

5 Key Tactics For Defense Cos. Planning A Bid Protest

By Erica Teichert

Law360, Washington (September 25, 2013, 3:09 PM ET) -- After losing out on a highly prized government contract, defense firms may be tempted to immediately launch a bid protest. But attorneys say that without careful planning, a formal challenge may do more harm than good. Here, attorneys share with Law360 five factors companies should first consider to ensure a successful protest.

Take Advantage of the Agency Debrief

Time moves quickly after government contract awards, and losing bidders have just days to gather information, request an agency debriefing and determine whether to file a bid protest after their meeting. But whether a company is considering challenging the award or not, outside counsel told Law360 that all firms should take advantage of the agency debriefing process.

“The debriefing is really critical,” McKenna Long & Aldridge LLP partner Jason A. Carey said. “It’s a critical mechanism for the company to gather information.”

According to Carey, debriefings give companies an opportunity to assess their business and legal interests concerning the lost procurement via learning how the agency believes the company could have marketed its offer better to shedding light on the agency’s evaluation process. Information gleaned during debriefings can bolster or shatter a company’s protest arguments.

In addition to preparing a detailed list of questions for agency officials, contractors and their inside counsel need to study the specific agency or military branch’s debriefing process. While some agencies provide an open in-person debriefing, others may prefer written processes, and that can also vary between contracting officers.

“From my perspective, obviously oral debriefings present better opportunities to have a dialogue with your customer. But you can’t as a contractor control the type of debriefing you get,” said Craig A. Holman, a government contracts partner at Arnold & Porter LLP. “Some agencies like the Air Force have very creative debriefing processes that are designed to get contractors more information and from the Air Force’s perspective, avoid protests that are filed due to lack of information.”

But even in an open, honest debriefing, contractors may not get all their questions answered. Still, outside counsel recommended that defense and aerospace firms be completely honest with their contracting officers about their protest arguments at the end of a debriefing, as it may help them glean more information about their chances.

Know Your Argument's Ultimate Outcome

While a defense or aerospace firm might have several strong protest arguments, some winning results may not be worth the overall time and effort spent. In particular, several lawyers told Law360 that they would dissuade clients from filing a bid protest if their issues will garner only a re-evaluation of the proposal, as the final award will remain the same.

“From a protest attorney's perspective, it's always important to make sure your client understands the protest process alone doesn't deliver contracts,” Holman said. “Typically what it delivers in a successful protest is renewed opportunity to compete.”

According to attorneys, protesting contractors are seldom directly awarded the procurement-in-question. Instead, a successful bid protest usually results in the protesting offeror receiving a second bite at the apple.

According to Carey, agencies often will re-evaluate procurement bids without a bid protest, but they usually still come to the same overall award conclusion. Unless a bidder has an argument that will allow it to revise its bid and make it more competitive, it may not be worth the time and money necessary to draw up the protest.

“Really the opportunity to revise the proposal can change the landscape of the procurement, and the client has a much better chance of winning the contract,” he said.

Akin Gump Strauss Hauer & Feld LLP partner Thomas P. McLish told Law360 that contractors may not understand the underlying purpose of the protest process, which can hinder their chances at securing a rebid.

“A lot of clients don't understand that it's not an appeal process where you get a chance to explain why you're the better offeror,” he said.

Instead, protesting contractors get an opportunity to poke holes in an agency's actions and show how it didn't follow its own rules. Those arguments are often the best bet to secure a rebid situation, McLish said.

Focus on the Agency's Actions

Although bid protests and their underlying arguments can vary wildly based on the facts surrounding the individual contract award, Carey recommends that firms focus primarily on whether the agency-at-issue followed their procurement processes rather than substance issues within the bids themselves.

For instance, Carey said companies should always sift through their agency communication to make sure the agency fulfilled its responsibility to conduct a meaningful discussion with the offeror. In addition, attorneys mentioned firms should pay close attention to the analysis process used to compare bids.

“I think there are fewer fruitful grounds to protest when it's a low price technically acceptable arrangement,” McLish said. “But you do see them being protested. There are still ways they can screw it up.”

And some attorneys believe LPTA analyses are being overused, particularly by the U.S. Department of Defense. While it limits offerors' protest arguments, Holman noted that the analysis' tradeoffs might not be worth it in the long run to the DOD and other agencies.

“I do think that some agencies have selected that tool because they believe it'll limit the ability to protest a procurement, but I also think that's a bit of cutting off your nose to spite your face,” he said. “The discretion that a best value procurement affords an agency exists so the agency can make a better decision. LPTA procurement strips that discretion and that's why I say if an agency is restricting its own discretion to avoid a protest, I think it's making a significant mistake.”

Be Mindful of Customer Relationships

In some lost bid situations, companies may need to consider whether a bid protest could sour their overall relationship with an agency and jeopardize future procurement possibilities. Although Richard P. Rector, chair of DLA Piper's government contracts practice, said he has never seen conclusive evidence that contracting officials have held out on awards due to past protests, it can be hard for companies to see what causes near misses.

“In that situation, it's human nature to say, 'Is this a relationship issue? Does it stem back from a protest?' Or is the contractor just barely missing on many procurements in a row?” Rector said. “It could be the latter. It could be legitimately you're just barely missing out.”

But he said it's always worth weighing those business considerations when mulling a bid protest possibility, especially if the firm works primarily with one or two offices.

“You can't think of the U.S. government as one entity,” Rector said. “You really have to answer that on an agency-by-agency basis.”

Similarly, McLish recommended contracting firms seriously consider their relationships with agencies and offices before filing a bid protest with questionable strategic worth and be aware of the risks associated with the move, including alienating their customer agency.

Things Change for Incumbent Contractors

Still, many factors may get tossed out if a company is the incumbent on a contract and just lost on the rebid, lawyers said.

“When a protest is filed, the contract is ongoing and tends to get extended for a time while the protest is being addressed,” Akin Gump partner Scott M. Heimberg said.

According to Rector, incumbent contractors could receive another 100 days of work by protesting a lost rebid, as the new contract is generally stayed or stopped while their protest is pending.

That additional work and the income generated by it may offset the company's costs for putting together the bid protest. With the added revenue and a potential second shot at reclaiming their market, Rector said protests are often worth the hassle for incumbents.

“It's certainly a factor if you're the incumbent on a big contract,” he said. “It affects how you view the risk equation. You're more likely to protest for a lower likelihood of success if you're going to be making money on the protest.”

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