
CARB: A Small Business Initiative to Settle Government Contracting Abuse Disputes

The New Option Avoids Costly Litigation and Make Possible Fair Settlements, something GAO Protests clearly fail to do!

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FACTS

- Government contracting abuse - according to a Congressional Report - is costing small businesses \$9 Billion yearly!
- According to the same Congressional Report, the Government failure to meets its own small business goals, is costing small businesses \$13.8 billion in lost contracting opportunities!
- According to a SBA Advocacy Report, 44% of the top 1,000 small business contractors were not small businesses, but yet they received, in FY2002, \$2 billion in contracts earmarked for small businesses.
- According to the U.S. Chamber of Commerce, legal costs, to among other things, fight this abuse, is also costing small businesses \$88 Billion per year!
- Between 1993-2004, the Government Accountability Office (GAO) sustained an average of only 15% of all protests it decided and those decisions did not provide the type of relief small businesses expected.
- The government has never offered small businesses a mechanism through which they could, fairly, inexpensively and without legal representation, settle contracting abuse disputes.
- The CARB Initiative would eliminate ALL litigation expense including potential damage awards in contracting abuse disputes. Additionally, it would provide small businesses - for the first time ever - with a fair settlement method to reclaim contract opportunities when they are unjustly treated.

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Overview

As a small business serving federal, state and local governments, it is our experience that many government agencies display a strong bias toward established large businesses even when such relationships are severely dysfunctional. This bias not only serves to lock out deserving small businesses, but it is also damaging to the interests of the contracting agency and the government. Indeed, in the past two years, FitNet has lost bids to vendors who have:

- provided inappropriate equipment (instantaneous heart rate monitors where cumulative monitors were required and called for),
- violated the FAR and committed alleged fraud on set-aside solicitations (the government ignored responsive bids from small businesses for no reason only to make the same purchase from 'large companies' on the Federal Schedule which were non-bidders and then claimed that these FSS companies were 'small businesses' when - in fact - they weren't!¹)
- offered inferior equipment (cardiovascular testing equipment with error rates more than twice as high as that offered by FitNet at a lower price) and
- severely inflated prices (an award of over \$600,000 to a vendor who offered a very limited web site capability when FitNet offered a vendor with a more complete product for under \$400,000).

According to a recent Congressional Committee report, "small businesses lose nearly \$9 Billion a year in work for the government due to unfair contracting practices."

¹ Thirty (30) per cent of the companies listed on the Federal Schedule (Group 78) are suspect of having misrepresented their S/B status to secure government set-aside contracts. The government (GSA) has been made aware of this, but GSA has taken no action! The SBA Office of Hearing and Appeals (OHA) has ruled [*Advanced Management Technology, SIZ-2003-11-25-71 (2004)*] that a company submitting a bid on a set-aside solicitation must be 'small' at the time it submits its quote to be awarded a contract and not – as it had been previously reported - throughout the term of its Federal Contract.

In all of these concrete cases, larger or better-connected vendors were either unethically favored or they simply exerted inappropriate and unethical influence over the purchase process in ways that left the actual user with equipment that was overpriced, inferior or even unusable. In a number of cases, FitNet has “successfully” challenged these contracting abuses. We say “successfully” because, while we have received acknowledgement we were treated unfairly on set-aside solicitations and have been promised future contracts, we have yet to actually receive any of the relief promised to us. In three specific cases, the Agencies have refused to accept our ‘reasonable and fair’ offers to provide the desired equipment at 5-10% over the Federal Schedule prices!

A Summary of the Problem

As often as these problems have arisen in our service to federal, state and local governments, FitNet is actually quite fortunate. We have contacts throughout the procurement system and access to the resources needed to pursue relief. Most small business vendors, however, simply suffer under the weight of a system that is seemingly designed to place them at a disadvantage. These small businesses simply do not have the resources needed to contest even the most blatant abuses of the procurement system.

Nurturing a small business is an extraordinarily difficult undertaking. Doing so while jousting with government contracting officers or government attorneys in costly hearings over contract abuses is simply not possible. However, the problems of the system do not deserve repair simply because there are abstract principles of fairness involved. They deserve attention because small businesses are often at the vanguard of innovation and all of us benefit if they have the opportunity to grow when they offer a better product or a better price. With this in mind, let us trace the shape of a possible solution.

Toward a Solution

Any realistic solution to the problem of contracting abuse of small businesses by large procurement agencies must have the following characteristics:

- it must not impair the ability of each agency to efficiently procure products and services;

- it must be efficient so that both parties – small businesses and procurement agencies – can clear conflicts quickly;
- it must not be so expensive that small businesses are effectively denied access;
- it must have the power to ensure that recommended solutions are implemented in a timely manner.

One mechanism popular with small businesses wishing to avoid costly litigation in the private sector is **arbitration**. An arbitration clause in a business contract is an agreement by all parties that, in the event of a disagreement or breach, such disagreement will be settled using an **independent** arbitrating organization such as the American Arbitration Association. This is often more expedient and far less expensive than civil litigation in a traditional court.

As a starting point, we suggest the formation of an independent body similar to the American Arbitration Association (AAA) with the purpose of settling government contracting abuse disputes. Since no such body currently exists and we are uncertain whether the AAA is appropriate in government contracting abuse matters, we shall refer to this body as the **“Contracting Abuse Resolution Board” or “CARB.”** The CARB will have three roles: to listen to the parties’ arguments to a dispute – **without the requirement of legal counsel** - in order to render a judgment on the vendor’s claim; to monitor the compliance of the contracting agencies with the terms of resolution and to educate the procurement community on ways to prevent contracting abuse.

We would like to suggest for **CARB** to be based at the SBA Office of Hearings and Appeals (OHA), the GSA Office of Contracting Dispute or at the Government Accountability Office (GAO.)

In our experience, actual abuse is often obvious and easy to illustrate (e.g. feedback that the quality of a product is “too high” and thus unlikely to meet the “users’ expectations”). Thus, we propose a two-tier resolution mechanism where the initial stage is a simple claim, to be available after the Agency Protest process is concluded without an obvious resolution. The second stage, in lieu of the GAO protest, is the CARB which incorporates, in addition to alternate dispute resolution (ADR) principles, a contracting vehicle with the power of passing on ‘sole source contracts’ to the victimized vendor. These two tiers are described in more detail in Appendix A.

In the event of a finding for the vendor after arbitration and in keeping with principle #1 (do not impair the agency) we would not typically call for the roll-back of the disputed contract or for a stop in the performance of the contract. In far too many cases, the goods will already have been purchased and will be in use. Instead, some mechanism for setting aside future contracts – as a way of a settlement – is likely to prove more efficient and effective. That is, an obligation will be placed upon the procuring agency to offer a sole-source contract(s) to the victimized vendor for products and/or services that the vendor is clearly qualified to supply. In the case that the victimized vendor does not already qualify for an 8(a) contract or other sole-source exception, an established 8(a) company set up with this service in mind can be used to source the contract(s) to the victimized vendor. The total obligation to the procurement agency found at fault will be for one or more contracts totaling at least 2x the total award of the original contract lost by the vendor.

The formation of a “Contracting Abuse Resolution Board” (CARB) should result in substantial savings to both vendors and the government since most disputes will be resolved without recourse to costly litigation and the involvement of legal counsel. The redress of grievances will not involve financial penalties to the government, but instead will consist, entirely, of new contract awards for bona-fide requirements of goods/services that will be purchased in any event. We believe that this new mechanism will permit small businesses to settle their contracting disputes in a fair and just manner while avoiding legal expenses and additional costs to the government.

Conclusion

We have discussed our finding and that of the Small Business Congressional Committee that contractual abuses disproportionately hurt small businesses. We observed that both as a matter of fairness and as a matter of our own society’s self-interest, some method for redressing these damages be found. Finally, we outlined some ideas for implementing a new alternative dispute resolution program which combines reliance on ADR principles with the use of an 8(a) company to simplify the process of awarding sole-source future contracts.

We would like to thank all involved parties for their willingness to review and comment on this proposed solution that will help American small businesses operate on a level playing field.

Appendix A

Agreement to Use CARB - an Alternative Dispute Resolution Initiative with a build-in Contracting Vehicle.

The broad outline of a dispute resolution process is presented in a format similar to that found in private contracts. Note that this is just an outline consistent with an existing FAR clause (52.233-9001) on the subject. The ADR clause would either have to be amended by a SBA directive (e.g., DLA Directive 5145.1 found at <http://160.147.217.67/SR2.htm>) or preferably, by an Executive Order, announced by the President himself, to formally put it in place without a lengthy legislative process. **The CARB concept incorporates ADR with a build-in contracting vehicle (i.e., 8(a) company) which could pass-on future sole-source contracts to any vendor found to be victimized by contracting abuse.** A legal team will be required to craft the final language.

Considerations and Issues

- (a) All future government solicitations expected to be over the \$50,000 threshold shall have the CARB clause included automatically.
- (b) CARB would only take effect after the Agency Protest procedure is concluded. This procedure allows the government (i.e., the contracting office) to outline the reasoning for its decision to make the award to a different vendor or to cancel the solicitation for a questionable cause (i.e., to buy the products/services off the Federal Schedule.)
- (c) If the vendor wishes to dispute the Agency's response claiming 'contracting abuse,' they must, within 15 days of being notified, inform the Contracting Abuse Resolution Board (CARB) of its decision to challenge the Agency's decision. The notification must be accompanied with a

refundable² deposit of \$1,000, as a fee, so CARB can convene a panel of independent experts, from outside the government, to examine the case.

- (d) The Agency whose decision has been challenged, must receive a copy of the notification to CARB. In the event the contracting agency believes the claimant is likely to prevail through ADR in its dispute, the contracting agency shall have the option of immediately registering an obligation to the vendor with the Contract Abuse Resolution Board (CARB) for future orders totaling at least 2X the value of the proposed award. If the case goes through the full CARB cycle, the obligation may be, at CARB's discretion, higher than 2X the value of the proposed award.
- (e) If the Agency, on the other hand, wishes to contest the vendor's contracting abuse claim through CARB, they shall notify the vendor, also within 15 days of their intention to challenge the claim.
- (f) The vendor shall have 35 days to forward written documentation to CARB as a reply to the Agency's response. The case shall be resolved by CARB's board of arbitrators under its own rules and procedures in effect at the time of submission.
- (g) Barring a negotiated agreement, the CARB's Board of arbitrators - experts in the particular commodity/service in question – shall settle the dispute using the documentation submitted by both parties, or at its own discretion, permit representatives for both parties to meet and present their final arguments to an assembled board arbitrators at a time and place convenient for both parties.
- (h) After examining the documentation and/or hearing arguments, the CARB's board of arbitrators shall render an opinion regarding the validity of the claim and the appropriate resolution. In the event that the contracting agency is found at fault, the board shall enter, as judgment, an award floor, in dollars, for future contracts due to the victimized vendor.

² This deposit will be refunded should the vendor prevails in its challenge. The fee structure will discourage frivolous challenges in contracting abuse matters.

- (i) In the event that the issues at hand are too complex for the board of experts to render a fair and informed opinion in the time allocated, CARB may request the Government Accountability Office (GAO) to intervene or, also at its discretion, it may recommend that the parties proceed with their claims to a full hearing before the appropriate Federal, District or State Court.
- (j) Judgments filed directly by the procurement agency as in paragraph (d) or filed by the arbitrators after the CARB hearing as in paragraph (g) and (h) shall be recorded in a database maintained by CARB. Once filed, an obligation is placed upon the procuring agency to offer one or more sole-source contracts to the vendor over a specified period of time – using the 8(a) company identified for this purpose. These 'future contract(s)' shall be for products and/or services that the vendor is clearly qualified to supply the value of which shall be no less than the total award judgment filed with CARB. Any given contract shall be applicable to the resolution of only a single filed case and, should multiple cases from a single vendor be filed against a procurement agency, that agency has the right to indicate which case a given award shall be counted against.
- (k) Any 'future' contract(s) to be awarded as a result of a CARB action to a victimized vendor shall be for bona-fide government requirements over the subsequent twelve months and the price the government is to pay for said contract(s) shall be fair and reasonable by government standards (e.g., 10-15% over FSS contract prices depending on the amount.)
- (l) The 8(a) company which serves as the conduit for any 'sole source contracts' involved in any CARB awards shall be permitted to add, as a fee for its services, an amount not to exceed five (5) per cent of the value of the contract or \$10,000, whichever is greater.
- (m) The final arbitrated decision by CARB shall be enforceable through the Federal District Court located closest to the vendor's domicile should enforcement be required. All the parties agreeing to participate on CARB would consent to enforcement by the appropriate Federal District Court and irrevocably waive any objections thereto.

The above represents the entire CARB concept idea. We trust that you would seriously consider it and recommend its immediate implementation.

Making the Case for CARB

GAO Protests Do not Offer Justice to Contractors

The Competition in Contracting Act of 1984 ("CICA") formally established a "Procurement Protest System" in 31 U.S.C. Secs. 3551-56 whereby the Comptroller General ("CG") decides protests of an alleged violation of a procurement statute or regulation. The CG is the head of the U.S. Government Accountability Office ("GAO").

Every year several thousand protests are filed at GAO. While the majority are dismissed because they are settled or are untimely or improperly filed, between 250-800 are considered and ruled upon by the GAO. During the past twelve years (1993-2004), the GAO sustained an average of only 15 percent of all protests it decided, with the sustain rates varying between 11 percent and 21 percent. The table below shows the history.

2004--1485 filed/ 365 decided/ 75 sustained (21%)
2003--1352 filed/ 290 decided/ 50 sustained (17%)
2002--1204 filed/ 256 decided/ 41 sustained (16%)
2001--1146 filed/ 311 decided/ 66 sustained (21%)
2000--1220 filed/ 306 decided/ 63 sustained (21%)
1999--1399 filed/ 347 decided/ 74 sustained (21%)
1998--1566 filed/ 406 decided/ 63 sustained (16%)
1997--1852 filed/ 501 decided/ 61 sustained (12%)
1996--2286 filed/ 579 decided/ 80 sustained (14%)
1995--2529 filed/ 663 decided/ 71 sustained (11%)
1994--2809 filed/ 716 decided/ 79 sustained (11%)
1993--3377 filed/ 815 decided/ 100 sustained (12%)

Based on simple statistics, protesters only have a one in five chance (or less) of having their protests sustained. The real probability is even less, since many of the sustained protests are "slam dunks" where the agency has

flagrantly violated the law, and for some reason doesn't want to admit the problem and take corrective action. But what happens when a protest is sustained? Does it mean the protester will get the contract? The answer is an absolute NO!

The law states that if the CG determines that a solicitation, proposed award, or award does not comply with a statute or regulation, the CG shall recommend that the Federal agency refrain from exercising an option, recomplete the contract, issue a new solicitation, terminate the contract, award the contract consistent with statute and regulation or implement other recommendations that the CG determines necessary. In other words, the Contractor, ends up with no meaningful relief to show for it! It is important to keep in mind, as one examines this, that the GAO (CG) only makes recommendations, and in many cases, agencies don't even follow them!

The law states that if a Federal agency fails to implement fully the recommendations of the CG, the agency must report this failure to the CG (31 USC Sec. 3554) who, in turn, reports these non-compliances to Congress. In January 2004, for example, the GAO reported that the Department of Defense had refused to follow GAO recommendations and recommended a Congressional inquiry, but there were none!

The bottom line is that GAO protests do not offer justice to contractors. It is very tough to win a protest at the GAO, and even if one wins, the relief is not what the contractor would want or would expect. And in a great number of cases, the agencies may even disregard the GAO recommendation altogether!

ISSUES AFFECTING SMALL BUSINESSES

Description of barriers and/or recommendations to open up access to government contracts

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- a. *Free Universal Access (FUA)* to public solicitations – a small business initiative aimed at preventing unscrupulous private IT firms from charging fees to access federal, state, municipal and local government solicitations. The US government must support FREE access to any tax based solicitation.
- b. Strengthening FAR Part 19 while lowering the preferred status of GSA Contract holders (FAR Part 8) in open competition. The FAR fails to make a clear distinction between the two and, as a result, all set-asides solicitations are now at risk of being abused by limited competition. For example, some agencies are both ignoring and circumventing the FAR 19 requirements – and getting away - by limiting the competition to 'GSA Schedule Holders Only.'
- c. *Contracting Abuse Resolution Board (CARB)* – an initiative aimed at permitting S/B to fairly settle disputes such as those detailed in the '*Contracting Abuse by the Air Force*' Report. This report details specific 'contracting abuse cases' by both solicitation number and AF unit.
- d. The need for a federal directive (i.e., Executive Order) amending ALL existing GSA contracts to permit S/B to purchase commodities on the GSA schedule (for resell to the government) at prices below the GSA schedule without violating the law. The current GSA rules prevent manufacturers - on the Federal Schedule – from selling their commodities at prices below the GSA Schedule.
- e. More emphasis on *Reverse Auctions* by private sector entities. It reduces the government bureaucratic process while expediting deliveries. In short, *reverse auctions* are the future in government procurement. This technology has matured enough to be able to save the government billions of taxpayers dollars.
- f. The *Small Business Set-Aside Alliance (SBSAA)*. – An initiative aimed at creating a semi-private and self-supporting non-profit organization under which the majority of the critical services (by both private and by government agencies) could be both grouped and offered – under one umbrella - to small businesses at savings of billions of dollars.
- g. Strengthening the current '*Size Standards*' of American businesses by incorporating '*penalties, enforcement and dispute resolution/size protest*' as integral parts of '**Size Standards.**' The current SBA efforts to revise '*size standards*' might leave out these three elements making the entire revision effort worthless.
- h. Emphasizing 'Debarment of '*Large*' businesses' caught either bidding or accepting Set Aside contracts. It's the most effective deterrent to the violation. Refer to the article by Attorney Al Krachman http://www.ncmahq.org/publications/cm/docs/CM_June05p30.pdf
- i. Prevent 'end-users' – especially in the military - from unethically justifying award decisions based on 'personal preference' and/or 'preferential status.' End users must be held accountable if they create 'contracting disputes.' Agencies with a record of protests attributed to 'end-user' interference may be liable for lost of funding and/or disciplinary action or both.
- j. Adding 'foreign purchases' to the list of commodities subject to the 'set-aside restrictions.' As long as the purchase is for a US made commodity and/or the delivery is made in the US, the FAR 19 requirement must be followed. Currently, false assumptions that foreign countries regulations would prevent such transactions are affecting both small businesses and limiting competition.
- k. Research the way modern business arrangements (i.e., 'alliances,' joint ventures') plus the IRS rule (which doesn't count 'independent contractors') impact/affect the SBA size standard policy.