at a procuring agency are supposed to be finished within 35 calendar

days (per FAR 33.103); protests filed at the GAO will be resolved within 100 calendar days. According to their statistics, over 25 percent of all GAO protest decisions are sustained (where there is a finding in favor of the protester). Sometimes corrective action is taken within days after a protest is filed.

NaVOBA: What happens if you are successful in overturning a contract award?

RP: Sometimes the award is re-directed to the protester, but this does not happen very often. Usually, the evaluation or source selection gets sent back to be re-done correctly.


NaVOBA: Does it mean you will be awarded the contract?

RP: No. Most commonly a mistake in evaluation or source selection is sent back for corrective action (re-evaluation or something like that).

NaVOBA: Is it necessary to obtain an attorney?

RP: No attorney is needed (strictly speaking) in connection with an agency protest or at the GAO. However, if you have an attorney, he or she can get access to all the protected material like the evaluation or source selection documentation, the awardee's proposal, etc. At the COFC, an attorney is required to represent a corporate party.

NaVOBA: Can people contact you if they have basic protest questions?

RP: Yes, certainly. It is always my pleasure to speak with government contractors, and especially with veterans in the business. 

Perlman's Advice for Protesting a Contract Award

- >> First and foremost, LISTEN to what you are hearing from the government procuring activity that has non-selected you. If what they are saying makes sense, then move along. If what they are saying does not make sense, then get expert help (not your local corporate attorney).

- >> Don't spend a fortune, but don't give up contract awards that really should be yours. Use good business judgment and common sense.

- >> Be firm and absolutely committed if you conclude that the government has not done the right thing in connection with the award decision. Likewise, if it turns out that the government folks really did have a good reason for selecting someone else, and then be prepared to pull the plug on the protest. Sometimes, withdrawing a protest gets more respect than fighting all the way with a losing position just out of stubbornness. In any event, letting folks know that you are absolutely committed to seeing the "right" thing" done is very important for customer relations.