

# Why DoD Contractors File Protests

...And Why Some Don't

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**A**s part of an acquisition reform study, the author conducted an informal, unscientific poll of defense executives, asking the question, "Why do DoD contractors file protests?" This article is a summary of the results of those conversations.

## Why Are Protests Filed?

The following list of reasons is roughly rank-ordered, with the most frequent responses appearing first.

**Contractor's decision maker expects to win.** Most respondents pointed out that this is a false expectation, but the decision maker is often too low in the organization to have seasoned judgment, too emotionally close to the bid to accept the possibility of having made an inferior offer, or just uninformed on the basis for which a successful protest can be filed.

## Expectation of a *quid pro quo*.

The contractor does not expect to win per se, but does expect to make some strong points, and negotiate a side agreement. No contractor was willing to make this assertion on the record, and no respondent claimed to have been involved in such an arrangement. But many claimed that their competition had made such assertions. Examples cited were directed sole-source awards to losers shortly after a protest, and similar anecdotes.

**Prove we did everything possible.** This "proof" can be aimed at demonstrating

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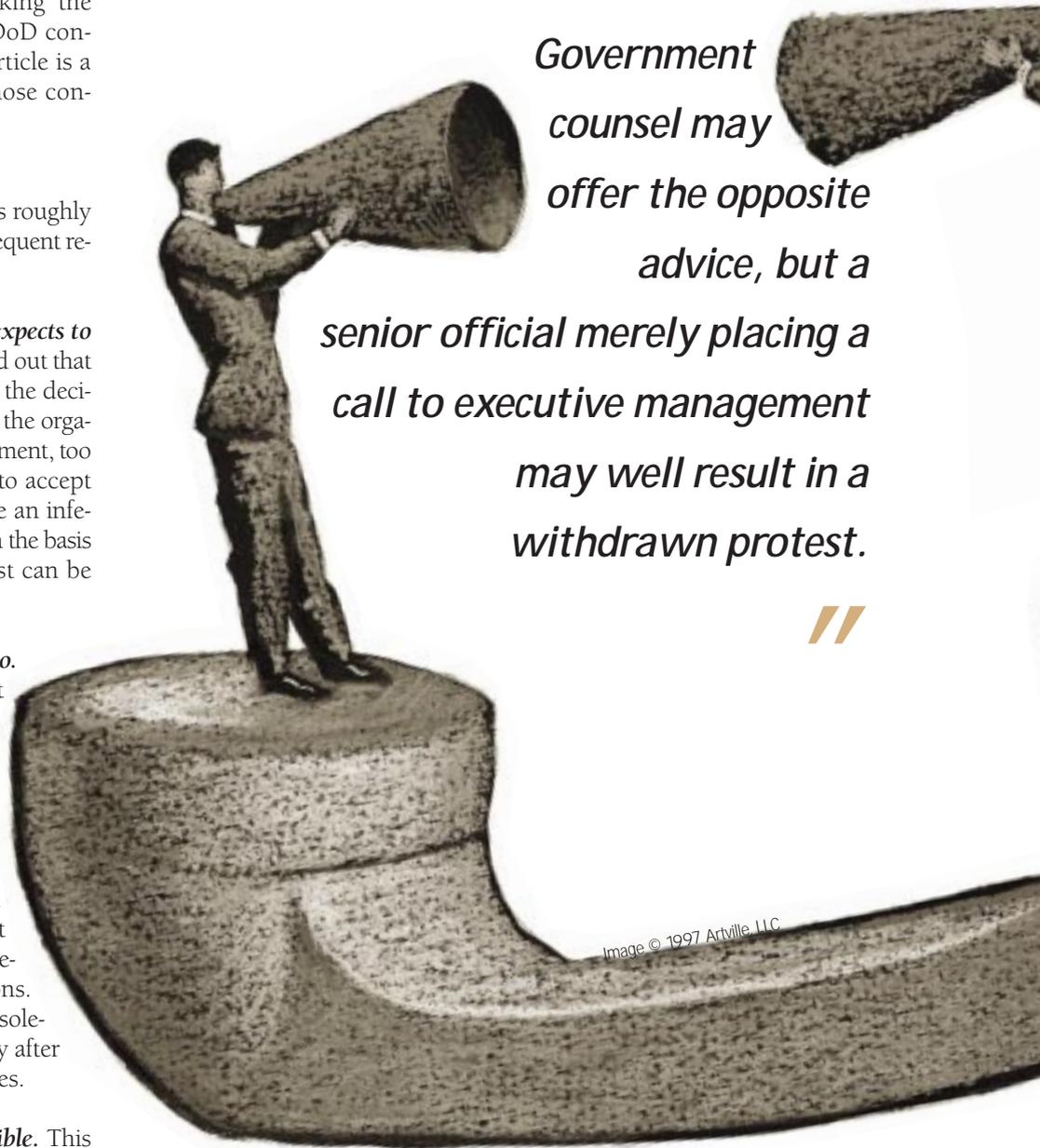


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resolve for the board, for executive management, or it can be the senior ranks "proving we back up our troops." This viewpoint took the position that protest was the legal right of the contractor, and even though the odds were long, it was the contractor's choice under the "rules of the game."

**Confusion over award criteria.** If the losing contractor misunderstood the government's selection criteria, it is a short step to filing a protest.

**Poor debrief.** If the government's debriefer appears insincere, evasive, unwilling to be complete, or argumentative, and then compounds the problem by making an incorrect statement, the losing contractor can easily seize on the error, failing to understand whether the issue was properly dealt with in the evaluation, or if it was even a relevant issue in determining the award.

offered by a contractor who said, "When I yell at the referee, I don't really expect him or her to change their call, but I do think the next play will be looked at from my point of view."

**Delay the award or program.** For a number of reasons, it may seem to be in the loser's best tactical or strategic business interests to delay the award. These reasons may involve older programs, funding, and several other issues.

**Hurt the winner.** If competition between the winner and loser is intense, the loser may file a protest to hurt the winner. If the winner is vulnerable because of a need to assign workers, the need to show signed contracts to investors, and so forth, the loser may be tempted to use the protest process. The aims may include raising questions about the winner's reputation, damage to the winner's financial position, or damaging the winner's ability to execute the contract as proposed.

**Obtain competitive intelligence.** Even though "clean teams" are usually set up to avoid transfer of proprietary information, some losers may feel the protest process can give them insight, just by virtue of the kinds of data that become relevant as the protest proceeds.

**The government really does make mistakes.** Sometimes a contractor is vindicated and made whole. Most respondents said they could not think of an example involving a major contract, however.

### Environmental Influences

In the process of conducting these interviews, the author noted a number of factors that seemed to make the potential of a protest more likely. These are not reasons contractors file protests, but are environmental conditions that make the filing of protests more likely.

**No new procurements in sight.** If the awarding command, Program Executive Officer (PEO), or contractor have no expectation of additional opportunities for business in the foreseeable future, the

contractor can easily rationalize there is little to lose, even if the protest is poorly founded.

**Marketplace decline, industry consolidation.** These environmental factors can make the contractor more prone to desperate moves.

**New procurement or competitive factors.** If the government uses new acquisition techniques, or if there are new winning competitors in a marketplace, these changes increase the likelihood of protest.

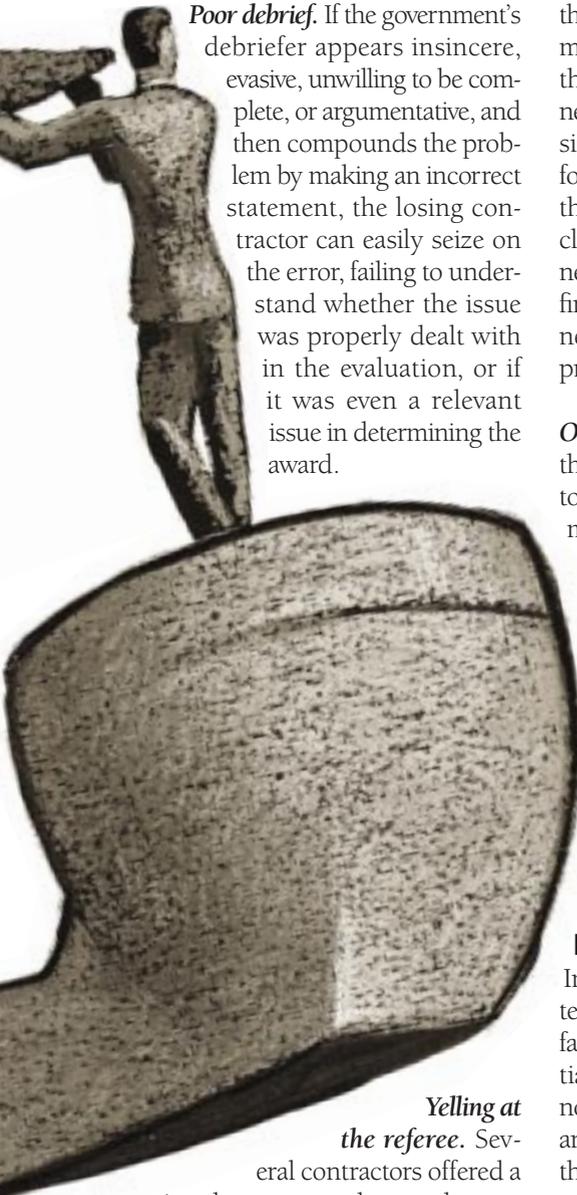
**Poor government communications.** If award criteria is poorly understood, if the debrief is delayed without explanation, if the contracting officer missteps, or if a myriad of other communications problems happen, the contractor can be led to assume the government has something to hide.

**Poor legal advice from the contractor's retained counsel.** In-house attorneys are loathe to file protests, since they generally expect to be on the job when the protest is settled, and in almost all cases, the contractor loses. Moreover, the in-house lawyer may have some knowledge of the bidding department's weakness.

On the other hand, retained counsel generates legal fees by urging the contractor to have his or her day in court. If this advice is offered without proper review of the case (and deadlines for protest filing almost assure proper review is impossible), it is very hard for even ethical counselors to strongly urge the contractor not to file.

The retained counsel sometimes suggests filing before the deadline to keep the contractor's options open, but this often creates momentum for a full-blown protest, since there are few graceful ways to back down.

**Government spends too much time and effort trying to prevent a protest.** Ironically, contractors sometimes feel a government program manager who talks a lot about preventing a protest must be planning to do something that warrants



**Yelling at the referee.** Several contractors offered a

view that a protest changes the next competition. Some offered very diplomatic, polished explanations involving the desire to change flawed award criteria or policy. However, perhaps the most basic explanation of this concept was

one. Attempts to prevent protests by asking bidders to pledge no protests, debriefs that are aimed at proving to the losers what poor proposals they wrote, and similar tactics seem to provoke protests, not prevent them.

### What About Those Who Never File Protests?

This poll naturally led to a follow-on poll asking, “Why do some people never [or almost never] file protests?” This was also an ad hoc, unscientific set of conversations. It led to a list of seven reasons offered:

**No one ever wins.** The most common reason cited was that the odds are so bad, protesting is a waste of time, money, and important corporate talent.

**Cost.** The general view was that “only the lawyers really win.” Even small protests can eat up the potential profit of a contract. Usually the protester will have to take on the legal teams from the government and from the winner.

**Yelling at the referee.** In contrast to those who felt that procurement authorities tended to “remember and be more careful” as a reason to protest, the same reasons were offered by those who felt this would lead to punitive actions.

**Extending the embarrassment and pain.** Some people felt that even a winnable protest was not worth sustaining a negative dialogue.

**Believe we lost fair and square, even if we made bad choices about what to offer.** This was usually offered after a good debrief. Contractors may miss the mark and make an offer that misses the intent of the acquisition organization. When a good debrief leads them to understand why they lost, contractors still don’t like losing, but generally don’t protest.

**Believe the government made a mistake, but...** Contractors finished this sentence with, “It all averages out.” Or, “Customers have the right to be wrong sometimes too.”

**Believe the customer has the right to do business with who he or she chooses, even**

// **The government need not prove anyone submitted a bad proposal — only that the winner submitted the best.** //



**with public money.** As long as no illicit behavior is suspected, some contractors felt that even if the General Accounting Office might uphold a protest, the procurement authority needed to have some latitude not strictly supported by the protest guidelines.

### Government Actions to Allay Protests

Taken together, the preceding three groups of factors and responses suggest the following five actions the government might take to reduce the number of protests filed.

**Communicate the long odds and downside of protest filing.** Some PEOs do this, and most senior defense executives know the facts, but many lower-level managers do not.

**Communicate the selection factors prior to proposal submittal, and if they are largely subjective, admit it.**

**If the environment is changing, discuss the changes with prospective bidders. Manage and meet expectations...especially in debriefing.** State the time expected for debriefs when the proposals are received or sooner. Don’t let the time needed to prepare a debrief seem suspicious. Don’t aim debriefs at preventing protests, but rather at the merits and lack of merit of the bids. The government need not prove anyone submitted a bad proposal — only that the winner submitted the best.

**If a protest is filed, don’t shut down communications.** Government counsel may offer the opposite advice, but a senior official merely placing a call to executive management may well result in a withdrawn protest. The government need not take a particular position, but need only ask if the executive knows a protest has been filed, or if there is some information the government could offer to help the contractor withdraw the protest. In any event, the government should do nothing to add to a climate of suspicion.

### A Few Caveats

Some caveats are appropriate. Most managers and executives interviewed spoke on the strict condition of anonymity, and offered unstructured comments. There was no formal survey instrument, and no contemporaneous notes. No single respondent offered all the reasons cited.

The organization of the information, and the information itself, are strongly biased by impressions the author formed during informal conversations. These impressions reflect protests involving DoD ACAT II or larger acquisitions. The author had very limited exposure to smaller contracts, service contracts, and Indefinite Period-Indefinite Quantity (IDIQ) efforts. The impression from these few conversations was protests in these other types of acquisition take on a different nature. This area is a fertile topic for a DoD-industry study, perhaps conducted by DSMC or the National Defense Industrial Association.

A final caveat. The author has never been party to filing a protest, and has no plans to do so in the foreseeable future.