

TO PROTEST OR NOT TO PROTEST: THAT IS THE QUESTION

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To protest or not to protest; that is the question;
Whether 'tis smarter in business to suffer
The slings and arrows of outrageous evaluation,
Or to file protests against a sea of wrongs,
And by filing, right the wrongs?

(Adapted from Shakespeare, *Hamlet*, Act 3, Scene 1).

Hamlet indirectly put his finger directly on an issue of great importance to government contractors: when should they protest an award that they believe is wrong, and when should they swallow hard and move on?

A contractor may protest if it believes that the contracting agency failed to comply with the government procurement statutes or regulations and that the failure harmed the protester's chances of winning the contract. Before submitting a bid protest, it is important for a contractor to consider the long term impact of the protest. In some cases, winning a bid protest is akin to a Pyrrhic victory, (A Pyrrhic victory is counterproductive--although the victor may win the battle, it loses the war.) This is because your relationship with the contracting officer or contracting office may become unpleasant for years to come, potentially costing your company other government contract awards in the long run.

Although the Federal Acquisition Regulation requires government business to be conducted "in a manner above reproach" and "with complete impartiality and . . . preferential treatment for none," contracting officials are human. They suffer from the same human frailties as others do. Make no mistake: a protest criticizes the manner in which a contracting officer and his/her team made or are making a procurement selection. After a bid protest, the protester is often met with a very chilly reception at the contracting office. Sometimes, former protesters may be evaluated more harshly or shut out entirely from future procurement opportunities. So it is imperative that a contractor think carefully before submitting a protest.

Protests of solicitations: There is little risk in protesting a solicitation, which must be filed before the closing date. The agency hasn't made a selection, and if there is something wrong with the solicitation (ambiguity, unclear language, insufficient specifications, etc.), the agency can correct it quickly without a battle.

Protests of evaluations and selections: A protester must explain how the facts and the law indicate that the agency did not conduct a proper evaluation or selection, and that they (the protester) would have had a good chance of winning if the agency had. For example, if an agency announces one evaluation scheme in a solicitation, but uses a different scheme in its evaluation, that is a direct violation of the procurement statutes and regulations. It is here that the choice of protesting or not becomes difficult.

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Caught between a suspected improper procurement and the possible loss of future procurements, what is a contractor to do? First, you should consider a bid protest as your last resort, reserved for those rare instances where informal personal discussions with the contracting officer have failed and a serious and costly injustice has occurred.

Second, if your protest can show a large number of significant and prejudicial violations of law or regulation, such as the one filed by the Boeing Corporation at the Government Accountability Office, *The Boeing Co.*, B-311344 et al., June 18, 2008, on the KC-X tanker (now known as the KC-46 tanker), an estimated \$35 billion procurement, then you undoubtedly should protest.

These were the agency's errors:

- Agency failure to evaluate in accordance with the evaluation criteria in the solicitation;
- Agency violated a key performance parameter in the solicitation;
- Agency could not demonstrate that awardee met a key specification;
- Agency conducted misleading and unequal discussions;
- Agency refused to enforce a material solicitation requirement;
- Multiple significant instances of improper and erroneous cost evaluation.

Finally, consider the long term implications of a protest. Must the contractor deal with this particular contracting office or officer again? If you have never received a fair shake from this contracting officer, why should he/she ever give you one again? What is the dollar value of the procurement in question and what is the strength of your position? All of these questions should be considered before filing a bid protest. Don't file the protest if it is likely to result in a Pyrrhic victory.

