

Top 10 Ways to Improve the Protest Process

1. **Make losing protestor liable for winner's legal costs**
2. **Encourage greater use of outside attorneys by the Government to defend awards**
3. **Identify conflicted companies at or before RFP release**
4. **Shorten the GAO 100-day timetable to 45 days; limit scope of discovery requests**
5. **Transition out losing incumbents while a protest is prosecuted**
6. **Require losing incumbents to forego any profit or fee on work performed during a protest that they filed**
7. **Improve training of Government officials to include case studies on tactics to avoid protests**
8. **Avoid protestable grounds in the first place – use objective “compliance assurance” assistance**
9. **Under MACs, Government should cancel a procurement instead of awarding to everyone**
10. **Replace the FAR / DFARS with a more responsive, lean, and modern approach, with input from industry and the legal community**

The Contractor Doth Protest Too Much

- 🐾 Incumbents are incentivized by continued profit and enabled by vague procurement regulations to protest awards and delay transitions
- 🐾 While the contractor protests, the Government customer is left with an underperforming lame duck and damaging delays to its mission
- 🐾 Compounding the protest trend is the use of the United States Court of Federal Claims (USCFC) if GAO rules against the protestor
- 🐾 Critical to streamline complex procurement regulations and relieve overburdened Contracting Officers and procurement officials
- 🐾 The Government deserves greater discretion in its award decisions and should be accorded a presumption that it acted in good faith
- 🐾 Price is an important factor in determining best value, but a low price does not entitle you to an award – one cannot protest on low price alone

Pressure Points

The state of the Federal procurement process is decried almost universally – by procurement shops, Congress, and industry alike – with most of the ire directed at LPTA trends, overuse of small business set-asides, and the inexorable “shift to the right” of key procurements. These trends are today’s facts of life – born of budget pressures, fiscal uncertainty, and the Government’s increased use of its monopsonistic power. Topping this list are the frustrations, costs, and delays that are a direct consequence of an antiquated protest process badly in need of reform.

Out with the Old...

For years, bidders limited protests to the more egregious cases in which they felt the RFP process was not followed or the evaluation was fatally flawed. Companies were concerned about reputational damage from protesting, and “walked the talk” with respect to putting their customers first. Those days are gone. Companies often put near-term “protest ROI” rationale ahead of customers’ best interests.

This manifests itself in several ways – losing incumbents who use protests to prolong revenue and profit streams, and sour grapes losers on multiple award IDIQ contracts who protest in hopes that the Government will find it easier to award to everyone. Both trends waste resources and foster cynicism and mistrust about the federal procurement process.

A Flawed Process Yields Flawed Results

To be fair, the problem is not limited exclusively to self-serving contractors who put their own interests ahead of their customers’ interests. Procurement regulations are complex; overworked Contracting Officers and procurement officials are often rushed to release RFPs before they are properly reviewed, and

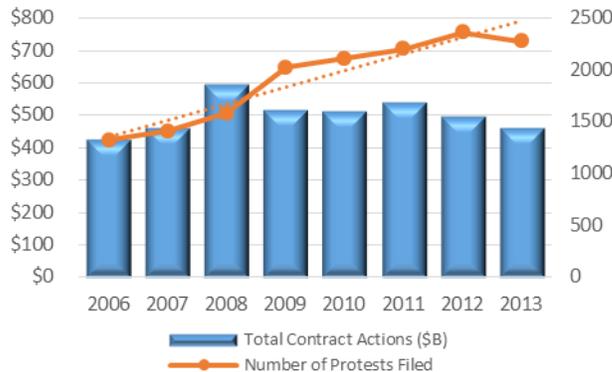
procurement evaluation processes can often be flawed. Flaws can and will occur, but the focus needs to be on reducing the flaws in the first place, as well as establishing clear guidelines for GAO that not all procurement flaws warrant overturning an award decision.

A Bridge too FAR

The FAR – all 1,100+ pages and 51 parts – became effective in April 1984. Despite revisions and updates, the FAR is out of touch with modern acquisition practices and unwittingly promotes protests through its complexity. We are long overdue for a major overhaul or a wholesale rewrite of the FAR, along with the DFARS

and agency procurement regulations, with a goal of reducing size and complexity. The Office of Federal Procurement Policy (OFPP) should seize the opportunity to put in place a procurement process for the future, shaped by best practices and substantive input from industry and the legal community. We need a better regulatory framework, not more regulations, to fix flawed practices and misguided behavior.

Total Contract Spending Versus GAO Bid Protests



While the number of protests filed at GAO decreased slightly in FY 2013, the percentage of dollars protested is on the rise because contracted dollars declined at a greater rate. Additionally, GAO protests represent only a subset of the overall protest landscape, which also includes agencies and federal courts.

Sources: CRS, GAO, WolfDen analysis. Excludes bid protests filed as a result of GAO’s expanded jurisdiction over task orders, A-76 protests, and TSA protests.

Fighting the Good Fight

Unlike the somewhat polarizing issue of fixing the small business set-aside problem – an issue that industry groups are reluctant to take on for fear that they will alienate many of their members – we have found no one who believes that the status quo protest process is working as intended. It is time for industry, with OFPP’s and GAO’s strong endorsement, to reform the protest process so that it offers legitimate redress of grievance without perverting the procurement process in a self-serving effort to prolong revenues or finagle an undeserved award. Fixing the flawed system and restoring Pareto optimality is in everyone’s best interests, both as industry participants and as taxpayers.