

PROTESTS AND APPEALS

This tutorial provides additional guidance in the event a formal protest is received on a contract at base level. It has been reviewed and approved by HQ AFSVA/SVL but is not intended to replace regulatory guidance or substitute for appropriate legal review. While a protest can be received prior to award, the main focus of this tutorial is on protests filed after award. No matter when it is received, a protest should be given top priority by all parties. In addition, HQ AFSVA/SVCKI and the base legal office should be notified immediately of any protests filed at base level and provided a copy of the protest letter and any attachments ASAP.

AFMAN 64-302, paragraph 5.2, outlines the policy for handling protests involving NAF contracts. The NAF Contracting Officer (CO) will make every effort to resolve protests filed at base level and the base legal office will review the protest and provide a written legal opinion to the CO before the CO prepares a final decision to be sent to the protester. If the protester is not satisfied with the CO's decision, they must file an appeal within ten (10) days from the CO's final decision. The appeal must be forwarded to the director of AF NAF Purchasing (AFNAFPO). "Filed" means the complete receipt of any documents by an agency before its close of business. Documents received after close of business are considered filed as of the next day.

Pre-award protests, to include protests challenging the propriety of a solicitation, must be filed prior to bid opening or the date for receipt of proposals. Before bid opening or proposal submission due date, a protester must be a prospective bidder or offeror with a direct economic interest. A prospective bidder or offeror is one who has expressed an interest in competing. An interested party for the purpose of filing a protest means an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.

Let's discuss a scenario where a protest is received after award and how to handle it. A contract has just been awarded to Company X. Two days later, the CO receives a letter from Company Y formally protesting the award to Company X.

There are two questions the CO should ask immediately. The first question is, "Is Company Y an actual bidder or offeror with a direct economic interest"? Moreover, did the award of the contract to Company X affect the economic interest of Company Y? If the answer to both questions is yes, then Company Y appears to be an interested party who may protest the award. If the CO determines that the proposed award does not affect the economic interest of Company Y, then the CO should send a letter to the protester denying their protest on the grounds that it is not an interested party. Always consult with the base legal office for advice on this.

The second question the CO should ask is, "Is the protest timely?" Generally speaking, the contractor must file its protest with the CO within 10 calendar days of when the protester knew or should have known of the bases for the protest. However, the CO, for good cause shown, or where the CO determines that a protest raises issues significant to the AF/NAF acquisition system, may consider the merits of any protest which is not timely filed. The exercise of sound judgment and discretion comes into play here. Again, the CO should seek guidance from the base legal office and follow their advice.

If the CO determines, in conjunction with the base legal office, that the contractor is an interested party and the protest is timely, the next step is have the base legal office review the protest and provide their written opinion for the CO's consideration. With legal guidance in hand, the CO may prepare the formal response to Company Y. Each issue outlined in the protest letter should be discussed separately in the response. You should stick to the facts as they pertain to the contract, and ALWAYS coordinate the proposed response with the base legal office before it is sent to the contractor. AFMAN 64-302 does not specify the number of days in which the CO must respond to the initial protest letter. However, a good rule of thumb is to respond to it within ten (10) calendar days, or as soon as practicable. The bottom line is, the CO should exercise due diligence in handling these important matters and not unduly delay responding to the protest. To the extent provided by law and regulation, the parties may exchange relevant information before the CO issues a final decision.

We recommend that the final paragraph of the response include the following advisory (or words similar to these):

“This letter represents my FINAL DECISION on your protest letter dated _____. If you do not concur with this decision, you may file an appeal within ten (10) days of the date of this letter. Your appeal must be filed through this office and will be forwarded to AFNAFPO for final resolution.”

The CO's protest decision should be provided to the protester using a method that provides evidence of receipt, i.e., Certified Mail/Return Receipt requested.

If the protester appeals the CO's final decision, the CO will notify AFSVA/SVCKI immediately via telecom or e-mail. A reviewing contract specialist will be assigned to provide assistance in preparing the package for the Director of AFNAFPO. There are documents that must be included in the package when it is forwarded to SCVKI. IAW AFMAN 64-302, paragraph 5.2, a background paper outlining the facts, a copy of the contract, all related documents, base legal review, and a proposed reply must be forwarded along with the contractor's appeal letter. Documents should be sent by Federal Express or overnight mail. Again, DO NOT DELAY forwarding the package to SVCKI. If possible, the CO should forward the package to SVCKI not later than seven (7) calendar days after receipt of the appeal. The Director of AFNAFPO will review the documents and determine the need for additional information. It is imperative that requests for additional information be handled and responded to with a strong sense of urgency.

In summary, protests are going to occur from time to time no matter how well the base contract team did its job. However, failure to process and respond to protests in a timely manner could jeopardize the government's position and cast doubt upon the integrity of the procurement process. To avoid these pitfalls, we need your help and commitment to give protests the high priority they deserve. It goes without saying that it is absolutely essential that the base legal office get involved early on and that the CO coordinate with the legal office every step of the way until the protest has been resolved and finalized.

We hope this guidance is helpful in the event you ever receive a formal protest on one of your contracts. Please contact Mr. Rich Jones, HQ AVSVA/SVCKI or consult your base legal office if you need any additional assistance.