

Successful Strategies in Defense Contract Bid Protests

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Mr. Kinberg is active in numerous professional organizations. He is an active member of the National Contract Management Association (NCMA), which awarded him the status of Fellow based on his many contributions to the contract management profession and has been inducted into the Hall of Fame for his local Chapter. Florida Today newspaper selected Mr. Kinberg as one of three finalists for its annual volunteer recognition award. He has written numerous articles involving contract and construction management and he is a frequent speaker on a variety of subjects. Mr. Kinberg received the Distinguished Service Award and the Community Service Award from the Melbourne/Palm Bay Chamber of Commerce and is a past president of his local Chapter of the Associated Builders and Contractors.

Introduction

This chapter is based on the reader having some familiarity with the terms commonly used in federal procurement. For those of you who may not be familiar with some of these terms, I have included in the appendix the definitions provided in Part 2.101 of the Federal Acquisition Regulation (FAR) for many of the terms used in this article. The appendix also includes the various rules referenced in this chapter.

A bid protest is a tool you can use to ensure that your bid or proposal was fairly evaluated by a public agency. While this chapter is limited to federal bid protests, most states and local governments have their own system for protesting contract awards. If your protest involves a state or local agency, the protest procedures will be discussed in the bid documents and/or local procurement manuals.

While filing a bid protest is relatively simple on the surface, it can be a fairly complex process. The Federal Acquisition Regulation (FAR), which applies to all agencies, with the exception of the post office, clearly states the basic information that needs to be included in a protest. While this article is limited to protests filed with the contracting agency or Government Accountability Office, which was previously called the General Accounting Office (GAO), the appendix to this article includes the Court of Federal Claims (COFC) rules for filing a bid protest.

The remainder of the chapter will discuss the bid protest process in more detail and explain how bid protests can be a vital part of your strategy in winning government contracts.

General Thoughts

While many contractors may be reluctant to protest a contract out of a concern that it will harm their relationship with the agency, in my opinion such reluctance is a mistake. The protest system was designed to provide a formal process for use by a contractor to ensure contracts are awarded in strict accordance with the “rules of the game” applicable to each procurement.

The bid protest system is a formal tool the United States federal government has developed that allows contractors to challenge a contract award. Bid protest procedures have come about because the government has recognized that there may be instances where a federal agency (the agency) may not have awarded a contract in strict accordance with the “rules of the game” applicable to each procurement; namely the statutes, regulations, and the unique provisions an agency may have developed for a specific procurement.

A bid protest is simply a complaint to the government’s oversight office that the agency did not select the winning contractor in strict compliance with the statute, regulation, and the rules established for the specific procurement. In filing a bid protest, the protesting contractor needs to explain how they think the agency “broke” the rules. The result of the bid protest process is a decision by a neutral body as to the merits of your complaint.

In this regard, it is important to keep in mind that the vast majority of bid protests are settled without a hearing. The primary reason for this is that during the protest process, the parties (the agency and the contractor) come to an understanding about the facts and circumstances of the appeal and reach an amicable resolution.

The Rules of the Road

The agency and the GAO are the most effective entities for filing protests as a timely filed protest will, with rare exception, result in a suspension of the contract award or performance. If you are filing a protest with the contracting agency, FAR 33.103 sets out the minimum information that must be in your protest. If you are filing with the GAO, Rule 21.1 of the GAO Bid Protest Regulations sets out the minimum information that must be in your protest.

While you can file a protest with the Court of Federal Claims (COFC), the rules are much more complicated and the cost will be significantly higher. Most importantly, it is very difficult to obtain an injunction to stop contract performance pending resolution of a protest filed with the COFC. As

such, this article will be limited to discussing protests filed with the contracting agency or the GAO.

A protest involves three basic elements: 1) timely filing, 2) an interested party, and 3) one or more allegations that the agency failed to make the award in accordance with statutes, regulations or the specific procedures provided by the agency in the Invitation for Bids (IFB), Request for Proposal (RFP) or Request for Quotes (RFQ), which will be collectively referred to as “the solicitation.”

The timely filing element is discussed in some detail below. The interested party element generally means a party that had a reasonable chance of award had the award decision been made in strict accordance with statute, regulation or the rules of the specific procurement. The final element is based on factors unique to each individual procurement and the manner in which the award decision was made.

The most critical issue in filing a bid protest is timing. If your protest is not filed within the time provided by the regulation, you will have lost your protest rights. While the GAO has the right to consider a late protest for “good cause” or if a “significant issue” is raised, the GAO rarely does so. The “deadlines” for filing a protest are:

1. For an issue that is apparent in the bid or proposal documents, the protest must be filed before the due date for submission of the bid or proposal.
2. If the protest involves sealing bidding (i.e. an IFB), the protest must be filed within ten days of the day you learn of the basis for the protest. While this would typically be the day of bid opening, you may not discover you have a basis for a protest until several days after bid opening. In such case, your initial filing must clearly explain why you did not know or could not have known of the basis for the protest at an earlier date.
3. If the acquisition is a negotiated procurement that uses an RFP, there are a number of different filing rules.

- a. As with an IFB, if you believe any terms of the proposal are unfair or unreasonable you must file the protest before the bid opening date. You need to carefully examine Section L, *Instructions, conditions, and notices to offerors or respondents*, and Section M, *Evaluation Factors for Award*, each of which provide requirements unique to each RFP. If you feel any of the provisions may affect the fair consideration of your proposal, you need to submit a protest before the due date for the proposal.

- b. Once you have submitted a proposal, you may discover that you have been excluded from the competitive range. The competitive range, decided by the agency after preliminary evaluation of proposals, is based on which proposals have the best chance of award.

If you are excluded from the competitive range, you must submit a request for a debriefing to the contracting officer within three days of the date you are noticed of your exclusion. While the agency may decide to delay the debriefing until after award, your failure to request a debriefing will result in the loss of your right to file a protest. The rules for pre-award debriefings are at FAR 15.505, which is included in the appendix.

- c. The timeline for protests becomes more complicated when an award is made in response to competitive proposals, as is the case with most RFPs. Issues unique to procurement that involve limited competition, no competition, or delivery orders under an indefinite delivery/indefinite quantity (ID/IQ) are discussed later in this chapter.

Before you can file a protest, you must request a debriefing. The rules for post-award debriefings are at FAR 15.506. You must make this request within three days of the date you learn of the award. Failure to make a timely request for a debriefing can result in your loss of a right to file a protest.

While there is no strict rule for the date a debriefing must be conducted by the agency, the FAR states agencies should conduct the debriefing within five days of the request. If you request a debriefing and the agency cannot provide the debriefing within five days of the date of the award, you need to clearly document the fact that the delay was solely for the agency's convenience, not yours.

Contract award/performance will only be suspended if you file a timely protest. While you have ten days from the date of award to file your protest and suspend performance, you only have five days from the date of the debriefing to file a protest and suspend award. These times cannot be added together.

As virtually all negotiated procurements require a debriefing, the key points to remember are: 1) file your request for a debriefing within three days of award, and 2) file your protest within five days of the date the debriefing is conducted.

- d. In procurements involving limited competition, no competition or ID/IQ delivery orders, it is more difficult to pin down the date your protest time begins to run. In the case of limited and/or no competition awards the government is required, with rare exception, to publish its notice of intent to award such a contract on FedBizOpps.gov.

The publication of the synopsis on the website is public notice of the government's intent. If you believe your company should be allowed to participate in the competition, it would be best to file a prompt protest with the contracting officer or agency.

In the case of ID/IQ delivery orders, you may first learn about the delivery order through the "grapevine." Once you suspect an improper order may have been placed, you

need to document your discovery and promptly file a protest.

While such protests could be premature since the solicitation or delivery order has not yet been issued, when protests are involved, it is better to be too early than too late. Even if the protest is premature, it puts the agency on notice about your concerns. As such, if your concerns are valid, the agency can take prompt corrective action.

- e. Another serious timing issue is dictated by whether you file your protest with the agency or the GAO. If you file a timely protest with the agency, the agency is required to suspend performance. However, if you appeal an agency protest decision to the GAO, the agency is not obligated to continue the suspension.

Since you did not file the GAO protest within ten days of award or five days after the debriefing, you are not entitled to an automatic suspension. While, in most cases, the agency will continue the suspension, it is not required to do so. In my opinion, if you are filing a post-award protest, you should file with the GAO and not the agency.

Another problem with an agency protest involves the agency's failure to take timely action. Under the GAO rules and cases, you can lose your right to challenge an agency decision on a protest to the GAO if you do not exercise due diligence in pursuing the agency protest.

While there is no clear definition of "due diligence," the GAO has found against a contractor who failed to bring its protest to the GAO for forty-five days after filing the agency protest. If you file an agency protest and do not receive any response from the agency within thirty-five days, you should file a protest with the GAO.

In the one instance in which I had this problem, the GAO attorney conducted a conference call in which the agency agreed to issue a decision by a specified date in return for my client's agreement to withdraw the GAO protest pending the agency's decision. By so doing, I was able to protect my client's ability to protest while continuing to work to resolve the issue at the agency level.

In addition to filing a timely protest, the protest can only be filed by interested parties. While there are many, many grounds for a protest, the basic rule is that a protest must involve a violation of law, regulation or the provisions of the RFP. The most common source of violations is a failure to comply with the evaluation factors in Section M of the RFP.

The final "timing" critical issue is when to get an "outside" attorney involved. An attorney who is not a full-time member of your staff can give frank advice about the benefits and disadvantages of a course of action you are considering. An outside attorney will be focused on the legal issues involved in the protest, not internal company issues or long running disputes you may have with the agency.

You should involve your attorney as soon as you suspect something is wrong. If you are reviewing the terms of an RFP and are uncomfortable with any of them, an experienced federal procurement attorney can assist you in clarifying the terms and protect you from losing your right to challenge an unfair provision.

If you are going to participate in a debriefing, you should take your attorney with you to the debriefing or if it is done in writing, forward the debriefing material to your attorney immediately. Consulting an experienced federal procurement attorney has two primary benefits:

1. If you do not have a firm basis for a protest, the attorney's advice will prevent you from wasting your time and resources in pursuing a case in which you have little chance of winning.

2. If you have a firm basis for a protest, the attorney can assist you in preparing, a clear, concise and compelling protest document that may assist you in reaching an early resolution of the protest.

You should consider an attorney a strategic element of your procurement system. Your best defense against wasting time and company resources on an issue in which you have little or no chance of winning is to have “outside” counsel assist you in making the decision.

An excellent source for a quick review of bid protest issues is wifcon.com. On the home page, click on the “legal” link. On the next page, click on the “protests” link. This will take you to a page that allows you to select cases organized by FAR section, by issue, by forum or by name. If you click on the “By Issue” link, you will get a list of issues. If you click on the “By FAR” link, you will get a list of each of the various FAR provisions that have been the subject of a bid protest decision.

Once you click on the issue or FAR clause of interest, you will be taken to a synopsis of cases that refer to that issue or that clause. More importantly, at the end of that list, the cases will be divided into two groups, those in which the government prevailed and those in which the protestor prevailed. This is a great starting point for anyone considering filing bid protests.

In my opinion, if you have not yet hired counsel, you should review the materials on this website before you make your final decision on filing a protest.

Department of Defense – Most Often Protested

Department of Defense contracts are the government contracts that are most often protested, for three key reasons:

1. The Department of Defense is the largest buyer;
2. Defense contracts are high stakes contracts with long-term consequences; and
3. Defense procurements are frequently complicated.

Many defense contracts are Indefinite Delivery/Indefinite Quantity (ID/IQ) contracts. Under this type of contract, there may be a small quantity the agency is required to order each year, with the government having the right to order much larger quantities at a later undetermined date. These contracts are often multi-year or have options for multiple years, which can result in the final contract value being several times higher than the award value.

In some cases, an agency may award several ID/IQ contracts to multiple vendors and then limit future work to the vendors that received the bid. This is particularly common in construction and service contracts where numerous projects come up during the year. This allows the agency to avoid full competition and make a direct award to one of the ID/IQ contractors.

The traditional rule is that delivery orders under an ID/IQ contract cannot be protested unless the agency changes the delivery order, which then modifies the scope of the original contract in a manner the bidders on the original contract could not have reasonably anticipated. This is very difficult to establish. However, this rule is changing, which is likely to increase the number of protests we will see in the future. For example, protests can be filed in the following situations:

1. Actual orders substantially exceed the quantities estimated in the original solicitation; or
2. Orders for goods and/or services differ from the goods and/or services in the original solicitation.

While this can be a complex legal issue, a good general rule to apply would be whether the goods or services being offered under a specific delivery order are different than what the bidding contractor thought would be ordered at the time they submitted a bid/proposal for an ID/IQ contract or considered submitting a bid/proposal. If there is a significant difference, it may well be an “out of scope” order.

In one case, one of my clients discovered that an agency was trying to avoid competition for a newly developed defense electronics product by ordering production quantities under an ID/IQ contract for engineering services.

The agency attempted to justify its order by relying on a provision that allowed the purchase of limited quantities of completed products for evaluation purposes. Because of the protest, the agency withdrew the order and my client was eventually allowed to participate in a full and open competition for the product.

There are also many contracts for production of newly developed items. By getting the first competitive award for a new item, the contractor is more likely to obtain future awards based on its experience in manufacturing the product. In addition, during wartime, the government may have “urgent and compelling” requirements that cannot be met in the time needed for a new supplier to begin production.

In these situations, an agency is allowed to award a sole source contract directly to a vendor that has the skills, equipment, and experience needed to provide the materials in the time required. Before an agency can conduct a sole source procurement, it must comply with very strict regulatory requirements. If the agency does not comply with those requirements, you have a reasonable basis for protesting the agency’s plan to award a sole source contract.

Trends in Bid Protests

Protests of government bid contracts are increasing for various reasons, including the fact that Congress recently expanded bid protest jurisdiction to allow protests of delivery orders in excess of \$10 million. The new rules also require an agency to provide each contractor in a group of contractors with related ID/IQ contracts with “fair opportunity” to compete for all orders of more than \$5 million. The rule specifically provides that a “...fair opportunity” has not been provided unless each of the contractors involved is provided:

- (1) Notice of the task or delivery order that includes a clear statement of the agency’s requirements;
- (2) A reasonable period of time to provide a proposal in response to the notice;
- (3) The factors that the agency expects to consider in evaluating proposals, and their relative importance;

- (4) In the case of an award that is to be made on a best value basis, a written statement documenting the basis for the award and the relative importance of quality and price or cost factors; and
- (5) An opportunity for a post-award debriefing.

Overall, these rules provide the same opportunity for a contractor to earn a large dollar delivery order as they had for the initial award of the ID/IQ contract. This process ensures the agency gets the best value for its product and does not simply award the ID/IQ contract to the most “convenient” contractor.

In addition to the rising number of protests that will come from these new rules, there has been a general increase in the number of all government contract bid protests over the last few years. Although the government added a “debriefing requirement” several years ago in an effort to reduce the number of protests, the number of protests has actually increased. While the new rules may be preventing many protests, there is so much contract activity that there could still be an increase in the *number* of protests, even if there is a decrease in the *percentage* of contract awards that are protested.

The most beneficial development in this area over the last few years was the establishment of a requirement for an agency, upon request by the contractor, to provide the contractor with a debriefing, and to require the debriefing before a protest can be filed. In some cases, the contractor may be more willing to accept the outcome of the competition because the debriefing establishes they got a fair shot at the award, or conversely, the debriefing may disclose flaws in the competition process that result in the agency taking corrective action.

Debriefings are meetings between the agency and a contractor at which the agency explains how it made its decision. The primary function of a debriefing is to allow the agency to explain why it believes its decision was fair and reasonable. As part of the debriefing, the contractor can explain why it thinks the agency made a mistake. This process plays a significant role in reducing protests for two primary reasons:

1. The contractor concludes that it was treated fairly and a protest would not be a good use of the contractor's limited resources; or
2. The agency learns of mistakes it may have made during the bidding process and is able to take corrective action rather than using its limited resources in defending a protest in which it is unlikely to prevail.

I had one case in which the debriefing disclosed that the agency had given my client a low score for past performance because it had concluded my client did not have experience making an item called for by the RFP. When my client learned of this mistake at the debriefing, it was able to correct the agency's mistake, which resulted in my client getting the award.

In another case, a client learned that the agency's estimated quantities had substantially changed after proposals were submitted and shortly before award.

The appendix has subpart 15.505 of the Federal Acquisition Regulation, which contains the rules and procedures for debriefing. If a contractor is bidding on federal contracts, the contractor needs to carefully review and understand these rules. The debriefing process provides the contractor with an excellent tool to ensure that each proposal/bid submitted is fairly evaluated.

The bottom line is that as government spending increases, protests increase. The more there is at risk, the more contractors are likely to seek to protect their rights. If the government expands its contracting rules to the areas of social services and health care, it is likely the number of protests will continue to increase in those areas as well.

In addition, government expansion into new areas will increase the contracting activity at agencies that are not as experienced in competitive acquisition, which may create the appearance of unfairness or failure to follow the rules. To the extent some of the services are new, the agencies will likely have a difficult time identifying what they need and how they are going to evaluate offers.

The Importance of Fairness

There is now a strong trend toward transparency and fairness in the government contracts bid process, largely because there is a general perception that over the last several years many large dollar awards were made in a “shadowy” manner and the government is overpaying for goods and services.

Over the last few years, many regulatory barriers have been overcome by revising regulations to encourage the purchase of “commercial products” rather than products produced to unique government requirements. This was done to increase the participation of businesses that do not historically sell to the government.

In addition, while there has been a substantial increase in contracting activity by the government, there has not been an increase in the people available to do the work. This results in shortcuts that open the door for more protests and delays in getting goods and services to the government customers that need them. All of these trends are driven by time, money, politics, and public perception.

Many contractors are concerned that filing a protest may result in confidential business information becoming part of the public record. This should not prevent you from filing a protest. The GAO has very strict procedures for ensuring confidentiality that start with the issuance of a protective order that can be requested by any party to the protest.

I have included the GAO Guide to Protective Orders in the appendix to this chapter. If you have any concerns about the information you need to include in a bid protest, you should request an order when you file your initial protest. In many cases, the GAO will issue the order on its own if it appears likely the protest will involve protected information.

While a protective order will ensure your confidential information is kept confidential, it also makes the protest process more cumbersome. Once an order is issued, your company will need to be represented by someone who is not involved in the bid/proposal decision process at your company.

The order is designed to protect information provided by all parties, not just your information. As such, before any information can be released to a party that has not been admitted to the protective order issued by the GAO, the information must be reviewed and protected portions removed.

Components of a Government Contracts Bid Protest

Each government contracts bid protest stands on its own. However, there are minimal common elements, such as:

- An interested party: This is a company that is an actual or prospective bidder or offeror with a direct economic interest in the procurement;
- A timely protest;
- Pre-Award Protest: Objections to the terms of government RFPs, RFQ, or IFBs must be submitted before the due date for proposals or bids established in the proposal;
- Post-Award Protest: Protests must be filed within ten days of the day the protestor knew or should have known of the basis for the protest. However, if a debriefing is required, the protest may not be filed before the debriefing takes place;
- A violation of law or regulations; or
- Failure to award the contract in strict accordance with the requirements established by the agency in the request for proposals.

While there is no requirement to use a specific form, each protest must meet certain minimum requirements set out in the Bid Protest Rules issued by the GAO. A sample format that has the required elements is included in the appendix.

In general, the base components of each protest are the same—i.e., did the agency violate a law, regulation, or the terms of the request for proposal, or conduct itself in some way that made the award process unfair?

Strategic Bid Protests

I am a fan of what I call a strategic protest. To me, this term refers to using the protest system to make sure the agency knows you are closely watching them and puts the agency on notice that they need to carefully follow the rules when you are involved.

While winning the protest is always the goal, in these instances it is equally important to ensure the agency understands you will not let it get away with favoritism. The problem of favoritism is most common when the agency has a long-standing relationship with a specific provider or a new product is being competed, and one of the competitors will be the firm that developed the product. In effect, the protest process can be used to break up a “cozy” relationship between an agency and a provider.

When I first left the Army, I had a client who submitted a proposal on a product that had been provided by a single source for several years. They protested the award and prevailed on the protest which resulted in a recompet. When the agency released the revised proposal, we notified them of several defects. The agency ignored our complaints and we filed a protest before the GAO. The GAO required all of the parties to meet in Washington for mediation.

Because of the mediation, the agency agreed to modify the RFP to add most of the items we initially requested and some additional items. Unfortunately, we did not get the award once again. We filed our third protest, which was denied by the GAO. After three tries, the agency finally got it right.

Several years later, the product came back up for competition. This time, the agency used a technique we had discussed during the protests to increase the likelihood a new vendor could make the product. My client ended up with an award that gave them a set time to produce an acceptable first article (a very small quantity to prove they could make it) and provided for them to get full production if they made the first article. In the meantime, during the period they were working on the first article, the incumbent would produce the item and, if my client failed to produce a timely first article, the incumbent would continue production.

In another case, my clients were producing a product that was being completely revamped by the original developer of the product. It was anticipated that all production would shift to the new version over a few years' time, and the version my client was making would go out of production at about the time the new product went into production.

In the competition for the original product, my client won over a team that included the developer. For the new product, the agency made numerous efforts to develop a means to award production, without competition, to the developer and/or a partner company. Each time my client learned of an effort to do so, it protested. This case involved several protests over a number of years and the result was the agency was forced to have a full and open competition for the product. While my client did not win that competition, they had a reasonably fair opportunity to get the work and they ultimately received a contract to produce the new item.

I have been involved in numerous other protests that have disclosed errors in the evaluation process resulting in a reconsideration of proposals. While the contractor does not always get the award of the contract due to a protest, protests are a valuable tool to ensure fairness in the award process.

Settlement Statistics

From a statistical point of view, most protests do not go to a decision by the GAO or the court—they are settled between the parties. In 2007, there were 1,411 protests filed before the GAO of which 1,393 were closed. Only 335 of the closed cases went to decision, or just over 20 percent. Most of those were submitted for decision by written arguments and only forty-one went to a hearing. Of the 335 cases that went to a decision, ninety-one protests were sustained. Interestingly, the sustain rate has increased every year since 2003, from 17 percent in 2003 to 27 percent in 2007.

In my experience, I would consider almost all settlements to be in favor of the contractors for one of two reasons:

1. The protest process created an environment in which the contractor comes to believe that it was treated fairly; or

2. The agency takes corrective action that restores fairness to the process.

Overall, the bid protest process is a critical tool in ensuring public contracting is done in a fair and reasonable manner as the agency has to keep in mind that contractors are keeping a close eye on the process and will not tolerate behavior that does not ensure all bidders are treated fairly and in strict accordance with the rules that apply to each specific acquisition.

Seeking Legal Assistance on Contract Bid Protests

I always prefer to get involved in a client's government contract matter during the bidding process. The agency documents need to be carefully reviewed to ensure there are no unfair terms—that is, terms that may favor an incumbent or put a company at an unfair advantage. Keep in mind that the bidder must challenge any unfair terms before the time and date proposals are due or the bidder waives their protest rights. I have seen many good cases that could not be protested because the contractor did not protest unfair terms or actions taken prior to the submission date.

Unfortunately, in many cases clients wait too long to seek legal assistance for contract bid protests. As previously noted, if there is a defect in the documents provided by the agency the protest must be filed before proposals are due. If the defect is in the award process, the protest needs to be filed within ten days of the date the contractor learned about the defect.

Again, many companies are reluctant to file protests because they feel it will injure their ability to get an award. Again, I disagree. Failure to protest is more likely to injure a contractor because it creates an environment in which the agency is comfortable with loosely applying rules. In effect, the game is not played properly because nobody cares to point out the problems.

In this regard, it is important to keep in mind that there are numerous ways to seek corrective action in the bidding process. If the bidder thinks a provision of a solicitation is unclear or puts them at a competitive disadvantage, the bidder must send a letter to the contracting officer (the

person at the agency whose sole job is to enforce the bidding rules for that agency) explaining their position without calling it a protest. If you are correct, the problem will be fixed. While this could be considered a protest, it is very low level and, in my opinion, is rarely taken in a negative manner by the contracting officer. Keep in mind that the agency wants an award that will stick as much as the bidding contractor wants a fair, full, and open competition.

If the agency does not take corrective action based on an informal letter, you can protest to the contracting officer. This is a very low-level protest and gives the contracting officer a chance to make a fix without delaying the procurement. If that does not work, you can protest to the agency itself, the GAO or a court (typically the Court of Federal Claims).

Generally, I recommend starting a protest at the lowest possible level. In effect, you want to create the impression that you are working hard to be a part of the team to ensure an award is made without delay, and made in a manner that sticks.

Where to File the Protest

A bid protest can be filed at a number of different levels, such as the:

1. Contracting officer;
2. Agency;
3. Government Accountability Office; or
4. Court of Federal Claims.

The first step in filing a protest is to determine the most appropriate level. If the bidder is filing a pre-award protest, I recommend that the bidder start with the contracting officer responsible for the procurement. This individual will be clearly identified in the IFB, RFP, or RFQ. By filing the protest with the contracting officer, there is a reasonable chance the contracting officer will take corrective action. If the contracting officer does not, at least the bidder has given the contracting officer the opportunity to take corrective action before going to a higher authority.

If the protest is after award of a contract, I recommend the bidder file the protest with the GAO. If the protest is filed on a timely basis, the agency will be required to suspend the contract award until the protest is resolved. The GAO procedure is generally fast paced and relatively informal.

Before filing a protest, the bidder needs to consult with an individual with substantial bid protest experience in order to select the most appropriate level for filing the protest.

Preliminary Research and Key Questions

I typically follow a three-step procedure to assess a client's government contract bid protest situation:

1. In-depth interview with the client to ensure I understand why they feel the need to protest.
2. Careful review of the terms and conditions of the solicitation and applicable regulations, as well as all associated correspondence. If an award has been made, I attend the debriefing.
3. Research bid protest case law, if needed. "Where in Federal Contracting" (wifcon.com) is an excellent website that breaks out past decisions by provisions of the Federal Acquisition Regulation, by subject and by date. In doing legal research, this should always be the first step in a government contract bid protest matter.

I also ask clients several key questions:

- When did you first suspect there was a problem with the solicitation?
- Why do you think the solicitation is unfair?
- Why do you think you have been treated unfairly?
- What documents are you relying on to support your protest?
- If an award has been announced, have you had a debriefing?
- Do you understand the bid protest process?
- Do you understand the time and expense involved in a bid protest?
- Is this protest a good use of your company's resources?

The primary client motivations for protesting a government contract bid should include:

- Unfair treatment during the evaluation phase and award to an undeserving competitor;
- Need to obtain or keep the work; or
- To prevent an unqualified competitor from getting the work.

A company should not be filing a protest unless they are highly motivated and committed to doing all that is needed to win an award.

Developing Strategy for Bid Protests

In order to develop an effective strategy for a client's government contract bid protest, I work to understand the client's goals in filing a protest and develop a strategy to pursue those goals. In some cases, this may result in something less than a protest, such as an informal letter saying the contractor does not feel the procurement was done properly but has chosen not to protest.

The most important strategic issue to develop is the scope of the protest. There is always a tendency to take a shotgun approach, which can result in the primary issue getting lost in the noise. I prefer to highlight one to three critical issues that clearly show that something was done wrong. In many cases, there may be a number of possible errors, most of which are minor. Instead of raising all of these minor errors, you need to focus the protest on major points that clearly demonstrate the agency's award decision was unfair.

Unfortunately, it is hard to provide specific examples, as a protest is based on the facts and circumstances of each specific procurement. The key point to keep in mind is that the protests with the most likelihood of success are those that are clearly, concisely and convincingly focused on no more than three key points that demonstrate the unfairness of the bid process. It is also important to convince an independent evaluator (judge or hearing officer) that you have been injured because the agency

did not do what it is required to do by law, regulation and the terms of the RFP, RFQ, or IFB.

As noted, the components of every bid protest include a timely protest by an interested party involving the agency's failure to conduct the procurement in accordance with the terms set forth in the solicitation as well as applicable laws and regulations. However, there are hundreds of variations on this process—each protest stands on its own.

In order to reach a favorable outcome for a client in a bid protest negotiation, I always:

1. Work with the client to make sure there is both a legal case and a firm business case for protesting.
2. Carefully review the facts and circumstances involved in the protest to develop a clear, concise and compelling case.
3. Have the client discuss the issue informally, to the extent possible, with agency representatives. If that is not possible, I may call the agency counsel to explain our concerns. Bottom line, I first try to resolve the matter at the lowest possible level.
4. Start building a record of reasonableness at the earliest stage possible (i.e. we have been working hard to solve this problem and the agency has been ignoring us).
5. Keep personality out of the dispute (i.e. working with the agency in a professional manner at all times).

I always advise clients to aggressively protect their rights—but do not fight an issue unless there is a strong chance they are right. It is important to use protests as a strategic tool to ensure you have a fair chance at an award, as previously discussed.

The Negotiation Process: The Client's Role

Checklists to identify all the negotiating points for a bid protest have to be developed on a case-by-case basis. The client takes the lead in developing the checklist based on good legal advice and extensive discussions. We have to make sure the negotiating process accurately represents the client's objections and does not develop into a fight that

may be damaging to the client's relationship with the agency. The most challenging negotiation issue is typically overcoming the agency's inability to understand that it could have done something wrong—people do not like to be challenged.

A successful outcome of bid protest negotiations is a revision of the terms of the solicitation if an award has not been made or a recompute on fair terms if an award has been made. Such an outcome generally depends on the strength of your case and the agency's need to get the product or service. The more the agency needs the goods or services, the more likely it is that the agency will work to quickly resolve issues that prevent it from getting those goods or services.

Venue for Bid Protests

The GAO is the most common venue for government contract bid protests. If a GAO protest is made within the required time, it suspends the contract until the protest is resolved unless the head of the agency makes a written finding that they will be injured by a delayed award, which is rarely done. This is also the quickest forum, as a decision must be issued within one hundred days of the day the protest is filed. However, the biggest challenge of filing a protest with the GAO is time—there are a lot of documents to review and a protest document to be prepared, which must typically be done in a very short time period.

The Court of Federal Claims is a more expensive and complex forum. In order to stop performance, you must obtain an injunction, which is difficult to obtain. To obtain an injunction you must convince the Court that there is a “substantial risk of irreparable harm” to your company if performance is not suspended. Generally, the Courts do not consider financial harm to be “irreparable.” As financial harm is typically the harm you are seeking to avoid, it is very unlikely the Court will grant an injunction.

Key Legal Skills in Bid Protests and Helpful Resources

The most important legal skills for an attorney handling a government contract bid protest include knowledge of government contracting law

and regulations; the ability to quickly read and understand complex procurement documents; the ability to prepare a clear, concise, and compelling protest document involving complex factual and legal issues in a very short time; the ability to explain difficult concepts to the client and ensure they fully understand the pros and cons of filing a protest; and the ability to work with opposing counsel in a professional manner. These skills are typically developed through experience.

Technology, such as e-mail and the use of the Internet, can be used to support these legal skills. Protests can be filed electronically and e-mail is frequently used to pass communications between the parties. Simply stated, technology allows you to communicate quickly with the client; conduct the required research; organize the facts and circumstances; and quickly prepare a clear, concise, and compelling protest document explaining why you have been treated unfairly.

The most updated information in this area can be found on the GAO website and wifcon.com. Other valuable resources include statutes, regulations, contract provisions, texts, and “how-to” books.

Successful Strategies

It is hard to pinpoint a specific method or technique that is critical to success in government bid protests. Each protest is unique. The only common themes are a thorough review of the case before you file the protest and the preparation of a clear, concise, and compelling protest document.

I believe that the most important bid protest strategy is to limit protests to matters that are critical to your company. Protests are time consuming and expensive. In the short term, they create friction with the buying agency and could damage your relationships if you have ongoing contracts with the agency.

It is important to be firm but patient and reasonable in working with counsel representing the agency. In many cases, the agency’s response is initially hostile and agency counsel is uncooperative. This can be

overcome by taking the high road (i.e. avoid hostile and uncooperative behavior). You want to create an environment where the agency will be willing to work with you to understand the issues and take corrective action. A hostile relationship with agency counsel will only make the agency counsel more resistant without providing any benefit to your company.

Key Players in a Bid Protest Negotiation

There are several key players in a bid protest negotiation.

On the protestor's side: company individuals involved in the protest, outside counsel, consultants and experts are all key players. In many cases, outside counsel is required, as the court or GAO frequently issue protective orders that limit the release of competition sensitive information to outside counsel and experts.

On the agency side: key players include the contracting officer, the program manager, technical specialists, in-house agency counsel and protest counsel (in many agencies these are two different people). Depending on the nature of the case, there may be many others involved, some from a higher level than the contracting officer, some from a lower level.

The decision maker for a contracting officer protest would be the contracting officer. For an agency protest, it may be the head of the agency. For a GAO protest, the GAO will have an attorney assigned to the protest. For a court protest, a judge will be assigned to the case.

The bottom line is that on the protestor side you need to ensure that whoever is needed at the time is available. Protests run in a very tight time frame; therefore, delayed access to needed information can hurt the case.

Putting together the right team is critical to getting the best result. It is important to have a team that can handle complicated work with very short deadlines. Additionally, the individuals responsible for preparing the portions of the solicitation that are the subject of the protest need to be involved. I prefer starting off with a mixed group of management and

technical staff to brainstorm the various issues involved in the protest and to use the individuals from that group as needed going forward.

It is important to have individuals on the team who have the ability to immediately shift gears from whatever they doing to work on a protest issue and who are willing to put in the time needed to get the answer right.

Critical Timelines

In most protests, there are two critical ten-day periods. The first is ten days after the award to file a protest, to get the award suspended; and the second critical ten-day period is after the agency report is received to respond. In addition to these limits, any motions or problems that come up are handled in a matter of days and sometimes hours.

Essential elements of the protest timeline include the following:

- Protests based on the terms of a solicitation must be submitted before the due date.
- Most other protests have to be filed within ten days of the day the basis for the protest is first learned.
- The agency has thirty days to submit its report.
- Once the report is received, the protestor has two days to request documents be added to the report if the protestor does not feel it is complete.
- The protestor has ten days to file a response to the agency report.
- For a GAO protest, the final decision must be issued one hundred days after the protest is filed.

The most important management tool is daily checking on the status of the protest to ensure that what needs to be done on time is done on time.

Financial Costs and Benefits of Litigating a Bid Protest

The financial costs of litigating a bid protest are considerable. Even a relatively simple protest can take twenty to thirty hours of legal time to draft the protest document and another twenty to thirty hours to respond to the agency report. It is difficult to find an experienced protest attorney who will work for less than \$300 an hour. In Washington, D.C. and other major cities, charges will be more. In addition, the attorney will most likely need a paralegal to assist with the documents. For a simple protest, costs of \$15,000 to \$25,000 are the norm. A moderately complicated protest costs \$75,000 or more. A complicated protest could cost several hundred thousand dollars. To a large extent, the cost of the protest is closely related to the potential value of the work the protestor is hoping to get through a government contract award.

The primary financial benefits to clients of a successful outcome are winning and/or keeping the contract. If the protestor prevails on the protest, they can also recover attorney's fees. However, do not make the decision to protest based on the ability to recover attorney's fees. The protest decision must be based on the importance of the project to the company. Attorney's fees are not a guarantee if the protest is won. If the agency takes prompt corrective action after the protest is filed, attorney's fees are not recoverable.

Final Thoughts

Over the last eight years, U.S. Department of Defense spending has nearly doubled. There have been an increasing number of contracts awarded on an ID/IQ basis that may start with a small value and have a substantial increase over the course of the contract.

Over the last several years, the number of bid protests has also increased and the percentage of cases that has resulted in a decision for the protestor has increased to just less than 30 percent. However, it is important to keep in mind that the vast majority of protests are resolved without a decision—that is, the agency and the contractor work out the problem.

As spending on new contracts increases, so do the number of protests, as this is where the most dollars and the most high-dollar contracts are bid. At the time of this writing, the most significant protest involves the award of the Air Force tanker contract. In that case, the Boeing Company was able to convince the GAO that the agency improperly awarded the contract to Northrup Grumman. As a result, the competition was reopened giving Boeing a second chance at earning the award.

It is unusual for a single protest to impact future cases. Each protest is highly fact specific. The factor that is most significant to the outcome of any bid protest is that all communications supporting the protest are clear, concise, and compelling.

Cases, Statutes, Regulations

Statutes and regulations that are relevant to the matters covered include the Competition in Contracting Act; The Federal Acquisition Regulation and the various agency supplements; Title 4 of the Code of Federal Regulations (CFR), Part 21; and Court of Federal Claims Bid Protest Rules.

The following is a GAO publication listing significant cases over the last year: http://gao.gov/decisions/significant_cases.pdf

Recommended Reading

Court of Federal Claims Bid Protest Guidelines
(<http://www.abanet.org/contract/federal/bidpro/cofcguid.html>)

Court of Federal Claims Procedure for Filing a Bid Protest
(<http://www.uscfc.uscourts.gov/./node/4090>)

Bid Protests a Descriptive Guide, published by the GAO
(<http://gao.gov/decisions/bidpro/bid/d06797sp.pdf>)

Guide to GAO Protective Orders, publish by the GAO
(<http://gao.gov/special.pubs/d06716sp.pdf>)

Selected Recent GAO Protest Decisions, published by the GAO
(http://gao.gov/decisions/significant_cases.pdf)

2007 Bid Protest Statistics
(<http://www.gao.gov/special.pubs/bidpro07.pdf>)

Government Accountability Office Decision in the Protest of Boeing Company, June 18, 2008
(<http://www.gao.gov/decisions/bidpro/311344.htm>)

As mentioned, the best electronic source for information is a website called, “Where in Federal Contracting,” (wifcon.com), which lists all decisions by subject and by FAR provision. There are also numerous articles of interest on this website.

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Appendix A

FAR DEFINITIONS

Definition of terms that may be involved in
a bid protest from Section 2.101 of the
Federal Acquisition Regulation

Note: FAR 2.101 provides definitions for many of the unique terms involved in federal procurement. The terms below are typically involved in a bid protest. As a general rule, I recommend all contractor's read the entire list of definitions in FAR 2.101 in order to ensure your understanding of a term is the same as the Agency's.

Adequate evidence means information sufficient to support the reasonable belief that a particular act or omission has occurred.

Best value means the expected outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the requirement.

Broad agency announcement means a general announcement of an agency's research interest including criteria for selecting proposals and soliciting the participation of all offerors capable of satisfying the Government's needs (see 6.102(d)(2)).

Contract means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, *et seq.* For discussion of various types of contracts, see part 16.

Excluded Parties List System means an electronic database maintained and posted by the General Services Administration containing the list of all parties suspended, proposed for debarment, debarred, declared ineligible, or excluded or disqualified under the nonprocurement common rule by agencies, Government corporations, or by the Government Accountability Office.

Major system means that combination of elements that will function together to produce the capabilities required to fulfill a mission need. The elements may include hardware, equipment, software, or any combination thereof, but exclude construction or other improvements to real property. A system is a major system if—

- (1) The Department of Defense is responsible for the system and the total expenditures for research, development, test, and evaluation for the system are estimated to be more than \$173.5 million or the eventual total expenditure for the acquisition exceeds \$814.5 million;
- (2) A civilian agency is responsible for the system and total expenditures for the system are estimated to exceed \$1.8 million or the dollar threshold for a “major system” established by the agency pursuant to Office of Management and Budget Circular A–109, entitled “Major System Acquisitions,” whichever is greater; or
- (3) The system is designated a “major system” by the head of the agency responsible for the system (10 U.S.C. 2302 and 41 U.S.C. 403).

Offer means a response to a solicitation that, if accepted, would bind the offeror to perform the resultant contract. Responses to invitations for bids (sealed bidding) are offers called “bids” or “sealed bids”; responses to requests for proposals (negotiation) are offers called “proposals”; however, responses to requests for quotations (simplified acquisition) are “quotations,” not offers. For unsolicited proposals, see subpart 15.6.

Offeror means offeror or bidder.

Sole source acquisition means a contract for the purchase of supplies or services that is entered into or proposed to be entered into by an agency after soliciting and negotiating with only one source.

Solicitation means any request to submit offers or quotations to the Government. Solicitations under sealed bid procedures are called “invitations for bids.” *Solicitations* under negotiated procedures are called “requests for proposals.” Solicitations under simplified acquisition procedures may require submission of either a quotation or an offer.

Solicitation provision or *provision* means a term or condition used only in solicitations and applying only before contract award.

Source selection information means any of the following information that is prepared for use by an agency for the purpose of evaluating a bid or proposal to enter into an agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

- (1) Bid prices submitted in response to an agency invitation for bids, or lists of those bid prices before bid opening.
- (2) Proposed costs or prices submitted in response to an agency solicitation, or lists of those proposed costs or prices.
- (3) Source selection plans.
- (4) Technical evaluation plans.
- (5) Technical evaluations of proposals.
- (6) Cost or price evaluations of proposals.
- (7) Competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract.
- (8) Rankings of bids, proposals, or competitors.
- (9) Reports and evaluations of source selection panels, boards, or advisory councils.
- (10) Other information marked as “Source Selection Information—See FAR 2.101 and 3.104” based on a case-by-case determination by the head of the agency or the contracting officer, that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates.

Statement of Objectives (SOO) means a Government-prepared document incorporated into the solicitation that states the overall performance objectives. It is used in solicitations when the Government intends to provide the maximum flexibility to each offeror to propose an innovative approach.

Substantially as follows or substantially the same as, when used in the prescription and introductory text of a provision or clause, means that authorization is granted to prepare and utilize a variation of that provision or clause to accommodate requirements that are peculiar to an individual acquisition; provided that the variation includes the salient features of the FAR provision or clause, and is not inconsistent with the intent, principle, and substance of the FAR provision or clause or related coverage of the subject matter.

Technical data means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer databases and computer software documentation). This term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. The term includes recorded information of a scientific or technical nature that is included in computer databases (See 41 U.S.C. 403(8)).

Appendix B

SUBPART 15.1 - SOURCE SELECTION PROCESSES AND TECHNIQUES

15.100 Scope of subpart.

This subpart describes some of the acquisition processes and techniques that may be used to design competitive acquisition strategies suitable for the specific circumstances of the acquisition.

15.101 Best value continuum.

An agency can obtain best value in negotiated acquisitions by using any one or a combination of source selection approaches. In different types of acquisitions, the relative importance of cost or price may vary. For example, in acquisitions where the requirement is clearly definable and the risk of unsuccessful contract performance is minimal, cost or price may play a dominant role in source selection. The less definitive the requirement, the more development work required, or the greater the performance risk, the more technical or past performance considerations may play a dominant role in source selection.

15.101-1 Tradeoff process.

- (a) A tradeoff process is appropriate when it may be in the best interest of the Government to consider award to other than the lowest priced offeror or other than the highest technically rated offeror.
- (b) When using a tradeoff process, the following apply:
 - (1) All evaluation factors and significant subfactors that will affect contract award and their relative importance shall be clearly stated in the solicitation; and
 - (2) The solicitation shall state whether all evaluation factors other than cost or price, when combined, are significantly more important than, approximately equal to, or significantly less important than cost or price.

(c) This process permits tradeoffs among cost or price and non-cost factors and allows the Government to accept other than the lowest priced proposal. The perceived benefits of the higher priced proposal shall merit the additional cost, and the rationale for tradeoffs must be documented in the file in accordance with 15.406.

15.101-2 Lowest price technically acceptable source selection process.

(a) The lowest price technically acceptable source selection process is appropriate when best value is expected to result from selection of the technically acceptable proposal with the lowest evaluated price.

(b) When using the lowest price technically acceptable process, the following apply:

(1) The evaluation factors and significant subfactors that establish the requirements of acceptability shall be set forth in the solicitation. Solicitations shall specify that award will be made on the basis of the lowest evaluated price of proposals meeting or exceeding the acceptability standards for non-cost factors. If the contracting officer documents the file pursuant to 15.304(c)(3)(iv), past performance need not be an evaluation factor in lowest price technically acceptable source selections. If the contracting officer elects to consider past performance as an evaluation factor, it shall be evaluated in accordance with 15.305. However, the comparative assessment in 15.305(a)(2)(i) does not apply. If the contracting officer determines that a small business' past performance is not acceptable, the matter shall be referred to the Small Business Administration for a Certificate of Competency determination, in accordance with the procedures contained in subpart 19.6 and 15 U.S.C. 637(b)(7)).

(2) Tradeoffs are not permitted.

(3) Proposals are evaluated for acceptability but not ranked using the non-cost/price factors.

(4) Exchanges may occur (see 15.306).

[62 FR 51230, Sept. 30, 1997, as amended at 64 FR 72443, Dec. 27, 1999]

15.102 Oral presentations.

(a) Oral presentations by offerors as requested by the Government may substitute for, or augment, written information. Use of oral presentations as a substitute for portions of a proposal can be effective in streamlining the source selection process. Oral presentations may occur at any time in the acquisition process, and are subject to the same restrictions as written information, regarding timing (see 15.208) and content (see 15.306). Oral presentations provide an opportunity for dialogue among the parties. Pre-recorded videotaped presentations that lack real-time interactive dialogue are not considered oral presentations for the purposes of this section, although they may be included in offeror submissions, when appropriate.

(b) The solicitation may require each offeror to submit part of its proposal through oral presentations. However, representations and certifications shall be submitted as required in the FAR provisions at 52.204–8(c) or 52.212–3(b), and a signed offer sheet (including any exceptions to the Government's terms and conditions) shall be submitted in writing.

(c) Information pertaining to areas such as an offeror's capability, past performance, work plans or approaches, staffing resources, transition plans, or sample tasks (or other types of tests) may be suitable for oral presentations. In deciding what information to obtain through an oral presentation, consider the following:

- (1) The Government's ability to adequately evaluate the information;
- (2) The need to incorporate any information into the resultant contract;
- (3) The impact on the efficiency of the acquisition; and
- (4) The impact (including cost) on small businesses. In considering the costs of oral presentations, contracting officers should also consider alternatives to on-site oral presentations (e.g., teleconferencing, video teleconferencing).

(d) When oral presentations are required, the solicitation shall provide offerors with sufficient information to prepare them. Accordingly, the solicitation may describe—

(1) The types of information to be presented orally and the associated evaluation factors that will be used;

(2) The qualifications for personnel that will be required to provide the oral presentation(s);

(3) The requirements for, and any limitations and/or prohibitions on, the use of written material or other media to supplement the oral presentations;

(4) The location, date, and time for the oral presentations;

(5) The restrictions governing the time permitted for each oral presentation; and

(6) The scope and content of exchanges that may occur between the Government's participants and the offeror's representatives as part of the oral presentations, including whether or not discussions (see 15.306(d)) will be permitted during oral presentations.

(e) The contracting officer shall maintain a record of oral presentations to document what the Government relied upon in making the source selection decision. The method and level of detail of the record (e.g., videotaping, audio tape recording, written record, Government notes, copies of offeror briefing slides or presentation notes) shall be at the discretion of the source selection authority. A copy of the record placed in the file may be provided to the offeror.

(f) When an oral presentation includes information that the parties intend to include in the contract as material terms or conditions, the information shall be put in writing. Incorporation by reference of oral statements is not permitted.

(g) If, during an oral presentation, the Government conducts discussions (see 15.306(d)), the Government must comply with 15.306 and 15.307.

Appendix C

15.505 PREAWARD DEBRIEFING OF OFFERORS

Offerors excluded from the competitive range or otherwise excluded from the competition before award may request a debriefing before award (10 U.S.C. 2305(b)(6)(A) and 41 U.S.C. 253b(f)–(h)).

(a)(1) The offeror may request a preaward debriefing by submitting a written request for debriefing to the contracting officer within 3 days after receipt of the notice of exclusion from the competition.

(2) At the offeror's request, this debriefing may be delayed until after award. If the debriefing is delayed until after award, it shall include all information normally provided in a postaward debriefing (see 15.506(d)). Debriefings delayed pursuant to this paragraph could affect the timeliness of any protest filed subsequent to the debriefing.

(3) If the offeror does not submit a timely request, the offeror need not be given either a preaward or a postaward debriefing. Offerors are entitled to no more than one debriefing for each proposal.

(b) The contracting officer shall make every effort to debrief the unsuccessful offeror as soon as practicable, **but may refuse the request for a debriefing if, for compelling reasons, it is not in the best interests of the Government to conduct a debriefing at that time.** The rationale for delaying the debriefing shall be documented in the contract file. If the contracting officer delays the debriefing, it shall be provided no later than the time postaward debriefings are provided under 15.506. In that event, the contracting officer shall include the information at 15.506(d) in the debriefing.

(c) Debriefings may be done orally, in writing, or by any other method acceptable to the contracting officer.

(d) The contracting officer should normally chair any debriefing session held. Individuals who conducted the evaluations shall provide support.

(e) At a minimum, preaward debriefings shall include—

- (1) The agency's evaluation of significant elements in the offeror's proposal;
- (2) A summary of the rationale for eliminating the offeror from the competition; and
- (3) Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed in the process of eliminating the offeror from the competition.

(f) Preaward debriefings shall not disclose—

- (1) The number of offerors;
- (2) The identity of other offerors;
- (3) The content of other offerors proposals;
- (4) The ranking of other offerors;
- (5) The evaluation of other offerors; or
- (6) Any of the information prohibited in 15.506(e).

(g) An official summary of the debriefing shall be included in the contract file.

Appendix D

15.506 POSTAWARD DEBRIEFING OF OFFERORS

(a)(1) An offeror, upon its written request received by the agency **within 3 days after the date on which that offeror has received notification of contract award in** accordance with 15.503(b), shall be debriefed and furnished the basis for the selection decision and contract award.

(2) **To the maximum extent practicable, the debriefing should occur within 5 days after receipt of the written request.** Offerors that requested a postaward debriefing in lieu of a preaward debriefing, or whose debriefing was delayed for compelling reasons beyond contract award, also should be debriefed within this time period.

(3) An offeror that was notified of exclusion from the competition (see 15.505(a)), but failed to submit a timely request, is not entitled to a debriefing.

(4)(i) Untimely debriefing requests may be accommodated.

(ii) **Government accommodation of a request for delayed debriefing pursuant to 15.505(a)(2), or any untimely debriefing request, does not automatically extend the deadlines for filing protests.** Debriefings delayed pursuant to 15.505(a)(2) could affect the timeliness of any protest filed subsequent to the debriefing.

(b) Debriefings of successful and unsuccessful offerors may be done orally, in writing, or by any other method acceptable to the contracting officer.

(c) The contracting officer should normally chair any debriefing session held. Individuals who conducted the evaluations shall provide support.

(d) At a minimum, the debriefing information shall include—

(1) The Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal, if applicable;

(2) The overall evaluated cost or price (including unit prices), and technical rating, if applicable, of the successful offeror and the debriefed offeror, and past performance information on the debriefed offeror;

(3) The overall ranking of all offerors, when any ranking was developed by the agency during the source selection;

(4) A summary of the rationale for award;

(5) For acquisitions of commercial items, the make and model of the item to be delivered by the successful offeror; and

(6) Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.

(e) The debriefing shall not include point-by-point comparisons of the debriefed offeror's proposal with those of other offerors. Moreover, the debriefing shall not reveal any information prohibited from disclosure by 24.202 or exempt from release under the Freedom of Information Act (5 U.S.C. 552) including—

(1) Trade secrets;

(2) Privileged or confidential manufacturing processes and techniques;

(3) Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information; and

(4) The names of individuals providing reference information about an offeror's past performance.

(f) An official summary of the debriefing shall be included in the contract file.

Appendix E

15.507 PROTESTS AGAINST AWARD

(a) Protests against award in negotiated acquisitions shall be handled in accordance with part 33. Use of agency protest procedures that incorporate the alternative dispute resolution provisions of Executive Order 12979 is encouraged for both preaward and postaward protests.

(b) If a protest causes the agency, within 1 year of contract award, to—

(1) Issue a new solicitation on the protested contract award, the contracting officer shall provide the information in paragraph (c) of this section to all prospective offerors for the new solicitation; or

(2) Issue a new request for revised proposals on the protested contract award, the contracting officer shall provide the information in paragraph (c) of this section to offerors that were in the competitive range and are requested to submit revised proposals.

(c) The following information will be provided to appropriate parties:

(1) Information provided to unsuccessful offerors in any debriefings conducted on the original award regarding the successful offeror's proposal; and

(2) Other nonproprietary information that would have been provided to the original offerors.

Appendix F

PART 33—PROTESTS, DISPUTES, AND APPEALS

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

33.000 Scope of part.

This part prescribes policies and procedures for filing protests and for processing contract disputes and appeals.

[50 FR 2270, Jan. 15, 1985]

Subpart 33.1—Protests

33.101 Definitions.

As used in this subpart—

Day means a calendar day, unless otherwise specified. In the computation of any period—

- (1) The day of the act, event, or default from which the designated period of time begins to run is not included; and
- (2) The last day after the act, event, or default is included unless—
 - (i) The last day is a Saturday, Sunday, or Federal holiday; or
 - (ii) In the case of a filing of a paper at any appropriate administrative forum, the last day is a day on which weather or other conditions cause the closing of the forum for all or part of the day, in which event the next day on which the appropriate administrative forum is open is included.

Filed means the complete receipt of any document by an agency before its close of business. Documents received after close of business are

considered filed as of the next day. Unless otherwise stated, the agency close of business is presumed to be 4:30 p.m., local time.

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.

Protest means a written objection by an interested party to any of the following:

- (1) A solicitation or other request by an agency for offers for a contract for the procurement of property or services.
- (2) The cancellation of the solicitation or other request.
- (3) An award or proposed award of the contract.
- (4) A termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

[50 FR 2270, Jan. 15, 1985, as amended at 53 FR 43391, Oct. 26, 1988; 54 FR 19827, May 8, 1989; 60 FR 48225, Sept. 18, 1995; 62 FR 64933, Dec. 9, 1997; 66 FR 2132, Jan. 10, 2001]

33.102 General.

(a) Contracting officers shall consider all protests and seek legal advice, whether protests are submitted before or after award and whether filed directly with the agency or the Government Accountability Office (GAO). (See 19.302 for protests of small business status, 19.305 for protests of disadvantaged business status, and 19.307 for protests of service-disabled veteran-owned small business status.)

(b) If, in connection with a protest, the head of an agency determines that a solicitation, proposed award, or award does not comply with the requirements of law or regulation, the head of the agency may—

(1) Take any action that could have been recommended by the Comptroller General had the protest been filed with the Government Accountability Office;

(2) Pay appropriate costs as stated in 33.104(h);

(3) Require the awardee to reimburse the Government's costs, as provided in this paragraph, where a post-award protest is sustained as the result of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification. In addition to any other remedy available, and pursuant to the requirements of Subpart 32.6, the Government may collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government.

(i) When a protest is sustained by GAO under circumstances that may allow the Government to seek reimbursement for protest costs, the contracting officer will determine whether the protest was sustained based on the awardee's negligent or intentional misrepresentation. If the protest was sustained on several issues, protest costs shall be apportioned according to the costs attributable to the awardee's actions.

(ii) The contracting officer shall review the amount of the debt, degree of the awardee's fault, and costs of collection, to determine whether a demand for reimbursement ought to be made. If it is in the best interests of the Government to seek reimbursement, the contracting officer shall notify the contractor in writing of the nature and amount of the debt, and the intention to collect by offset if necessary. Prior to issuing a final decision, the contracting officer shall afford the contractor an opportunity to inspect and copy agency records pertaining to the debt to the extent permitted by statute and regulation, and to request review of the matter by the head of the contracting activity.

(iii) When appropriate, the contracting officer shall also refer the matter to the agency debarment official for consideration under Subpart 9.4.

(c) In accordance with 31 U.S.C. 1558, with respect to any protest filed with the GAO, if the funds available to the agency for a contract at the time a protest is filed in connection with a solicitation for, proposed award of, or award of such a contract would otherwise expire, such funds shall remain available for obligation for 100 days after the date on which the final ruling is made on the protest. A ruling is considered final on the date on which the time allowed for filing an appeal or request for reconsideration has expired, or the date on which a decision is rendered on such appeal or request, whichever is later.

(d) *Protest likely after award.* The contracting officer may stay performance of a contract within the time period contained in 33.104(c)(1) if the contracting officer makes a written determination that—

(1) A protest is likely to be filed; and

(2) Delay of performance is, under the circumstances, in the best interests of the United States.

(e) An interested party wishing to protest is encouraged to seek resolution within the agency (see 33.103) before filing a protest with the GAO, but may protest to the GAO in accordance with GAO regulations (4 CFR part 21).

(f) No person may file a protest at GAO for a procurement integrity violation unless that person reported to the contracting officer the information constituting evidence of the violation within 14 days after the person first discovered the possible violation (41 U.S.C. 423(g)).

[50 FR 2270, Jan. 15, 1985, as amended at 55 FR 38517, Sept. 18, 1990; 55 FR 52795, Dec. 21, 1990; 60 FR 48226, 48275, Sept. 18, 1995; 61 FR 41470, Aug. 8, 1996; 61 FR 67411, Dec. 20, 1996; 62 FR 233, Jan. 2, 1997; 63 FR 35724, June 30, 1998; 69 FR 25279, May 5, 2004; 71 FR 36941, June 28, 2006; 71 FR 57380, Sept. 28, 2006]

33.103 Protests to the agency.

(a) *Reference.* Executive Order 12979, Agency Procurement Protests, establishes policy on agency procurement protests.

(b) Prior to submission of an agency protest, all parties shall use their best efforts to resolve concerns raised by an interested party at the contracting officer level through open and frank discussions.

(c) The agency should provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests. Where appropriate, the use of alternative dispute resolution techniques, third party neutrals, and another agency's personnel are acceptable protest resolution methods.

(d) The following procedures are established to resolve agency protests effectively, to build confidence in the Government's acquisition system, and to reduce protests outside of the agency:

(1) Protests shall be concise and logically presented to facilitate review by the agency. Failure to substantially comply with any of the requirements of paragraph (d)(2) of this section may be grounds for dismissal of the protest.

(2) Protests shall include the following information:

(i) Name, address, and fax and telephone numbers of the protester.

(ii) Solicitation or contract number.

(iii) Detailed statement of the legal and factual grounds for the protest, to include a description of resulting prejudice to the protester.

(iv) Copies of relevant documents.

(v) Request for a ruling by the agency.

(vi) Statement as to the form of relief requested.

(vii) All information establishing that the protester is an interested party for the purpose of filing a protest.

(viii) All information establishing the timeliness of the protest.

(3) All protests filed directly with the agency will be addressed to the contracting officer or other official designated to receive protests.

(4) In accordance with agency procedures, interested parties may request an independent review of their protest at a level above the contracting officer; solicitations should advise potential bidders and offerors that this review is available. Agency procedures and/or solicitations shall notify potential bidders and offerors whether this independent review is available as an alternative to consideration by the contracting officer of a protest or is available as an appeal of a contracting officer decision on a protest. Agencies shall designate the official(s) who are to conduct this independent review, but the official(s) need not be within the contracting officer's supervisory chain. When practicable, officials designated to conduct the independent review should not have had previous personal involvement in the procurement. If there is an agency appellate review of the contracting officer's decision on the protest, it will not extend GAO's timeliness requirements. Therefore, any subsequent protest to the GAO must be filed within 10 days of knowledge of initial adverse agency action (4 CFR 21.2(a)(3)).

(e) Protests based on alleged apparent improprieties in a solicitation shall be filed before bid opening or the closing date for receipt of proposals. In all other cases, protests shall be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier. The agency, for good cause shown, or where it determines that a protest raises issues significant to the agency's acquisition system, may consider the merits of any protest which is not timely filed.

(f) *Action upon receipt of protest.*

(1) Upon receipt of a protest before award, a contract may not be awarded, pending agency resolution of the protest, unless contract award is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government. Such justification or determination shall be approved at a level above the contracting officer, or by another official pursuant to agency procedures.

(2) If award is withheld pending agency resolution of the protest, the contracting officer will inform the offerors whose offers might become eligible for award of the contract. If appropriate, the offerors should be requested, before expiration of the time for acceptance of their offers, to extend the time for acceptance to avoid the need for resolicitation. In the event of failure to obtain such extension of offers, consideration should be given to proceeding with award pursuant to paragraph (f)(1) of this section.

(3) Upon receipt of a protest within 10 days after contract award or within 5 days after a debriefing date offered to the protester under a timely debriefing request in accordance with 15.505 or 15.506, whichever is later, the contracting officer shall immediately suspend performance, pending resolution of the protest within the agency, including any review by an independent higher level official, unless continued performance is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government. Such justification or determination shall be approved at a level above the contracting officer, or by another official pursuant to agency procedures.

(4) Pursuing an agency protest does not extend the time for obtaining a stay at GAO. Agencies may include, as part of the agency protest process, a voluntary suspension period when agency protests are denied and the protester subsequently files at GAO.

(g) Agencies shall make their best efforts to resolve agency protests within 35 days after the protest is filed. To the extent permitted by law and regulation, the parties may exchange relevant information.

(h) Agency protest decisions shall be well-reasoned, and explain the agency position. The protest decision shall be provided to the protester using a method that provides evidence of receipt.

[61 FR 39219, July 29, 1996, as amended at 61 FR 69289, Dec. 31, 1996; 62 FR 270, Jan. 2, 1997; 62 FR 10710, Mar. 10, 1997; 62 FR 51271, Sept. 30, 1997]

33.104 Protests to GAO.

Procedures for protests to GAO are found at 4 CFR Part 21 (GAO Bid Protest Regulations). In the event guidance concerning GAO procedure in this section conflicts with 4 CFR Part 21, 4 CFR Part 21 governs.

(a) General procedures.

(1) A protester is required to furnish a copy of its complete protest to the official and location designated in the solicitation or, in the absence of such a designation, to the contracting officer, so it is received no later than 1 day after the protest is filed with the GAO. The GAO may dismiss the protest if the protester fails to furnish a complete copy of the protest within 1 day.

(2) Immediately after receipt of the GAO's written notice that a protest has been filed, the agency shall give notice of the protest to the contractor if the award has been made, or, if no award has been made, to all parties who appear to have a reasonable prospect of receiving award if the protest is denied. The agency shall furnish copies of the protest submissions to such parties with instructions to (i) communicate directly with the GAO, and (ii) provide copies of any such communication to the agency and to other participating parties when they become known. However, if the protester has identified sensitive information and requests a protective order, then the contracting officer shall obtain a redacted version from the protester to furnish to other interested parties, if one has not already been provided.

(3)

(i) Upon notice that a protest has been filed with the GAO, the contracting officer shall immediately begin

compiling the information necessary for a report to the GAO. The agency shall submit a complete report to the GAO within 30 days after the GAO notifies the agency by telephone that a protest has been filed, or within 20 days after receipt from the GAO of a determination to use the express option, unless the GAO—

(A) Advises the agency that the protest has been dismissed; or

(B) Authorizes a longer period in response to an agency's request for an extension. Any new date is documented in the agency's file.

(ii) When a protest is filed with the GAO, and an actual or prospective offeror so requests, the procuring agency shall, in accordance with any applicable protective orders, provide actual or prospective offerors reasonable access to the protest file. However, if the GAO dismisses the protest before the documents are submitted to the GAO, then no protest file need be made available. Information exempt from disclosure under 5 U.S.C. 552 may be redacted from the protest file. The protest file shall be made available to non-intervening actual or prospective offerors within a reasonable time after submittal of an agency report to the GAO. The protest file shall include an index and as appropriate—

(A) The protest;

(B) The offer submitted by the protester;

(C) The offer being considered for award or being protested;

(D) All relevant evaluation documents;

(E) The solicitation, including the specifications or portions relevant to the protest;

(F) The abstract of offers or relevant portions; and

(G) Any other documents that the agency determines are relevant to the protest, including documents specifically requested by the protester.

(iii) At least 5 days prior to the filing of the report, in cases in which the protester has filed a request for specific documents, the agency shall provide to all parties and the GAO a list of those documents, or portions of documents, that the agency has released to the protester or intends to produce in its report, and those documents that the agency intends to withhold from the protester and the reasons for the proposed withholding. Any objection to the scope of the agency's proposed disclosure or nondisclosure of the documents must be filed with the GAO and the other parties within 2 days after receipt of this list.

(iv) The agency report to the GAO shall include—

(A) A copy of the documents described in 33.104(a)(3)(ii);

(B) The contracting officer's signed statement of relevant facts, including a best estimate of the contract value, and a memorandum of law. The contracting officer's statement shall set forth findings, actions, and recommendations, and any additional evidence or information not provided in the protest file that may be necessary to determine the merits of the protest; and

(C) A list of parties being provided the documents.

(4)

(i) At the same time the agency submits its report to the GAO, the agency shall furnish copies of its report to the

protester and any intervenors. A party shall receive all relevant documents, except—

(A) Those that the agency has decided to withhold from that party for any reason, including those covered by a protective order issued by the GAO. Documents covered by a protective order shall be released only in accordance with the terms of the order. Examples of documents the agency may decide to exclude from a copy of the report include documents previously furnished to or prepared by a party; classified information; and information that would give the party a competitive advantage; and

(B) Protester's documents which the agency determines, pursuant to law or regulation, to withhold from any interested party.

(ii)

(A) If the protester requests additional documents within 2 days after the protester knew the existence or relevance of additional documents, or should have known, the agency shall provide the requested documents to the GAO within 2 days of receipt of the request.

(B) The additional documents shall also be provided to the protester and other interested parties within this 2-day period unless the agency has decided to withhold them for any reason (see subdivision (a)(4)(i) of this section). This includes any documents covered by a protective order issued by the GAO. Documents covered by a protective order shall be provided only in accordance with the terms of the order.

(C) The agency shall notify the GAO of any documents withheld from the protester and other interested parties and shall state the reasons for withholding them.

(5) The GAO may issue protective orders which establish terms, conditions, and restrictions for the provision of any document to an interested party. Protective orders prohibit or restrict the disclosure by the party of procurement sensitive information, trade secrets or other proprietary or confidential research, development or commercial information that is contained in such document. Protective orders do not authorize withholding any documents or information from the United States Congress or an executive agency.

(i) *Requests for protective orders.* Any party seeking issuance of a protective order shall file its request with the GAO as soon as practicable after the protest is filed, with copies furnished simultaneously to all parties.

(ii) *Exclusions and rebuttals.* Within 2 days after receipt of a copy of the protective order request, any party may file with the GAO a request that particular documents be excluded from the coverage of the protective order, or that particular parties or individuals be included in or excluded from the protective order. Copies of the request shall be furnished simultaneously to all parties.

(iii) *Additional documents.* If the existence or relevance of additional documents first becomes evident after a protective order has been issued, any party may request that these additional documents be covered by the protective order. Any party to the protective order also may request that individuals not already covered by the protective order be included in the order. Requests shall be filed with the GAO, with copies furnished simultaneously to all parties.

(iv) *Sanctions and remedies.* The GAO may impose appropriate sanctions for any violation of the terms of the protective order. Improper disclosure of protected information will entitle the aggrieved party to all appropriate remedies under law or equity. The GAO may also take appropriate action against an agency which fails to provide documents designated in a protective order.

(6) The protester and other interested parties are required to furnish a copy of any comments on the agency report directly to the GAO within 10 days, or 5 days if express option is used, after receipt of the report, with copies provided to the contracting officer and to other participating interested parties. If a hearing is held, these comments are due within 5 days after the hearing.

(7) Agencies shall furnish the GAO with the name, title, and telephone number of one or more officials (in both field and headquarters offices, if desired) whom the GAO may contact who are knowledgeable about the subject matter of the protest. Each agency shall be responsible for promptly advising the GAO of any change in the designated officials.

(b) *Protests before award.*

(1) When the agency has received notice from the GAO of a protest filed directly with the GAO, a contract may not be awarded unless authorized, in accordance with agency procedures, by the head of the contracting activity, on a nondelegable basis, upon a written finding that—

(i) Urgent and compelling circumstances which significantly affect the interest of the United States will not permit awaiting the decision of the GAO; and

(ii) Award is likely to occur within 30 days of the written finding.

(2) A contract award shall not be authorized until the agency has notified the GAO of the finding in subparagraph (b)(1) of this section.

(3) When a protest against the making of an award is received and award will be withheld pending disposition of the protest, the contracting officer should inform the offerors whose offers might become eligible for award of the protest. If appropriate, those offerors should be requested, before expiration of the time for acceptance of their offer, to extend the time for acceptance to avoid the need for resolicitation. In the event of failure to obtain such extensions of offers, consideration should be given to proceeding under subparagraph (b)(1) of this section.

(c) *Protests after award.*

(1) When the agency receives notice of a protest from the GAO within 10 days after contract award or within 5 days after a debriefing date offered to the protester for any debriefing that is required by 15.505 or 15.506, whichever is later, the contracting officer shall immediately suspend performance or terminate the awarded contract, except as provided in paragraphs (c) (2) and (3) of this section.

(2) In accordance with agency procedures, the head of the contracting activity may, on a nondelegable basis, authorize contract performance, notwithstanding the protest, upon a written finding that—

(i) Contract performance will be in the best interests of the United States; or

(ii) Urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for the GAO's decision.

(3) Contract performance shall not be authorized until the agency has notified the GAO of the finding in subparagraph (c)(2) of this section.

(4) When it is decided to suspend performance or terminate the awarded contract, the contracting officer should attempt to negotiate a mutual agreement on a no-cost basis.

(5) When the agency receives notice of a protest filed with the GAO after the dates contained in subparagraph (c)(1), the contracting officer need not suspend contract performance or terminate the awarded contract unless the contracting officer believes that an award may be invalidated and a delay in receiving the supplies or services is not prejudicial to the Government's interest.

(d) *Findings and notice.* If the decision is to proceed with contract award, or continue contract performance under paragraphs (b) or (c) of this section, the contracting officer shall include the written findings or other required documentation in the file. The contracting officer also shall give written notice of the decision to the protester and other interested parties.

(e) *Hearings.* The GAO may hold a hearing at the request of the agency, a protester, or other interested party who has responded to the notice in paragraph (a)(2) of this section. A recording or transcription of the hearing will normally be made, and copies may be obtained from the GAO. All parties may file comments on the hearing and the agency report within 5 days of the hearing.

(f) *GAO decision time.* GAO issues its recommendation on a protest within 100 days from the date of filing of the protest with the GAO, or within 65 days under the express option. The GAO attempts to issue its recommendation on an amended protest that adds a new ground of protest within the time limit of the initial protest. If an amended protest cannot be resolved within the initial time limit, the GAO may resolve the amended protest through an express option.

(g) *Notice to GAO.* If the agency has not fully implemented the GAO recommendations with respect to a solicitation for a contract or an award or a proposed award of a contract within 60 days of receiving the GAO recommendations, the head of the contracting activity responsible for that contract shall report the failure to the GAO not later than 5 days after the expiration of the 60-day period. The report shall explain the reasons why

the GAO's recommendation, exclusive of costs, has not been followed by the agency.

(h) *Award of costs.*

- (1) If the GAO determines that a solicitation for a contract, a proposed award, or an award of a contract does not comply with a statute or regulation, the GAO may recommend that the agency pay to an appropriate protester the cost, exclusive of profit, of filing and pursuing the protest, including reasonable attorney, consultant, and expert witness fees, and bid and proposal preparation costs. The agency shall use funds available for the procurement to pay the costs awarded.
- (2) The protester shall file its claim for costs with the contracting agency within 60 days after receipt of the GAO's recommendation that the agency pay the protester its costs. Failure to file the claim within that time may result in forfeiture of the protester's right to recover its costs.
- (3) The agency shall attempt to reach an agreement on the amount of costs to be paid. If the agency and the protester are unable to agree on the amount to be paid, the GAO may, upon request of the protester, recommend to the agency the amount of costs that the agency should pay.
- (4) Within 60 days after the GAO recommends the amount of costs the agency should pay the protester, the agency shall notify the GAO of the action taken by the agency in response to the recommendation.
- (5) No agency shall pay a party, other than a small business concern within the meaning of section 3(a) of the Small Business Act (see 2.101, "Small business concern"), costs under paragraph (h)(2) of this section—

- (i) For consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by

the Government pursuant to 5 U.S.C. 3109 and 5 CFR 304.105; or

(ii) For attorney's fees that exceed \$150 per hour, unless the agency determines, based on the recommendation of the Comptroller General on a case-by-case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. The cap placed on attorneys' fees for businesses, other than small businesses, constitutes a benchmark as to a "reasonable" level for attorney's fees for small businesses.

(6) Before paying a recommended award of costs, agency personnel should consult legal counsel. Section 33.104(h) applies to all recommended awards of costs that have not yet been paid.

(7) Any costs the contractor receives under this section shall not be the subject of subsequent proposals, billings, or claims against the Government, and those exclusions should be reflected in the cost agreement.

(8) If the Government pays costs, as provided in paragraph (h)(1) of this section, where a postaward protest is sustained as the result of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification, the Government may require the awardee to reimburse the Government the amount of such costs. In addition to any other remedy available, and pursuant to the requirements of subpart 32.6, the Government may collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government.

[57 FR 60585, Dec. 21, 1992, as amended at 60 FR 48227, 48275, Sept. 18, 1995; 61 FR 41470, Aug. 8, 1996; 61 FR 69289, Dec. 31, 1996; 62 FR 12718, Mar. 17, 1997; 62 FR 51271, Sept. 30, 1997; 62 FR 64933, Dec. 9, 1997; 63 FR 1532, Jan. 9, 1998; 63 FR 58603, Oct. 30, 1998; 72 FR 63065, Nov. 7, 2007]

33.105 [Reserved]

33.106 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 52.233–2, Service of Protest, in solicitations for contracts expected to exceed the simplified acquisition threshold.

(b) The contracting officer shall insert the clause at 52.233–3, Protest After Award, in all solicitations and contracts. If a cost reimbursement contract is contemplated, the contracting officer shall use the clause with its *Alternate I*.

[50 FR 25681, June 20, 1985, as amended at 60 FR 34759, July 3, 1995]

Subpart 33.2—Disputes and Appeals

Source: 48 FR 42349, Sept. 19, 1983, unless otherwise noted. Redesignated at 50 FR 2270, Jan. 15, 1985.

33.201 Definitions.

As used in this subpart—

Accrual of a claim means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred.

Alternative dispute resolution (ADR) means any type of procedure or combination of procedures voluntarily used to resolve issues in controversy. These procedures may include, but are not limited to, conciliation, facilitation, mediation, fact-finding, minitrials, arbitration, and use of ombudsmen.

Defective certification means a certificate which alters or otherwise deviates from the language in 33.207(c) or which is not executed by a person duly authorized to bind the contractor with respect to the claim. Failure to certify shall not be deemed to be a defective certification.

Issue in controversy means a material disagreement between the Government and the contractor that (1) may result in a claim or (2) is all or part of an existing claim.

Misrepresentation of fact means a false statement of substantive fact, or any conduct which leads to the belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

[48 FR 42349, Sept. 19, 1983. Redesignated and amended at 50 FR 2270, Jan. 15, 1985; 56 FR 67417, Dec. 30, 1991; 59 FR 11381, Mar. 10, 1994; 60 FR 48230, Sept. 18, 1995; 63 FR 58594, Oct. 30, 1998; 66 FR 2132, Jan. 10, 2001; 67 FR 43514, June 27, 2002]

33.202 Contract Disputes Act of 1978.

The Contract Disputes Act of 1978, as amended (41 U.S.C. 601–613) (the Act), establishes procedures and requirements for asserting and resolving claims subject to the Act. In addition, the Act provides for: (a) the payment of interest on contractor claims; (b) certification of contractor claims; and (c) a civil penalty for contractor claims that are fraudulent or based on a misrepresentation of fact.

[56 FR 67417, Dec. 30, 1991, as amended at 59 FR 11381, Mar. 10, 1994]

33.203 Applicability.

(a) Except as specified in paragraph (b) below, this part applies to any express or implied contract covered by the Federal Acquisition Regulation.

(b) This subpart does not apply to any contract with (1) a foreign government or agency of that government, or (2) an international organization or a subsidiary body of that organization, if the agency head determines that the application of the Act to the contract would not be in the public interest.

(c) This part applies to all disputes with respect to contracting officer decisions on matters *arising under* or *relating to* a contract. Agency Boards of Contract Appeals (BCA's) authorized under the Act continue to have all of the authority they possessed before the Act with respect to disputes arising

under a contract, as well as authority to decide disputes relating to a contract. The clause at 52.233–1, Disputes, recognizes the *all disputes* authority established by the Act and states certain requirements and limitations of the Act for the guidance of contractors and contracting agencies. The clause is not intended to affect the rights and obligations of the parties as provided by the Act or to constrain the authority of the statutory agency BCA's in the handling and deciding of contractor appeals under the Act.

[48 FR 42349, Sept. 19, 1983. Redesignated and amended at 50 FR 2270, Jan. 15, 1985]

33.204 Policy.

The Government's policy is to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level. Reasonable efforts should be made to resolve controversies prior to the submission of a claim. Agencies are encouraged to use ADR procedures to the maximum extent practicable. Certain factors, however, may make the use of ADR inappropriate (see 5 U.S.C. 572(b)). Except for arbitration conducted pursuant to the Administrative Dispute Resolution Act (ADRA), (5 U.S.C. 571, *et seq.*), agencies have authority which is separate from that provided by the ADRA to use ADR procedures to resolve issues in controversy. Agencies may also elect to proceed under the authority and requirements of the ADRA.

[59 FR 11381, Mar. 10, 1994, as amended at 63 FR 58595, Oct. 30, 1998]

33.205 Relationship of the Act to Pub. L. 85–804.

(a) Requests for relief under Pub. L. 85–804 (50 U.S.C. 1431–1435) are not claims within the Contract Disputes Act of 1978 or the Disputes clause at 52.233–1, Disputes, and shall be processed under Subpart 50.1, Extraordinary Contractual Actions. However, relief formerly available only under Pub. L. 85–804; i.e., legal entitlement to rescission or reformation for mutual mistake, is now available within the authority of the contracting officer under the Contract Disputes Act of 1978 and the Disputes clause. In case of a question whether the contracting officer has authority to settle or

decide specific types of claims, the contracting officer should seek legal advice.

(b) A contractor's allegation that it is entitled to rescission or reformation of its contract in order to correct or mitigate the effect of a mistake shall be treated as a claim under the Act. A contract may be reformed or rescinded by the contracting officer if the contractor would be entitled to such remedy or relief under the law of Federal contracts. Due to the complex legal issues likely to be associated with allegations of legal entitlement, contracting officers shall make written decisions, prepared with the advice and assistance of legal counsel, either granting or denying relief in whole or in part.

(c) A claim that is either denied or not approved in its entirety under paragraph (b) above may be cognizable as a request for relief under Pub. L. 85-804 as implemented by Subpart 50.1. However, the claim must first be submitted to the contracting officer for consideration under the Contract Disputes Act of 1978 because the claim is not cognizable under Public Law 85-804, as implemented by Subpart 50.1, unless other legal authority in the agency concerned is determined to be lacking or inadequate.

[48 FR 42349, Sept. 19, 1983, as amended at 72 FR 63030, Nov. 7, 2007]

33.206 Initiation of a claim.

(a) Contractor claims shall be submitted, in writing, to the contracting officer for a decision within 6 years after accrual of a claim, unless the contracting parties agreed to a shorter time period. This 6-year time period does not apply to contracts awarded prior to October 1, 1995. The contracting officer shall document the contract file with evidence of the date of receipt of any submission from the contractor deemed to be a claim by the contracting officer.

(b) The contracting officer shall issue a written decision on any Government claim initiated against a contractor within 6 years after accrual of the claim, unless the contracting parties agreed to a shorter time period. The 6-year period shall not apply to contracts awarded prior to October 1, 1995, or to a Government claim based on a contractor claim involving fraud.

[60 FR 48230, Sept. 18, 1995]

33.207 Contractor certification.

- (a) Contractors shall provide the certification specified in paragraph (c) of this section when submitting any claim exceeding \$100,000.
- (b) The certification requirement does not apply to issues in controversy that have not been submitted as all or part of a claim.
- (c) The certification shall state as follows:

I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.

- (d) The aggregate amount of both increased and decreased costs shall be used in determining when the dollar thresholds requiring certification are met (see example in 15.403–4(a)(1)(iii) regarding cost or pricing data).
- (e) The certification may be executed by any person duly authorized to bind the contractor with respect to the claim.
- (f) A defective certification shall not deprive a court or an agency BCA of jurisdiction over that claim. Prior to the entry of a final judgment by a court or a decision by an agency BCA, however, the court or agency BCA shall require a defective certification to be corrected.

[59 FR 11381, Mar. 10, 1994, as amended at 60 FR 48218, 48230, Sept. 18, 1995; 62 FR 51271, Sept. 30, 1997; 63 FR 58595, Oct. 30, 1998]

33.208 Interest on claims.

- (a) The Government shall pay interest on a contractor's claim on the amount found due and unpaid from the date that—

(1) The contracting officer receives the claim (certified if required by 33.207(a)); or

(2) Payment otherwise would be due, if that date is later, until the date of payment.

(b) Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the contracting officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim. (See the clause at 52.232-17 for the right of the Government to collect interest on its claims against a contractor).

(c) With regard to claims having defective certifications, interest shall be paid from either the date that the contracting officer initially receives the claim or October 29, 1992, whichever is later. However, if a contractor has provided a proper certificate prior to October 29, 1992, after submission of a defective certificate, interest shall be paid from the date of receipt by the Government of a proper certificate.

[59 FR 11381, Mar. 10, 1994, as amended at 60 FR 48230, Sept. 18, 1995; 73 FR 54005, Sept. 17, 2008]

33.209 Suspected fraudulent claims.

If the contractor is unable to support any part of the claim and there is evidence that the inability is attributable to misrepresentation of fact or to fraud on the part of the contractor, the contracting officer shall refer the matter to the agency official responsible for investigating fraud.

33.210 Contracting officer's authority.

Except as provided in this section, contracting officers are authorized, within any specific limitations of their warrants, to decide or resolve all claims arising under or relating to a contract subject to the Act. In accordance with agency policies and 33.214, contracting officers are authorized to use ADR procedures to resolve claims. The authority to decide or resolve claims does not extend to—

(a) A claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine; or

(b) The settlement, compromise, payment or adjustment of any claim involving fraud.

[48 FR 42349, Sept. 19, 1983. Redesignated and amended at 50 FR 2270, Jan. 15, 1985; 51 FR 36972, Oct. 16, 1986; 59 FR 11381, Mar. 10, 1994]

33.211 Contracting officer's decision.

(a) When a claim by or against a contractor cannot be satisfied or settled by mutual agreement and a decision on the claim is necessary, the contracting officer shall—

- (1) Review the facts pertinent to the claim;
- (2) Secure assistance from legal and other advisors;
- (3) Coordinate with the contract administration officer or contracting office, as appropriate; and
- (4) Prepare a written decision that shall include—
 - (i) A description of the claim or dispute;
 - (ii) A reference to the pertinent contract terms;
 - (iii) A statement of the factual areas of agreement and disagreement;
 - (iv) A statement of the contracting officer's decision, with supporting rationale;
 - (v) Paragraphs substantially as follows:

“This is the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision this appeal is taken.

The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number.

With regard to appeals to the agency board of contract appeals, you may, solely at your election, proceed under the board's—

(1) Small claim procedure for claims of \$50,000 or less or, in the case of a small business concern (as defined in the Small Business Act and regulations under that Act), \$150,000 or less; or

(2) Accelerated procedure for claims of \$100,000 or less.

Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims (except as provided in the Contract Disputes Act of 1978, 41 U.S.C. 603, regarding Maritime Contracts) within 12 months of the date you receive this decision”

(vi) Demand for payment prepared in accordance with 32.604 and 32.605) in all cases where the decision results in a finding that the contractor is indebted to the Government.

(b) The contracting officer shall furnish a copy of the decision to the contractor by certified mail, return receipt requested, or by any other method that provides evidence of receipt. This requirement shall apply to decisions on claims initiated by or against the contractor.

(c) The contracting officer shall issue the decision within the following statutory time limitations:

(1) For claims of \$100,000 or less, 60 days after receiving a written request from the contractor that a decision be rendered within that

period, or within a reasonable time after receipt of the claim if the contractor does not make such a request.

(2) For claims over \$100,000, 60 days after receiving a certified claim; *provided, however*, that if a decision will not be issued within 60 days, the contracting officer shall notify the contractor, within that period, of the time within which a decision will be issued.

(d) The contracting officer shall issue a decision within a reasonable time, taking into account—

(1) The size and complexity of the claim;

(2) The adequacy of the contractor's supporting data; and

(3) Any other relevant factors.

(e) The contracting officer shall have no obligation to render a final decision on any claim exceeding \$100,000 which contains a defective certification, if within 60 days after receipt of the claim, the contracting officer notifies the contractor, in writing, of the reasons why any attempted certification was found to be defective.

(f) In the event of undue delay by the contracting officer in rendering a decision on a claim, the contractor may request the tribunal concerned to direct the contracting officer to issue a decision in a specified time period determined by the tribunal.

(g) Any failure of the contracting officer to issue a decision within the required time periods will be deemed a decision by the contracting officer denying the claim and will authorize the contractor to file an appeal or suit on the claim.

(h) The amount determined payable under the decision, less any portion already paid, should be paid, if otherwise proper, without awaiting contractor action concerning appeal. Such payment shall be without prejudice to the rights of either party.

[48 FR 42349, Sept. 19, 1983. Redesignated at 50 FR 2270, Jan. 15, 1985, and amended at 54 FR 34755, Aug. 21, 1989; 59 FR 11382, Mar. 10,

1994; 60 FR 48230, Sept. 18, 1995; 73 FR 21800, Apr. 22, 2008; 73 FR 54005, Sept. 17, 2008]

33.212 Contracting officer's duties upon appeal.

To the extent permitted by any agency procedures controlling contacts with agency BCA personnel, the contracting officer shall provide data, documentation, information, and support as may be required by the agency BCA for use on a pending appeal from the contracting officer's decision.

33.213 Obligation to continue performance.

(a) In general, before passage of the Act, the obligation to continue performance applied only to claims arising under a contract. However, the Act, at 41 U.S.C. 605(b), authorizes agencies to require a contractor to continue contract performance in accordance with the contracting officer's decision pending a final resolution of any claim arising under, or relating to, the contract. (A claim arising under a contract is a claim that can be resolved under a contract clause, other than the clause at 52.233-1, Disputes, that provides for the relief sought by the claimant; however, relief for such claim can also be sought under the clause at 52.233-1. A claim relating to a contract is a claim that cannot be resolved under a contract clause other than the clause at 52.233-1.) This distinction is recognized by the clause with its *Alternate I* (see 33.215).

(b) In all contracts that include the clause at 52.233-1, Disputes, with its *Alternate I*, in the event of a dispute not arising under, but relating to, the contract, the contracting officer shall consider providing, through appropriate agency procedures, financing of the continued performance; *provided*, that the Government's interest is properly secured.

[48 FR 42349, Sept. 19, 1983. Redesignated at 50 FR 2270, Jan. 15, 1985, as amended at 64 FR 72451, Dec. 27, 1999; 67 FR 43514, June 27, 2002]

33.214 Alternative dispute resolution (ADR).

(a) The objective of using ADR procedures is to increase the opportunity for relatively inexpensive and expeditious resolution of issues in controversy. Essential elements of ADR include—

- (1) Existence of an issue in controversy;
- (2) A voluntary election by both parties to participate in the ADR process;
- (3) An agreement on alternative procedures and terms to be used in lieu of formal litigation; and
- (4) Participation in the process by officials of both parties who have the authority to resolve the issue in controversy.

(b) If the contracting officer rejects a contractor's request for ADR proceedings, the contracting officer shall provide the contractor a written explanation citing one or more of the conditions in 5 U.S.C. 572(b) or such other specific reasons that ADR procedures are inappropriate for the resolution of the dispute. In any case where a contractor rejects a request of an agency for ADR proceedings, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request.

(c) ADR procedures may be used at any time that the contracting officer has authority to resolve the issue in controversy. If a claim has been submitted, ADR procedures may be applied to all or a portion of the claim. When ADR procedures are used subsequent to the issuance of a contracting officer's final decision, their use does not alter any of the time limitations or procedural requirements for filing an appeal of the contracting officer's final decision and does not constitute a reconsideration of the final decision.

(d) When appropriate, a neutral person may be used to facilitate resolution of the issue in controversy using the procedures chosen by the parties.

(e) The confidentiality of ADR proceedings shall be protected consistent with 5 U.S.C. 574.

(f)

(1) A solicitation shall not require arbitration as a condition of award, unless arbitration is otherwise required by law. Contracting officers should have flexibility to select the appropriate ADR procedure to resolve the issues in controversy as they arise.

(2) An agreement to use arbitration shall be in writing and shall specify a maximum award that may be issued by the arbitrator, as well as any other conditions limiting the range of possible outcomes.

(g) Binding arbitration, as an ADR procedure, may be agreed to only as specified in agency guidelines. Such guidelines shall provide advice on the appropriate use of binding arbitration and when an agency has authority to settle an issue in controversy through binding arbitration.

[56 FR 67417, Dec. 30, 1991, as amended at 59 FR 11382, Mar. 10, 1994; 60 FR 48230, Sept. 18, 1995; 63 FR 58595, Oct. 30, 1998]

33.215 Contract clauses.

(a) Insert the clause at 52.233–1, Disputes, in solicitations and contracts, unless the conditions in 33.203(b) apply. If it is determined under agency procedures that continued performance is necessary pending resolution of any claim arising under or relating to the contract, the contracting officer shall use the clause with its *Alternate I*.

(b) Insert the clause at 52.233–4 in all solicitations and contracts.

Appendix G

PROCEDURE IN PROCUREMENT PROTEST CASES PURSUANT TO 28 U.S.C. § 1491(b)

I. INTRODUCTION

1. This Appendix describes standard practices in protest cases filed pursuant to 28 U.S.C. § 1491(b) and supplements the Rules of the United States Court of Federal Claims, which are otherwise fully applicable to these cases.

II. REQUIREMENT FOR PRE-FILING NOTIFICATION

2. In order to expedite proceedings, plaintiff's counsel must (except in exceptional circumstances to be described in moving papers) provide at least 24-hour advance notice of filing a protest case to:

- (a) the Department of Justice, Commercial Litigation Branch, Civil Division;
- (b) the Clerk, United States Court of Federal Claims;
- (c) the procuring agency's contracting officer by facsimile transmission only; and
- (d) the apparently successful bidder/offeror (in cases where there has been an award and plaintiff has received notice of the identity of the awardee).

Such notice must be provided by e-mail or by facsimile transmission during conventional business hours. (The contacts for the clerk of court and the Department of Justice are posted on the court's website—<http://www.uscfc.uscourts.gov>.)

The pre-filing notice is intended to permit the Department of Justice to assign an attorney to the case who can address relevant issues on a timely basis and to permit the court to ensure the availability of appropriate court resources. Failure to provide pre-filing notification will not preclude the filing of the case but is likely to delay the initial processing of the case, including the scheduling of the initial status conference. See paragraph 8, below. Plaintiff's counsel must apprise the above entities of any material

change in respect to the timing of or the intent to file a protest. Plaintiff is encouraged to provide earlier notice if possible as a courtesy to the court and to government counsel.

3. The pre-filing notice must include the following information:

- (a) the name of the procuring agency and the number of the solicitation in the contested procurement;
- (b) the name and telephone number of the contracting officer responsible for the procurement;
- (c) the name and telephone number of the principal agency attorney, if known, who represented the agency in any prior protest of the same procurement;
- (d) whether plaintiff contemplates requesting temporary or preliminary injunctive relief pursuant to RCFC 65;
- (e) whether plaintiff has discussed the need for temporary or preliminary injunctive relief with Department of Justice counsel and the response, if any;
- (f) whether the action was preceded by the filing of a protest before the Government Accountability Office (GAO) and if so, the “B-” number of the protest and whether a decision was issued; and
- (g) whether plaintiff contemplates the need for the court to enter a protective order.

III. FILING UNDER SEAL

4. In the event plaintiff believes its complaint, or any related material filed at the same time, contains confidential or proprietary information and plaintiff seeks to protect that information from public scrutiny, plaintiff must file a motion together with the complaint for leave to file the complaint under seal. When a complaint or any related material is filed with an accompanying motion for leave to file under seal, the complaint or related material will be treated as though filed under seal while the motion is pending.

5. When filing documents under seal, a party must follow the procedures described in RCFC 5.4(d).

6. A complaint or any related material filed together with the complaint that is to be filed under seal must be marked or highlighted in such a way that confidential or proprietary information is indicated and must be accompanied by a redacted version of the pleading (i.e., a version that omits confidential or proprietary information), which will be available to the public. Failure to file a redacted copy may result in denial of the motion for leave to file under seal.

7. To the extent the complaint or any related material filed together with the complaint contains classified information, the filing must conform to the requirements of the classifying agency.

IV. INITIAL STATUS CONFERENCE

8. The court will schedule an initial status conference with the parties to address relevant issues including, but not limited to, the following:

- (a) identification of interested parties;
- (b) admission of any successful offeror as an intervenor;
- (c) any request for temporary or preliminary injunctive relief (see paragraph 15, below);
- (d) the content of a protective order, if requested by one or more of the parties, and the requirement for redacted copies;
- (e) the content of and time for filing the administrative record;
- (f) whether it may be appropriate to supplement the administrative record; and
- (g) the nature of and schedule for further proceedings. This initial status conference will be held as soon as practicable after the filing of the complaint.

V. INJUNCTIVE RELIEF

9. The court's practice is to expedite protest cases to the extent practicable and to conduct hearings on motions for preliminary injunctions at the earliest practicable time. Accordingly, when a plaintiff seeks a preliminary injunction, it may not need to request a temporary restraining order.

10. An application for a temporary restraining order and/or preliminary injunction must be filed together with the complaint with the clerk, unless the complaint has been previously filed. The application must be accompanied by affidavits, supporting memoranda, and any other documents upon which plaintiff intends to rely. The application also must be accompanied by a statement that plaintiff's counsel has provided, by hand delivery, overnight mail, or electronic means, copies of the foregoing documents to the Department of Justice, Commercial Litigation Branch, 8th Floor, 1100 L St. NW, Washington, DC 20530.

11. If the name of the apparently successful bidder/offeror is known (in cases where there has been an award and plaintiff has received notice of the identity of the awardee), plaintiff must state in the application that copies of the foregoing documents have been provided, by hand delivery, overnight mail, or electronic means, to the apparently successful bidder/offeror. If the name of the awardee is unknown, plaintiff must so state.

12. The apparently successful bidder/offeror may enter a notice of appearance at any hearing on the application for a temporary restraining order/preliminary injunction if it advises the court of its intention to move to intervene pursuant to RCFC 24(a)(2) or has moved to intervene before the hearing.

13. The clerk will promptly inform the parties of the judge to whom the case has been assigned and the time and place of any hearing.

14. Except in an emergency, the court will not consider *ex parte* applications for a temporary restraining order.

15. In cases in which plaintiff seeks temporary or preliminary injunctive relief, counsel must be prepared to discuss the following matters at the initial status conference:

- (a) whether and to what extent, absent temporary or preliminary injunctive relief, the court's ability to afford effective final relief is likely to be prejudiced;

- (b) whether plaintiff has discussed any request it has made for a temporary restraining order in advance with Department of Justice counsel and, if so, defendant's response;
- (c) whether the government will agree to withhold award or suspend performance pending a hearing on the motion for preliminary injunction;
- (d) whether the government will agree to withhold award or suspend performance pending a final decision on the merits;
- (e) an appropriate schedule for completion of the briefing on any motion for a preliminary injunction;
- (f) the security requirements of RCFC 65(c) (See Appendix of Forms, Forms 11–13); and
- (g) whether the hearing on the preliminary injunction should be consolidated with a final hearing on the merits.

VI. PROTECTIVE ORDERS

16. Preliminary Matters.

(a) The principal vehicle relied upon by the court to ensure protection of sensitive information is the protective order. The protective order defines the procedures to be followed to identify protected information, to prepare redacted versions of such information, and to dispose of protected information at the conclusion of the case.

(b) Information a party identifies as protected may be disclosed only to the court and to individuals who have been admitted to the protective order.

(c) Once a protective order is issued by the court, individuals who seek access to protected information must file an appropriate application. If admitted to the protective order, an individual becomes subject to the terms of the order. It is the responsibility of those admitted to the protective order to take the necessary steps to ensure that the information is protected, consistent with the terms of the protective order, while it is under their control (including oversight of support personnel who may have access to protected information). (d) Court, procuring agency, and Department of Justice personnel are automatically admitted to protective orders when issued and are subject to their terms.

17. Issuance of a Protective Order. (a) Motions for protective orders must meet the requirements of RCFC 10. The court may issue a protective order at its discretion. (b) A sample protective order is found at Appendix of Forms, Form 8. The parties are cautioned that individual judges and the parties themselves may want to amend the sample protective order to meet the needs of a specific case or their individual preferences. The specific protective order issued in a case governs the treatment of protected information in that case.

18. Application for Admission to the Protective Order. (a) Each party seeking access to protected information on behalf of an individual must file with the court an appropriate “Application for Access to Information Under Protective Order” (see Appendix of Forms, Forms 9 and 10). The application may also be amended by the court in response to individual case needs. (b) Objections to an application for access must be filed with the court within 2 days after a party’s receipt of the application. (c) In considering objections to an application for access, the court will consider such factors as the nature and sensitivity of the information at issue, the party’s need for access to the information in order to effectively represent its position, the overall number of applications received, and any other concerns that may affect the risk of inadvertent disclosure. (d) If the court receives objections to an application, access will only be granted by court order.

19. Designation of Protected Information and Preparation of Redacted Pleadings. After a protective order is entered, the designation of protected information and the preparation and filing of redacted documents will be governed by the terms of the protective order.

20. Disposition of Material Containing Protected Information. The specific procedures to be followed in disposing of protected information at the conclusion of the case will be as described in the protective order.

VII. THE CONTENT AND FILING OF THE ADMINISTRATIVE RECORD

21. The United States will be required to identify and provide (or make available for inspection) the administrative record in a protest case by the date(s) established at the initial status conference. The filing of all or a part of the administrative record must be accompanied by a Notice of Filing.

22. Early production of relevant core documents may expedite final resolution of the case. The core documents relevant to a protest case may include, as appropriate, (a) the agency's procurement request, purchase request, or statement of requirements; (b) the agency's source selection plan; (c) the bid abstract or prospectus of bid; (d) the Commerce Business Daily or other public announcement of the procurement; (e) the solicitation, including any instructions to offerors, evaluation factors, solicitation amendments, and requests for best and final offers; (f) documents and information provided to bidders during any pre-bid or pre-proposal conference; (g) the agency's responses to any questions about or requests for clarification of the solicitation; (h) the agency's estimates of the cost of performance; (i) correspondence between the agency and the protester, awardee, or other interested parties relating to the procurement; (j) records of any discussions, meetings, or telephone conferences between the agency and the protester, awardee, or other interested parties relating to the procurement; (k) records of the results of any bid opening or oral motion auction in which the protester, awardee, or other interested parties participated; (l) the protester's, awardee's, or other interested parties' offers, proposals, or other responses to the solicitation; (m) the agency's competitive range determination, including supporting documentation; (n) the agency's evaluations of the protester's, awardee's, or other interested parties' offers, proposals, or other responses to the solicitation, including supporting documentation; (o) the agency's source selection decision, including supporting documentation; (p) pre-award audits, if any, or surveys of the offerors; (q) notification of contract award and the executed contract; (r) documents relating to any pre- or post-award debriefing; (s) documents relating to any stay, suspension, or termination of award or performance pending resolution of the bid protest; (t) justifications, approvals, determinations, and findings, if any, prepared for the procurement by the agency pursuant to statute or

regulation; and (u) the record of any previous administrative or judicial proceedings relating to the procurement, including the record of any other protest of the procurement.

23. Because a protest case cannot be efficiently processed until production of the administrative record, the court expects the United States to produce the core documents and the remainder of the administrative record as promptly as circumstances will permit. (See RCFC 5.4(d) which is applicable to administrative records, unless waived by the court.) Materials that otherwise qualify as part of the administrative record may not be excluded from the record merely because they are available in electronic form only.

24. Any additional documents within the administrative record must be produced at such time as may be agreed to by the parties or ordered by the court.

VIII. ADMISSION OF COUNSEL

25. In procurement protest cases in which plaintiff's counsel is not a member of the bar of the court and does not have sufficient time to gain admission prior to the filing of the action, the clerk will accept for filing any proper complaint and accompanying pleadings under 28 U.S.C. § 1491(b) from such counsel, conditioned upon counsel's prompt pursuit of admission to practice 108 before the United States Court of Federal Claims pursuant to RCFC 83.1. Failure to pursue such admission within 30 days after the initiation of the action may result in dismissal of the action and possible referral for disciplinary action.

RULES COMMITTEE NOTES

Rules Committee Notes
2002 Revision

This appendix sets forth the procedures applicable to the court's procurement protest jurisdiction. In the main, these procedures reflect those that formerly appeared as General Order No. 38, issued on May 7, 1998. In addition, however, Appendix C now incorporates—in paragraphs

10 through 14—those provisions of former RCFC 65(f) (titled “Procedures”) which enumerated requirements particular to applications for temporary restraining orders and/or motions for preliminary injunction. Papers and exhibits are often filed under seal in procurement protests. Procedures for unsealing are addressed at RCFC 77.3(d). The standards for granting access to protected information are addressed in decisions such as *U.S. Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984), and *Matsushita Elec. Indus. Co. v. United States*, 929 F.2d 1577 (Fed. Cir. 1991).

2005 Amendment

Paragraphs 16(a) and 20 of this appendix address the disposition of material containing protected information after a case has been concluded. Both paragraphs contemplate that a protective order entered in a case involving protected information will set out the obligations of the parties in this regard. Form 8 in the Appendix of Forms, the sample protective order suggested for use in procurement protest cases, has been modified to include a new paragraph 8 which concerns the court’s retention and disposition of protected materials filed by the parties. The new paragraph provides that the original version of the administrative record and any other materials filed under seal in such a case will be retained by the court pursuant to RCFC 77.3(d). Copies of such materials filed with the court in addition to the original version may be returned by the court to the parties for appropriate disposition. In a particular case, the parties may propose to the court that other provisions be substituted for this portion of the model protective order.

2007 Amendment

Paragraph 18(a) has been reworded and paragraph 18(b) has been deleted as unnecessary. In addition, paragraph 18(e) has been amended to clarify that issuance of a court order granting access to protected information is required only in those cases where objections to the application have been raised. This clarification confirms the practice spelled out in the court’s sample protective order (Appendix of Forms, Form 8). Finally, minor changes (primarily grammatical) have been introduced throughout the Appendix.

Appendix H

PART 21 - BID PROTEST REGULATIONS

Sec. 21.0 Definitions.

Sec. 21.1 Filing a protest.

Sec. 21.2 Time for filing.

Sec. 21.3 Notice of protest, submission of agency report, and time for

Sec. 21.4 Protective orders.

Sec. 21.5 Protest issues not for consideration.

Sec. 21.6 Withholding of award and suspension of contract performance.

Sec. 21.7 Hearings.

Sec. 21.8 Remedies.

Sec. 21.9 Time for decision by GAO.

Sec. 21.10 Express options, flexible alternative procedures,

Sec. 21.11 Effect of judicial proceedings.

Sec. 21.12 Distribution of decisions.

Sec. 21.13 Nonstatutory protests.

Sec. 21.14 Request for reconsideration.

Authority: 31 U.S.C. 3551-3556.

Sec. 21.0 Definitions.

(a) Interested party means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.

(b) Intervenor means an awardee if the award has been made or, if no award has been made, all bidders or offerors who appear to have a substantial prospect of receiving an award if the protest is denied.

(c) Federal agency means any executive department or independent establishment in the executive branch, including any wholly owned government corporation, and any establishment in the legislative or judicial branch, except the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his direction.

(d) Contracting agency means a Federal agency which has awarded or proposes to award a contract under a protested procurement.

(e) Days are calendar days. In computing any period of time described in Subchapter V, Chapter 35 of Title 31, United States Code, including those described in this part, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. Similarly, when the General Accounting Office (GAO), or another Federal agency where a submission is due, is closed for all or part of the last day, the period extends to the next day on which the agency is open.

(f) Adverse agency action is any action or inaction by a contracting agency which is prejudicial to the position taken in a protest filed with the agency, including a decision on the merits of a protest; the opening of bids or receipt of proposals, the award of a contract, or the rejection of a bid despite a pending protest; or contracting agency acquiescence in continued and substantial contract performance.

(g) A document is filed on a particular day when it is received by GAO by 5:30 p.m., eastern time, on that day. A document may be filed by hand delivery, mail, or commercial carrier; parties wishing to file a document by facsimile transmission or other electronic means must ensure that the necessary equipment is operational at GAO's Procurement Law Control Group.

Sec. 21.1 Filing a protest.

(a) An interested party may protest a solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services; the cancellation of such a solicitation or other request; an award or proposed award of such a contract; and a termination of such a contract, if the protest alleges that the termination was based on improprieties in the award of the contract.

(b) Protests must be in writing and addressed as follows: General Counsel, General Accounting Office, 441 G Street, NW., Washington, DC 20548, Attention: Procurement Law Control Group.

(c) A protest filed with GAO shall:

- (1) Include the name, address, and telephone and facsimile numbers of the protester,
- (2) Be signed by the protester or its representative,
- (3) Identify the contracting agency and the solicitation and/or contract number,
- (4) Set forth a detailed statement of the legal and factual grounds of protest including copies of relevant documents,
- (5) Set forth all information establishing that the protester is an interested party for the purpose of filing a protest,
- (6) Set forth all information establishing the timeliness of the protest,
- (7) Specifically request a ruling by the Comptroller General of the United States, and
- (8) State the form of relief requested.

(d) In addition, a protest filed with GAO may:

- (1) Request a protective order,
- (2) Request specific documents, explaining the relevancy of the documents to the protest grounds, and
- (3) Request a hearing, explaining the reasons that a hearing is needed to resolve the protest.

(e) The protester shall furnish a complete copy of the protest, including all attachments, to the individual or location designated by the contracting agency in the solicitation for receipt of protests, or if there is no designation, to the contracting officer. The designated individual or location (or, if applicable, the contracting officer) must receive a complete copy of

the protest and all attachments not later than 1 day after the protest is filed with GAO. The protest document must indicate that a complete copy of the protest and all attachments are being furnished within 1 day to the appropriate individual or location.

(f) No formal briefs or other technical forms of pleading or motion are required. Protest submissions should be concise and logically arranged, and should clearly state legally sufficient grounds of protest. Protests of different procurements should be separately filed.

(g) Unless precluded by law, GAO will not withhold material submitted by a protester from any party outside the government. If the protester believes that the protest contains information which should be withheld, a statement advising of this fact must be on the front page of the submission. This information must be identified wherever it appears, and the protester must file a redacted copy of the protest which omits the information with GAO and the agency within 1 day after the filing of its protest with GAO.

(h) Parties who intend to file documents containing classified information should notify GAO in advance to obtain advice regarding procedures for filing and handling the information.

(i) A protest may be dismissed for failure to comply with any of the requirements of this section, except for the items in paragraph (d) of this section. In addition, a protest shall not be dismissed for failure to comply with paragraph (e) of this section where the contracting officer has actual knowledge of the basis of protest, or the agency, in the preparation of its report, was not prejudiced by the protester's noncompliance.

Sec. 21.2 Time for filing.

(a)(1) Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals. In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation.

(2) Protests other than those covered by paragraph (a)(1) of this section shall be filed not later than 10 days after the basis of protest is known or should have been known (whichever is earlier), with the exception of protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required. In such cases, with respect to any protest basis which is known or should have been known either before or as a result of the debriefing, the initial protest shall not be filed before the debriefing date offered to the protester, but shall be filed not later than 10 days after the date on which the debriefing is held.

(3) If a timely agency-level protest was previously filed, any subsequent protest to GAO filed within 10 days of actual or constructive knowledge of initial adverse agency action will be considered, provided the agency-level protest was filed in accordance with paragraphs (a)(1) and (a)(2) of this section, unless the contracting agency imposes a more stringent time for filing, in which case the agency's time for filing will control. In cases where an alleged impropriety in a solicitation is timely protested to a contracting agency, any subsequent protest to GAO will be considered timely if filed within the 10-day period provided by this paragraph, even if filed after bid opening or the closing time for receipt of proposals.

(b) Protests untimely on their face may be dismissed. A protester shall include in its protest all information establishing the timeliness of the protest; a protester will not be permitted to introduce for the first time in a request for reconsideration information necessary to establish that the protest was timely.

(c) GAO, for good cause shown, or where it determines that a protest raises issues significant to the procurement system, may consider an untimely protest.

Sec. 21.3 Notice of protest, submission of agency report, and time for filing of comments on report.

(a) GAO shall notify the contracting agency by telephone within 1 day after the filing of a protest, and, unless the protest is dismissed under this part, shall promptly send a written confirmation to the contracting agency and an

acknowledgment to the protester. The contracting agency shall immediately give notice of the protest to the contractor if award has been made or, if no award has been made, to all bidders or offerors who appear to have a reasonable prospect of receiving an award. The contracting agency shall furnish copies of the protest submissions to those parties, except where disclosure of the information is prohibited by law, with instructions to communicate further directly with GAO. All parties shall furnish copies of all protest communications to the contracting agency and to other participating parties. All protest communications shall be sent by means reasonably calculated to effect expeditious delivery.

(b) A contracting agency or intervenor which believes that the protest or specific protest allegations should be dismissed before submission of an agency report should file a request for dismissal as soon as practicable.

(c) The contracting agency shall file a report on the protest with GAO within 30 days after the telephone notice of the protest from GAO. The report provided to the parties need not contain documents which the agency has previously furnished or otherwise made available to the parties in response to the protest. At least 5 days prior to the filing of the report, in cases in which the protester has filed a request for specific documents, the agency shall provide to all parties and GAO a list of those documents, or portions of documents, which the agency has released to the protester or intends to produce in its report, and of the documents which the agency intends to withhold from the protester and the reasons for the proposed withholding. Any objection to the scope of the agency's proposed disclosure or nondisclosure of documents must be filed with GAO and the other parties within 2 days of receipt of this list.

(d) The report shall include the contracting officer's statement of the relevant facts, including a best estimate of the contract value, a memorandum of law, and a list and a copy of all relevant documents, or portions of documents, not previously produced, including, as appropriate: the protest; the bid or proposal submitted by the protester; the bid or proposal of the firm which is being considered for award, or whose bid or proposal is being protested; all evaluation documents; the solicitation, including the specifications; the abstract of bids or offers; and any other relevant documents. In appropriate cases, the contracting agency may

request that the protester produce relevant documents, or portions of documents, that are not in the agency's possession.

(e) Subject to any protective order issued in the protest pursuant to Sec. 21.4, the contracting agency shall simultaneously furnish a copy of the report to the protester and any intervenors. The copy of the report filed with GAO shall list the parties who have been furnished copies of the report. Where a protester does not have counsel admitted to a protective order and documents are withheld from the protester in accordance with this part, the agency shall provide documents adequate to inform the protester of the basis of the agency's position.

(f) The contracting agency may request an extension of time for the submission of the list of documents to be provided by the agency pursuant to Sec. 21.3(c) or for the submission of the agency report. Extensions will be granted on a case-by-case basis.

(g) The protester may request additional documents after receipt of the agency report when their existence or relevance first becomes evident. Except when authorized by GAO, any request for additional documents must be filed with GAO and the contracting agency not later than 2 days after their existence or relevance is known or should have been known, whichever is earlier. The contracting agency shall provide the requested documents, or portions of documents, and a list to GAO and the other parties within 2 days or explain why it is not required to produce the documents.

(h) Upon the request of a party, GAO will decide whether the contracting agency must provide any withheld documents, or portions of documents, and whether this should be done under a protective order. When withheld documents are provided, the protester's comments on the agency report shall be filed within the original comment filing period unless GAO determines that an extension is appropriate.

(i) Comments on the agency report shall be filed with GAO within 10 days after receipt of the report, with a copy provided to the contracting agency and other participating parties. The protest shall be dismissed unless the protester files comments or a written statement requesting that the case be

decided on the existing record, or requests an extension of time within the 10-day period. Unless otherwise advised by the protester, GAO will assume the protester received the agency report by the due date specified in the acknowledgment of protest furnished by GAO. Upon a showing that the specific circumstances of a protest require a period longer than 10 days for the submission of comments, GAO will set a new date for the submission of comments. Extensions will be granted on a case-by-case basis.

(j) GAO may request or permit the submission of additional statements by the parties and by other parties not participating in the protest as may be necessary for the fair resolution of the protest. The agency and other parties shall not submit any additional statements unless the statements are specifically requested by GAO or submitted after permission has been granted by GAO.

Sec. 21.4 Protective orders.

(a) At the request of a party or on its own initiative, GAO may issue a protective order controlling the treatment of protected information. Such information may include proprietary, confidential, or source-selection-sensitive material, as well as other information the release of which could result in a competitive advantage to one or more firms. The protective order shall establish procedures for application for access to protected information, identification and safeguarding of that information, and submission of redacted copies of documents omitting protected information. Because a protective order serves to facilitate the pursuit of a protest by a protester through counsel, it is the responsibility of protester's counsel to request that a protective order be issued and to submit timely applications for admission under that order.

(b) If no protective order has been issued, the agency may withhold from the parties those portions of its report which would ordinarily be subject to a protective order. GAO will review *in camera* all information not released to the parties.

(c) After a protective order has been issued, counsel or consultants retained by counsel appearing on behalf of a party may apply for admission under the order by submitting an application to GAO, with copies furnished simultaneously to all parties. The application shall establish that the

applicant is not involved in competitive decision-making for any firm that could gain a competitive advantage from access to the protected information and that there will be no significant risk of inadvertent disclosure of protected information. Objections to an applicant's admission shall be raised within 2 days after receipt of the application, although GAO may consider objections raised after that time.

(d) Any violation of the terms of a protective order may result in the imposition of such sanctions as GAO deems appropriate, including referral to appropriate bar associations or other disciplinary bodies and restricting the individual's practice before GAO.

Sec. 21.5 Protest issues not for consideration.

GAO shall summarily dismiss a protest or specific protest allegations that do not state a valid basis for protest, are untimely (unless considered pursuant to Sec. 21.2(c)), or are not properly before GAO. A protest or specific protest allegations may be dismissed any time sufficient information is obtained by GAO warranting dismissal. Where an entire protest is dismissed, no agency report shall be filed; where specific protest allegations are dismissed, an agency report shall be filed on the remaining allegations. Among the protest bases which shall be dismissed are the following:

(a) Contract administration. The administration of an existing contract is within the discretion of the contracting agency. Disputes between a contractor and the agency are resolved pursuant to the disputes clause of the contract and the Contract Disputes Act of 1978. 41 U.S.C. 601-613.

(b) Small Business Administration issues. (1) Small business size standards and standard industrial classification. Challenges of established size standards or the size status of particular firms, and challenges of the selected standard industrial classification may be reviewed solely by the Small Business Administration. 15 U.S.C. 637(b)(6).

(2) Small Business Certificate of Competency Program. Any referral made to the Small Business Administration pursuant to sec. 8(b)(7) of the Small Business Act, or any issuance of, or refusal to issue, a certificate of competency under that section will not be reviewed by GAO absent a

showing of possible bad faith on the part of government officials or a failure to consider vital information bearing on the firm's responsibility. 15 U.S.C. 637(b)(7).

(3) Procurements under sec. 8(a) of the Small Business Act. Under that section, since contracts are entered into with the Small Business Administration at the contracting officer's discretion and on such terms as are agreed upon by the procuring agency and the Small Business Administration, the decision to place or not to place a procurement under the 8(a) program is not subject to review absent a showing of possible bad faith on the part of government officials or that regulations may have been violated. 15 U.S.C. 637(a).

(c) Affirmative determination of responsibility by the contracting officer. Because the determination that a bidder or offeror is capable of performing a contract is based in large measure on subjective judgments which generally are not readily susceptible of reasoned review, an affirmative determination of responsibility will not be reviewed absent a showing of possible bad faith on the part of government officials or that definitive responsibility criteria in the solicitation were not met.

(d) Procurement integrity. For any Federal procurement, GAO will not review an alleged violation of subsections (a), (b), (c), or (d) of sec. 27 of the Office of Federal Procurement Policy Act, 41 U.S.C. 423, as amended by sec. 4304 of the National Defense Authorization Act for Fiscal Year 1996, Public Law 104-106, 110 Stat. 186, February 10, 1996, where the protester failed to report the information it believed constituted evidence of the offense to the Federal agency responsible for the procurement within 14 days after the protester first discovered the possible violation. The provision in paragraph (d) of Sec. 21.5 will apply not later than January 1, 1997.

(e) Protests not filed either in GAO or the contracting agency within the time limits set forth in Sec. 21.2.

(f) Protests which lack a detailed statement of the legal and factual grounds of protest as required by Sec. 21.1(c)(4), or which fail to clearly state legally sufficient grounds of protest as required by Sec. 21.1(f).

(g) Procurements by agencies other than Federal agencies as defined by sec. 3 of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. 472. Protests of procurements or proposed procurements by agencies such as the U.S. Postal Service, the Federal Deposit Insurance Corporation, and nonappropriated fund activities are beyond GAO's bid protest jurisdiction as established in 31 U.S.C. 3551-3556.

(h) Subcontract protests. GAO will not consider a protest of the award or proposed award of a subcontract except where the agency awarding the prime contract has requested in writing that subcontract protests be decided pursuant to Sec. 21.13.

Sec. 21.6 Withholding of award and suspension of contract performance.

Where a protest is filed with GAO, the contracting agency may be required to withhold award and to suspend contract performance. The requirements for the withholding of award and the suspension of contract performance are set forth in 31 U.S.C. 3553 (c) and (d).

Sec. 21.7 Hearings.

(a) At the request of a party or on its own initiative, GAO may conduct a hearing in connection with a protest. The request shall set forth the reasons why a hearing is needed to resolve the protest.

(b) Prior to the hearing, GAO may hold a pre-hearing conference to discuss and resolve matters such as the procedures to be followed, the issues to be considered, and the witnesses who will testify.

(c) Hearings generally will be conducted as soon as practicable after receipt by the parties of the agency report and relevant documents. Although hearings ordinarily will be conducted at GAO in Washington, DC, hearings may, at the discretion of GAO, be conducted at other locations, or by telephone.

(d) All parties participating in the protest shall be invited to attend the hearing. Others may be permitted to attend as observers and may participate as allowed by GAO's hearing official. In order to prevent the improper disclosure of protected information at the hearing, GAO's hearing official may restrict attendance during all or part of the proceeding.

(e) Hearings shall normally be recorded and/or transcribed. If a recording and/or transcript is made, any party may obtain copies at its own expense.

(f) If a witness whose attendance has been requested by GAO fails to attend the hearing or fails to answer a relevant question, GAO may draw an inference unfavorable to the party for whom the witness would have testified.

(g) If a hearing is held, no separate comments on the agency report should be submitted unless specifically requested by GAO. Each party shall file with GAO, within 5 days after the hearing was held or as specified by GAO, a single document expressing any comments on both the hearing and agency report, with copies furnished to the other parties. By the due date, if the protester has not filed comments or a written statement requesting that the case be decided on the existing record, GAO shall dismiss the protest.

(h) In post-hearing comments, the parties should reference all testimony and admissions in the hearing record that they consider relevant, providing specific citations to the testimony and admissions referenced.

Sec. 21.8 Remedies.

(a) If GAO determines that a solicitation, cancellation of a solicitation, termination of a contract, proposed award, or award does not comply with statute or regulation, it shall recommend that the contracting agency implement any combination of the following remedies:

(1) Refrain from exercising options under the contract;

(2) Terminate the contract;

(3) Reopen the contract;

(4) Issue a new solicitation;

(5) Award a contract consistent with statute and regulation; or

(6) Such other recommendation(s) as GAO determines necessary to promote compliance.

(b) In determining the appropriate recommendation(s), GAO shall, except as specified in paragraph (c) of this section, consider all circumstances surrounding the procurement or proposed procurement including the seriousness of the procurement deficiency, the degree of prejudice to other parties or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement, and the impact of the recommendation(s) on the contracting agency's mission.

(c) If the head of the procuring activity determines that performance of the contract notwithstanding a pending protest is in the government's best interest, GAO shall make its recommendation(s) under paragraph (a) of this section without regard to any cost or disruption from terminating, recompeting, or reawarding the contract.

(d) If GAO determines that a solicitation, proposed award, or award does not comply with statute or regulation, it may recommend that the contracting agency pay the protester the costs of:

(1) Filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees; and

(2) Bid and proposal preparation.

(e) If the contracting agency decides to take corrective action in response to a protest, GAO may recommend that the agency pay the protester the costs of filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees. The protester shall file any request that GAO recommend that costs be paid within 15 days after being advised that the contracting agency has decided to take corrective action. The protester shall furnish a copy of its request to the contracting agency, which may file a response within 15 days after receipt of the request, with a copy furnished to the protester.

(f)(1) If GAO recommends that the contracting agency pay the protester the costs of filing and pursuing the protest and/or of bid or proposal preparation, the protester and the agency shall attempt to reach agreement on the amount of costs. The protester shall file its claim for costs, detailing and certifying the time expended and costs incurred, with the contracting agency within 60 days after receipt of GAO's recommendation that the agency pay the protester its costs. Failure to file the claim within that time may result in forfeiture of the protester's right to recover its costs.

(2) The contracting agency shall issue a decision on the claim for costs as soon as practicable after the claim is filed. If the protester and the contracting agency cannot reach agreement within a reasonable time, GAO may, upon request of the protester, recommend the amount of costs the agency should pay in accordance with 31 U.S.C. 3554(c). In such cases, GAO may also recommend that the contracting agency pay the protester the costs of pursuing the claim for costs before GAO.

(3) The contracting agency shall notify GAO within 60 days after GAO recommends the amount of costs the agency should pay the protester of the action taken by the agency in response to the recommendation.

Sec. 21.9 Time for decision by GAO.

(a) GAO shall issue a decision on a protest within 100 days after it is filed.

(b) In protests where GAO uses the express option procedures in Sec. 21.10, GAO shall issue a decision on a protest within 65 days after it is filed.

(c) GAO, to the maximum extent practicable, shall resolve a timely supplemental protest adding one or more new grounds to an existing protest, or a timely amended protest, within the time limit established in paragraph (a) of this section for decision on the initial protest. If a supplemental or an amended protest cannot be resolved within that time limit, GAO may resolve the supplemental or amended protest using the express option procedures in Sec. 21.10.

Sec. 21.10 Express options, flexible alternative procedures, accelerated schedules, summary decisions, and status and other conferences.

(a) At the request of a party or on its own initiative, GAO may decide a protest using an express option.

(b) The express option will be adopted at the discretion of GAO and only in those cases suitable for resolution within 65 days.

(c) Requests for the express option shall be in writing and received in GAO not later than 5 days after the protest or supplemental/amended protest is filed. GAO will promptly notify the parties whether the case will be handled using the express option.

(d) When the express option is used, the following schedule applies instead of those deadlines in Sec. 21.3 and Sec. 21.7:

(1) The contracting agency shall file a complete report with GAO and the parties within 20 days after it receives notice from GAO that the express option will be used.

(2) Comments on the agency report shall be filed with GAO and the other parties within 5 days after receipt of the report.

(3) If a hearing is held, no separate comments on the agency report under paragraph (d)(2) of this section should be submitted unless specifically requested by GAO. Consolidated comments on the agency report and hearing shall be filed within 5 days after the hearing was held or as specified by GAO.

(4) Where circumstances demonstrate that a case is no longer suitable for resolution using the express option, GAO shall establish a new schedule for submissions by the parties.

(e) GAO may use flexible alternative procedures to promptly and fairly resolve a protest, including establishing an accelerated schedule and/or issuing a summary decision.

(f) GAO may conduct status and other conferences by telephone or in person with all parties participating in a protest to promote the expeditious development and resolution of the protest.

Sec. 21.11 Effect of judicial proceedings.

(a) A protester must immediately advise GAO of any court proceeding which involves the subject matter of a pending protest and must file with GAO copies of all relevant court documents.

(b) GAO will dismiss any protest where the matter involved is the subject of litigation before a court of competent jurisdiction, or where the matter involved has been decided on the merits by a court of competent jurisdiction. GAO may, at the request of a court, issue an advisory opinion on a bid protest issue that is before the court. In these cases, unless a different schedule is established, the times provided in this part for filing the agency report (Sec. 21.3(c)), filing comments on the report (Sec. 21.3(i)), holding a hearing and filing comments (Sec. 21.7), and issuing a decision (Sec. 21.9) shall apply.

Sec. 21.12 Distribution of decisions.

(a) Unless it contains protected information, a copy of a decision shall be provided to the protester, any intervenors, the head of the contracting activity responsible for the protested procurement, and the senior procurement executive of each Federal agency involved; a copy shall also be made available to the public. A copy of a decision containing protected information shall be provided only to the contracting agency and to individuals admitted to any protective order issued in the protest. A public version omitting the protected information shall be prepared wherever possible.

(b) Decisions are available from GAO by electronic means.

Sec. 21.13 Nonstatutory protests.

(a) GAO will consider protests concerning awards of subcontracts by or for a Federal agency, sales by a Federal agency, or procurements by agencies of the government other than Federal agencies as defined in Sec. 21.0(c) if the agency involved has agreed in writing to have protests decided by GAO.

(b) The provisions of this part shall apply to nonstatutory protests except for the provision of Sec. 21.8(d) pertaining to recommendations for the payment of costs. The provision for the withholding of award and the suspension of contract performance, 31 U.S.C. 3553(c) and (d), also does not apply to nonstatutory protests.

Sec. 21.14 Request for reconsideration.

(a) The protester, any intervenor, and any Federal agency involved in the protest may request reconsideration of a bid protest decision. GAO will not consider a request for reconsideration that does not contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.

(b) A request for reconsideration of a bid protest decision shall be filed, with copies to the parties who participated in the protest, not later than 10 days after the basis for reconsideration is known or should have been known, whichever is earlier.

(c) GAO will summarily dismiss any request for reconsideration that fails to state a valid basis for reconsideration or is untimely. The filing of a request for reconsideration does not require the withholding of award and the suspension of contract performance under 31 U.S.C. 3553 (c) and (d).

Appendix I

PROTEST FORMAT

Office of General Counsel
Attn: Procurement Control Group
Government Accountability Office
411 G. Street N.W.
Washington, D.C. 20548

Re: **Protest of**

By Confirmed Fax to XXXXXXXX, by Electronic Mail to XXXXX
and by USPS Overnight Mail

Dear Sir/Madam:

By this letter, I am submitting a protest in reference to the above referenced matter.

Name, Address and Telephone/Facsimile Numbers of the Protestor:

The protestor is:

Represented by:

Contract Agency and the Solicitation Number:

Statement Factual Grounds for Protest

Discussion

Information establishing that Protestor is an Interested Party

Information Establishing the Protest is Timely

Form of Relief Requested

Documents Requested

Exhibit List



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