

Bid Protests



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Do you have an experienced team prepared to fight for you?

Bid protests are one of the most frequently debated subjects in government contracting. There are many opponents who believe that bid protests delay needed services to the government and are bad for the system. Some contractors believe that if they file a bid protest they will be punished by the agency and will never be considered for a future award. Neither of these is true if your protest is filed by the experienced attorneys of Offit Kurman.

BID PROTESTS ATTORNEYS

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The bid protest is the single most important mechanism for ensuring that the government is complying with the law in government acquisitions, and the ability to file a bid protest is one of the most important tools a government contractor possesses. A bid protest gives the contractor an opportunity to have the procurement reviewed to determine whether the government, as well as the other competitors, followed the law and relevant regulations. The most successful government contractors recognize this important principal and exercise the right to protest when it makes good business sense.

The decision of whether to file a bid protest must be made within days of learning of an award or of your elimination from the competition; the decision to file a pre-award protest may need to be made within a matter of hours. The most frequent mistake made by contractors is to wait too long to file a protest, resulting in their protest being dismissed as untimely. The difference between a timely- and an untimely-filed protest could be the difference of the protest being dismissed, or the agency suspending award until the protest is decided. There are two primary times in the life of a solicitation when a protest must be filed:

PRE-AWARD PROTEST:

If the contractor believes that there is a violation of the law regarding the way the procurement is being solicited, that protest must typically be filed **BEFORE** the deadline for bid/proposal submission. Examples of grounds for a pre-award protest include an agency illegally setting aside a contract for a particular category of contractors, thereby eliminating other contractors from the competition, or the existence of an ambiguity in the solicitation that could impact the preparation or evaluation of proposals. In both of these examples if the protest is not filed before the deadline for bid/proposal submission, then the right to protest these issues is usually lost.

POST-AWARD PROTEST:

If a contractor believes that there is a violation of the law regarding the way bids/proposals were evaluated or how the contract was awarded, then the protest must typically be filed within 10 days of when that knowledge was gained. In order to force the government to suspend the award, however, the protest must typically be filed within 5 days. Only under certain circumstances will receiving a debriefing increase the time to file a protest. If a contractor does not file within the allotted time, the right to protest will be lost, no matter how egregious the violation.

Bid protests are usually filed in one of three venues: at the procuring agency, at the Court of Federal Claims, or, most frequently, at the Government Accountability Office (GAO). Each of these venues can be advantageous to the contractor for different reasons. Agency protests are typically the most informal, and may offer the least adversarial process to a contractor who engages with that agency regularly. However, most protests are filed at the GAO because, if the protest meets the requirements of the Competition in Contracting Act, there will be an automatic stay of the award or performance of the contract. This is a powerful tool for the protesting contractor and

should be utilized as often as possible. Although a protest in the Court does not come with an automatic stay, there are several reasons why the Court may be the preferred forum for a bid protest. The attorneys of Offit Kurman have extensive experience in all three forums.

Many contractors encounter bid protests after they have won a contract and the award is protested by another contractor. This is one of the most important times to find a qualified bid protest attorney. Although an attorney for the agency will endeavor to protect the award in the face of a protest, many government attorneys have little or no experience with bid protests and can therefore be overwhelmed by a private attorney with far more experience. A contractor should never leave the protection of their award just to a government attorney. An awardee has the right to intervene and to have an attorney participate in every phase of the protest, ensuring that their award is protected. Intervening attorneys work hand in hand with the government attorneys to help prove that the protest should be dismissed or denied.

In today's competitive government contracting environment, the difference between winning and losing a contract can be a very thin line. When a contractor has questions about whether they have a valid grounds for a bid protest or whether they need an attorney to intervene on their behalf, only attorneys with decades of experience filing bid protests can help them. There are less than 3,000 protests filed each year at the GAO. A large portion of those protests are filed on very small contracts by unrepresented contractors. That leaves a much smaller proportion of protests where attorneys have the opportunity to gain bid protest experience. Few attorneys practicing bid protest law can claim the level of experience that the government contract attorneys at Offit Kurman have developed over decades of bid protest practice.

A merit-based protest filed by an experienced attorney does not delay the system, but rather serves as a check on the system to ensure that the government is acting responsibly within the limits of the law. Not only will an agency not hold it against a contractor who files a legitimate protest, agencies are often appreciative of a protest that exposes clear government mistakes. Some attorneys do not appreciate that there continues to be a human factor underlying all decisions in government contracting. The attorneys at Offit Kurman understand that we are protesting a decision of the government, not the ability of the government to make decisions. We strive to maintain a professional demeanor throughout the course of a protest, and ensure that we are not making the protest a personal attack against the contracting officer. Sadly, many attorneys do in fact burn bridges for their clients through the manner in which they protest.

Nearly every contract award can be protested, but few should be protested. The attorneys at Offit Kurman understand when a contractor has an opportunity to prevail and when they should walk away. Contractors often prevail in a protest only to find that they gained nothing from the win. Winning the protest is not enough; there must be a business advantage to be gained by the contractor through protesting. The attorneys at Offit Kurman have been successful in not only winning protests, but also seeing their clients be awarded the contracts that were protested. The ultimate goal of any protesting contractor should be to win the award. The attorneys at Offit Kurman are more concerned about our long term relationship with our clients and will not advise clients to file a protest unless there is something tangible to be gained.

Although this list is far from exhaustive, here are a few of the most frequently protested issues:

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| <p>Pre-award:</p> <ul style="list-style-type: none">• Improper set aside• Failure to set aside for small business• Ambiguity in the solicitation• A company that you know to be participating has a conflict of interest (OCI)• A government official participating in the procurement in spite of a personal conflict of interest• Prejudicial solicitation requirements• Evaluation terms contrary to the law | <p>Post-Award:</p> <ul style="list-style-type: none">• Failure to evaluate according to the published evaluation criteria• Award to a technically unacceptable proposal• Not conducting a best value trade off• Awarding to ineligible company• Treating a best-value award as a lowest price technically acceptable award• Not treating all offerors the same• Misleading discussions |
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