

Government Contracts Blog

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DOD Director of Industrial Policy Assails Bid Protest Process -- "Don't Confuse Me With the Facts"

If the whispering campaign is true and the Obama Administration has in fact embarked on a “war against contractors,” then Brett Lambert may well have been designated to “take the [point](#).”

As reported recently, the inaugural interview of DOD’s new Director of Industrial Policy was one for the ages. In short order, Mr. Lambert lambasted Government contractors as a whole for asserting their right to protest Government misconduct in the award of contracts, threatened a veritable jihad against “the serial protesters,” accused protesters of disregarding the interests of the war-fighters by delaying their access to needed supplies, and apparently left the impression that legislation to repeal or significantly curtail the protest rights accorded by the Competition in Contracting Act was not out of the question. Along the way, he decried the “\$1,000-an-hour” bid protest lawyers who purportedly frustrate our national defense, made some incredibly uninformed statements about the law, and -- oh, by the way -- misstated the GAO statistics that formed the very basis for his screed. A report of the interview can be found at [Bloomberg.com](#).

What Mr. Lambert did not acknowledge, of course, was the proverbial “elephant in the room,” *i.e.*, the amazing success rate of the protests he deplors, a success rate that is driven not by the contractors but by the DOD agencies whose conduct of acquisitions is all too often determined by the Government Accountability Office to have been arbitrary, capricious, devoid of reason and/or inconsistent with law or regulation. Mr. Lambert surely realizes, does he not, that the lawyers who write the decisions sustaining those protests are Federal employees and that -- unless there is some hidden, under the table budget of which we are all unaware -- not one of them is paid “\$1,000-an-hour”?

There are, of course, many ways to calculate success rates at the GAO. The GAO publishes annually the statistics relating to its protest docket, including the percentage of cases in which it provides the protester with some form of relief. But any true measure of protest success must also take into account those cases that do not go to decision because the protest process exposes the flaws in the Government’s acquisition so clearly that either (a) the agency folds its hand before the GAO even speaks, or (b) the agency abandons its defense once the GAO has given it a non-binding “outcome prediction” that signals the death knell of the original source selection decision. Although there are calculations that can run much higher, a conservative estimate of successful protests, so defined, can easily reach 25% per year. Mr. Lambert decries this outcome,

essentially implying that the protesters (and their lawyers) are unpatriotic and enemies of the war-fighters. But, Mr. Lambert, what rational enterprise entrusted with the safety of the men and women who put themselves in harm's way to enforce your national and international policy goals would accept a 25% error rate in the processes that put in their hands the arms, ammunition, and weapon systems they need both to defend our nation and to defend their very lives? Would you, Mr. Lambert, buy a car for your family knowing that there was a 25% error rate in the factory that furnished that vehicle for their use at speed on a crowded highway? Don't you think our war-fighters are entitled to as much from you and your colleagues? Isn't "getting it right" more important than just "getting it done?"

Let's spend a few minutes analyzing Mr. Lambert's "facts," starting with the lowest of the low hanging fruit.

First, let's consider the "\$1,000-an-hour" bid protest lawyers that seem to worry and anger Mr. Lambert so much. As lawyers who are often retained to engage in the bid protest process, our response to Mr. Lambert would be simple – "From your lips to God's ears." The "\$1,000-an-hour" bid protest lawyers he decries do not exist. They are like the hobgoblins that we trot out at Halloween to frighten those who are as yet unaccustomed to life's realities.

Second, "companies can bill legal costs to the Pentagon as general overhead," a comment designed to suggest that the Government pays for the companies' bid protest costs. This is a statement that would be, as our partner Louis Victorino often says (albeit with no claim of authorship), "significant -- if true." It is, however, palpably false. Perhaps there is no copy of the Federal Acquisition Regulation in Mr. Lambert's Pentagon office. But his staff should provide him one, open it to Section 31.205-47(f)(8), and permanently affix a Post-it™ to that page. Anyone familiar with protests knows what it says, *i.e.*, that costs are "unallowable if incurred in connection" with "Protests of Federal Government solicitations or contract awards . . ." So much for that bogeyman.

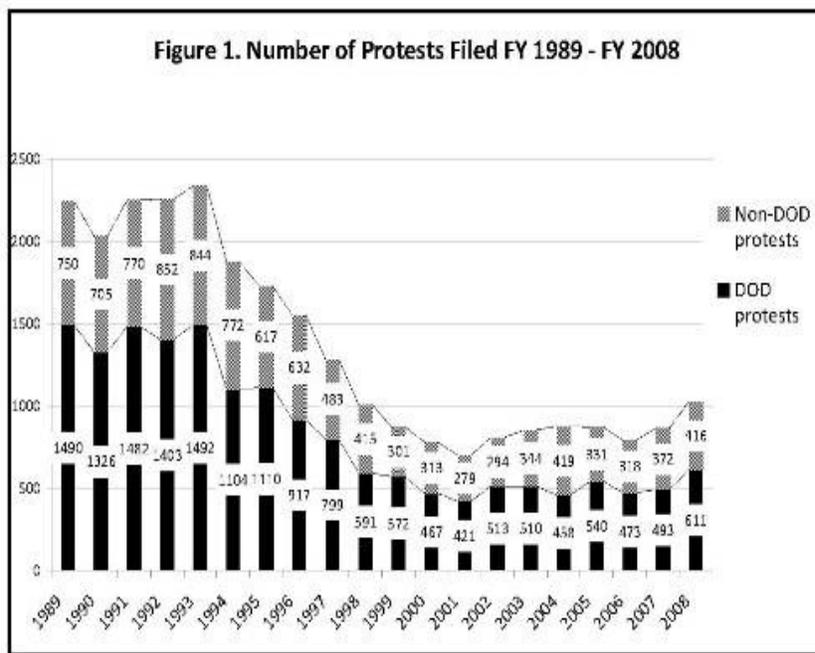
Third, Mr. Lambert asserted that there was a need for, and the Pentagon had initiated a study for, the evaluation of the "causes and costs of a record 611 [DOD] contract-award protests in 2008," which he described as a 24% "spike" in protest activity, a figure that he purportedly derived from GAO data. Let's take a moment or two to look at and analyze the underlying GAO data.

As the GAO itself has explained, its statistics count each protest and each supplemental protest filed by any offeror in connection with a given procurement as a separate protest for reporting purposes. As a result, the data simply do not inform the reader with respect to the number of procurements challenged, but rather, only the total number of protests filed in connection with the procurements that are challenged. Take for example the hypothetical case of a multiple award DOD contract – the incidence of which is expanding in near geometric fashion in recent years. Assume seven protesters (and, yes, this happens much more frequently than one might think). For the purposes of GAO's statistics, the mere involvement of seven protesters would count as seven protests. And if each of the protesters had filed only one supplemental protest upon access to the underlying record (a not unusual occurrence), then the procurement would be counted in the [GAO reported](#) statistical data as fourteen protests. One procurement under challenge; 14 protests for statistical purposes. Which figure is more informative in terms of the

overall impact of the protest process on DOD? The 1 or the 14? I would respectfully submit that if you have an axe to grind, you opt for the larger number because it unreasonably skews the data to support your point. Which is precisely what Mark Twain meant when he cautioned with respect to the three kinds of lies -- “Lies, damned lies, and statistics.”

It is for this reason, perhaps, that the GAO did not ever characterize its 2008 protest experience with respect to DOD procurements as a “spike.” To the contrary, [GAO concluded](#) that, “historically,” protests lodged against DOD procurements in 2008 were “lower than average.” And, in a [separate release](#), GAO noted that “...while the number of DOD protests filed with GAO has fluctuated significantly over the past 20 years (FY 1989 to FY 2008), the last 5 years reflect relatively low numbers of DOD protests filed, in terms of the historical trends.” (emphasis added).

A picture is often useful in dispelling the suggestive impact of political rhetoric, so let’s look at GAO’s pictorial history of bid protests and see how it matches up with Mr. Lambert’s description of 2008 as a “record” year for protests against DOD:



Some "record." Some "spike."

Fourth, Mr. Lambert is laboring under the apparent misconception that protests are outpacing the growth in DOD spending, a “fact” that he presumably tosses on the table as evidence of the frivolity of those “record” protests. Mr. Lambert’s position is stated in simple terms -- “protests increased 38 percent from 2001 to 2008 as the overall value of defense contracts awarded in the eight years rose 120 percent.”

Let’s start with his mathematics. The last time I looked, 38% was less than 120%. Perhaps DOD uses a different math book, but if it does, it is also a different math book than the one used in early 2009 by the [Congressional Research Service](#) -- “[t]he overall dollar value of DOD contracts has increased proportionally more than the number of protests filed with GAO.” Mr. Lambert’s words sound convincing, but as the Bee Gees once sang so many years ago, “It’s only words.” His math will not score high on anyone’s SAT.

Fifth, we come to the Director’s most obvious attempt to win the hearts and minds of the defense contractors on whom DOD’s soldiers, sailors and airmen rely for their very lives, a direct attack on the contractors’ patriotism, and an explicit assertion that they subordinate the war-fighters’ needs to those of their shareholders:

“Their [defense contractors] motivations are different in some ways than ours [because] [t]he Pentagon represents war-fighters and taxpayers, and companies are representing shareholders”

Of course publicly-owned companies represent their shareholders, Mr. Lambert. They have a fiduciary duty to represent the interests of those people who provide the capital needed to operate the companies. And if they do not do so, your SEC comes knocking on their doors. But let’s not get carried away with some Ivory Tower fantasy about DOD’s imperviousness to financial pressures in weighing the needs of the war-fighters against the interests of those who provide the capital to DOD to run its enterprise – the Congress. Time and again, DOD has been vocal about its need to jettison programs, requirements and capabilities needed by the war-fighter because of financial concerns. So, sir, look in the mirror before you level that criticism at anyone else. Moreover, spend a little time talking to the men and women who provide your Department with the technology and instruments through which you implement your national defense policies. Other than those who have spilled their blood, faced hostile fire, or hold close the memories of loved ones who gave what Abraham Lincoln called the “last full measure of devotion” to their country, you will not find a more dedicated or patriotic constituency, nor one more committed to the men and women who defend us.

Here’s a tip. If you want to eliminate the delays in procurement that are occasioned by the bid protest process, Mr. Lambert, read and take to heart Luke 4:23 -- “Physician, heal thyself.” The single most important reason for delay of support to the war-fighter is DOD’s inability to define its requirements in a timely manner and then move in an equally timely manner to acquire the supplies and services identified in compliance with the law and the regulations. Keep your own

house in order and you will not have to worry about a “record” number of bid protests. And, by the way, you will be serving the needs of the war-fighters and taxpayers far more effectively than you now are. Wars should be conducted against terrorists, not our contractors.

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