

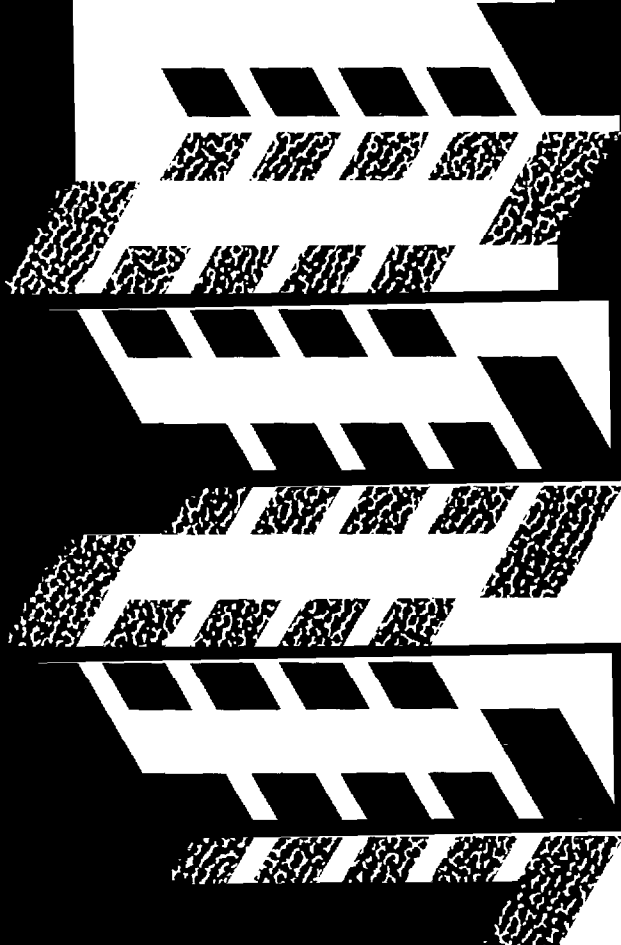
GAO

Office of General Counsel



Edition

Bid Protests at GAO: A Descriptive Guide



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Third Edition
1988

**Bid Protests at GAO:
A Descriptive Guide**

Introduction

The laws and regulations that govern contracting with the federal government are designed to assure that federal procurements are conducted fairly and, whenever possible, in a way that maximizes competition. On occasion, however, bidders or others interested in government procurements may have reason to believe that a contract has been or is about to be awarded improperly or illegally, or that in some way they have been unfairly denied a contract or an opportunity to compete for one. A major avenue of relief for those concerned about the propriety of an award has been the General Accounting Office (GAO), which for more than 60 years has provided an objective, independent, and impartial forum for the resolution of disputes concerning the award of federal contracts.

Over the years, GAO has developed a substantial body of law and standard procedures for consideration of bid protests. This booklet is the third edition of a guide prepared by the Office of General Counsel to aid those interested in the bid protest process. We issued the first edition of this booklet in 1975 to facilitate greater public familiarity with the bid protest process at GAO. In 1985, we issued a revised edition of the booklet incorporating the numerous changes in the procedures required by the Competition in Contracting Act of 1984. After three years' experience under that act, we refined and expanded the regulations governing the bid protest process, effective January 15, 1988. This third edition is based on the revised regulations.



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The Bid Protest Process

Background

For more than 60 years GAO has provided an objective, independent, and impartial forum for the resolution of disputes concerning the award of federal contracts. Over the years, the decisions of the Comptroller General of the United States, the head of the GAO, in bid protest cases have resulted in a uniform body of law applicable to the procurement process that is relied upon by the Congress, the courts, contracting agencies, and the public. The filing of a bid protest with GAO is easy and inexpensive and does not require the services of an attorney (although many protesters do retain counsel). In addition, matters can usually be resolved more quickly by protests filed with GAO than by litigation.

GAO receives several thousand bid protests annually and since 1985 has had detailed regulations to inform protesters where and how to file, what to expect in the way of subsequent action, and the time frames established for completion of those actions. These regulations were promulgated to implement the Competition in Contracting Act, which Congress passed in 1984. The regulations appear in Title 4 of the Code of Federal Regulations, Part 21. The Code of Federal Regulations is published annually and contains the revisions or additions to the regulations that were published in the Federal Register during the preceding year.

Although the purpose of this booklet is to set forth the basic steps involved in the bid protest process together with the advantages and limitations, GAO's detailed regulations are included at the end of this booklet and should be reviewed and considered prior to filing a protest.

It should be noted that changes to the regulations are published from time to time in the Federal Register when changes are made necessary by either changes in the applicable statutory law, or a binding court decision, or when experience dictates a modification is necessary. Because the regulations

and the changes are published in the Federal Register, protesters are held to constructive knowledge of them, even though they may not have actual knowledge of their content. While we attempt to keep this publication current, it may not always be possible to do so.

Law and Regulations

Federal procurements are governed primarily by the Armed Services Procurement Act of 1947 and the Federal Property and Administrative Services Act of 1949, as amended, particularly by the Competition in Contracting Act. These statutes are implemented by the Federal Acquisition Regulation (FAR) and individual agency regulations, as well as by the Federal Information Resources Management Regulation, which governs the procurement of automatic data processing and telecommunication needs. The GAO Bid Protest Regulations govern GAO's handling of protests and impose certain requirements on procuring agencies, protesters, and others who participate in bid protests.

Bid Protests in General

A bid protest at GAO is initiated by filing a written protest with GAO's Office of General Counsel. This initial filing must contain a detailed statement of the grounds for protest if the protest is to be considered. The agency will furnish a report to GAO and will provide a copy of its report to the protester, who is given an opportunity to comment. Other interested parties may also be provided with copies of the protest and the agency report for comments. In some cases, an informal conference may be held in which the protester and others are afforded an opportunity to present their views directly to the GAO attorneys responsible for the case. Also, a fact finding conference may be held in some cases. The fact finding conference differs from an informal conference in that witnesses will testify under oath or affirmation and a transcript of the proceeding will be made. Transcripts can be ordered directly from the reporter at prices established by GAO.

After the record is complete, GAO will consider the facts and issues raised and will render a decision in the name of the Comptroller General. A copy of the decision is sent to the protester, to interested parties, and to the agency involved. The agency normally takes action in accordance with the decision. Processing time from the date of receipt of the protest to the date of decision can take up to 90 working days, depending on urgency, complexity, and workload.

Who May Protest

Any interested party may file a protest with GAO. An interested party for this purpose is an actual or prospective bidder or offeror with a direct economic interest in the award of a contract. Usually this refers to someone who would be in line for award if the protest were upheld.

What May Be Protested

GAO considers protests against solicitations and against the award or proposed award of procurement contracts by federal agencies. Although most protests are against the acceptance or rejection of a bid or proposal, protests against solicitation defects are also considered. Alleged restrictive specifications, omission of a required provision, or ambiguous or indefinite evaluation factors are bases for protest. Protests of different procurements must be separately filed; that is, only one protest may be the subject of a particular submission, and only one protest submission per package or envelope is permitted.

There are some matters, however, that cannot be protested to GAO. Among them are the following:

1. Subcontract Awards

Protests against subcontract awards generally are not considered except in certain very limited circumstances when the award is made by or for the

government, such as when a contractor acts as a purchasing agent for the government.

2. Size and Manufacturer/
Regular Dealer
Determinations

GAO does not consider protests involving matters which, under the law, are to be determined by other agencies. For example, disputes over whether a firm is a regular dealer or manufacturer under the Walsh-Healey Act are resolved by the Department of Labor or by the Small Business Administration if a small business is involved. Challenges of established size standards or the size status of a particular firm and challenges of the selected standard industrial classification are for review solely by the Small Business Administration.

3. Responsibility

As a matter of policy, GAO does not consider protests against an agency's determination that a firm is a responsible bidder or offeror, except in cases when there is a showing of possible fraud or bad faith on the part of the agency, because such a determination is almost entirely a matter of discretion. However, if objective standards for determining responsibility are set forth in a solicitation, GAO will consider a protest against an affirmative responsibility determination when it is claimed that the determination is contrary to those standards. GAO also generally does not consider whether a small business is or is not responsible, because by law that is to be determined by the Small Business Administration under its Certificate of Competency Program if the contracting officer believes the small business bidder is not responsible.

4. Matter in Court

Also as a matter of policy, GAO generally will not render a decision on a protest when the matter involved is the subject of litigation before a court that has proper jurisdiction or when the matter has been decided by such a court. However, if the court requests a Comptroller General decision, the protest will be decided. The time for filing an agency

report, filing comments on the report, holding and commenting on a conference, and issuing a decision may be changed if a court so orders.

5. Contract Administration

GAO does not consider protests involving contract administration. Contract administration includes disputes arising during contract performance, such as whether the contractor is entitled to additional compensation and agency decisions not to exercise options.

6. Section 8(a) Contracts

Decisions to place or not to place a contract with a socially and economically disadvantaged firm under the Small Business Administration's section 8(a) program generally are not considered by GAO, unless there is a showing of possible fraud or bad faith on the part of government officials or that regulations may have been violated.

7. Protests to GSA Board of Contract Appeals

Most procurements of automatic data processing needs may be protested either to GAO or to the General Services Administration (GSA) Board of Contract Appeals. Once a procurement has been protested to the GSA Board, GAO will not consider a protest involving that procurement, even from another party, while the protest is pending before the Board. Moreover, the party who has filed a protest with the Board may not protest the same matter to GAO under any circumstance.

8. Exempt Organizations and Activities

GAO has no authority to issue decisions on bid protests involving procurement actions of organizations or activities that are not federal agencies. These include the U.S. Postal Service, the Government of Puerto Rico, the Government of the District of Columbia, and government corporations such as the Federal Deposit Insurance Corporation that are not wholly owned by the government. Also included

in this category are nonappropriated fund activities, such as the Army and Air Force Exchange Service, Navy Exchange, and military clubs and theaters.

Where to Protest

Protests must be in writing and addressed to the General Counsel, General Accounting Office, 441 G St., NW, Washington, D.C. 20548, Attention: Procurement Law Control Group. Protests may be sent by mail, telegram, or commercial carrier or may be delivered in person. A copy of the protest must be filed with the contracting officer or the individual or location identified for that purpose in a solicitation within 1 day after the protest is filed with GAO.

Form of Protest

There is no prescribed form for filing a protest; formal briefs and other technical forms of pleading are not required. However, protests must be in writing, be signed, and include at least one copy. Protests should be concise and logically arranged. Protests filed with GAO are required to contain the following:

1. Name, address, and telephone number of the protester.
2. Identity of the contracting activity and the number of the solicitation or contract.
3. A detailed statement of the legal and factual grounds for protest, including copies of relevant documents, with the reasons why the protest should be sustained.
4. A specific request for a ruling by the Comptroller General and a statement of the relief requested.
5. Indication that a copy of the protest was or is being filed with the contracting officer or other appropriate individual or location specified in the solicitation within 1 day.

If this information is not furnished, GAO may refuse to consider the protest.

Acknowledgment of Protest

Protests filed with GAO are acknowledged unless they are summarily dismissed. In such cases, a dismissal decision or notice of dismissal will be furnished instead.

Time for Filing

The bid protest process may delay the procurement of goods and services needed by the government. In order to minimize the possible adverse effect of these delays, time limits for bid protest actions have been established. GAO believes that these time limits provide would-be protesters with a reasonable opportunity to submit protests, and therefore it will normally refuse to consider protests that are not filed in accordance with those time limits. However, under certain limited circumstances, GAO will consider protests that are not filed timely. The various time frames established, the manner in which timeliness is determined, and the exceptions to the timeliness requirements are described below.

1. Time for Filing Protests

a. Protests filed initially with contracting agencies

Protesters may seek resolution of their complaints initially with the contracting agencies. If a protest is filed initially with a contracting agency, any subsequent protest to GAO must be filed within 10 working days of the protester's learning of initial adverse agency action. In many cases, this adverse agency action will be formal notification that the protest is denied. However, adverse agency action may also be indicated by bid opening or the receipt of proposals, the award of a contract to another party, rejection of a bid, or agency acquiescence in continued performance. Therefore, those who initially file protests with the contracting agencies cannot wait for a formal agency response to the

protest, but must be alert to any possible agency action that is adverse to the protest.

b. Protests based upon solicitation improprieties

Protests alleging improprieties in a solicitation that are apparent prior to bid opening or the closing date for the receipt of proposals must be filed prior to such bid opening or closing date. If, in the case of a negotiated procurement, an alleged impropriety did not exist in the initial solicitation but is subsequently incorporated into it by amendment, a protest based on that impropriety must be filed prior to the next closing date established for submission of revised proposals. This requirement is also applicable to the protests filed initially with the contracting agency. Thus, if a protest based on an apparent solicitation defect is filed with an agency after bid opening, a protest subsequently lodged with GAO will not be considered timely even if it is filed within 10 working days of adverse agency action.

c. All other cases

In all other cases, protests must be filed not later than 10 working days after the basis for protest is known or should have been known. For example, if a bidder believes the low bid to be nonresponsive, a protest based on the alleged nonresponsiveness must be filed within 10 working days after the bidder learns or should have learned that the contracting officer does not regard the bid as nonresponsive. This requirement is also applicable to protests filed initially with the contracting agency, which means that a subsequent protest filed with GAO will not be considered timely unless the protest initially lodged with the agency was filed within the 10 working-day period.

2. Determining Timeliness

The time periods for filing protests are based on the *working days* of the federal government rather

than on calendar days. This means that a protest lodged with GAO after notification of initial adverse agency action or after the basis for protest becomes known will be considered timely if filed within 10 working days of those occurrences. The term "filed" means *receipt* in the contracting agency (for agency-level protests) or GAO, as the case may be, and *not merely the mailing or other transmission* of the protest.

3. Consideration of Untimely Protests

GAO may consider any protest that is not filed timely "for good cause shown" or when a protest raises issues that are significant to procurement practices or procedures. Good cause generally refers to some compelling reason beyond the protester's control that caused the protest to be filed late. A significant issue is not dependent upon the amount of money involved, but rather upon the presence of a principle of widespread interest.

Processing of a Protest

1. General Information

Upon receipt of a protest, GAO will notify the contracting agency within 1 day by telephone and confirm that notice in writing. GAO will also mail an acknowledgment of the protest to the protester. The agency will then give notice of the protest to the contractor if award has been made, or, if no award has been made, to all interested parties and furnish copies of the protest documents to those parties. The agency will prepare a documented report that is responsive to the protest and furnish the report to GAO with a copy to the protester and other interested parties. In most cases, the agency must furnish a report within 25 working days of its receipt of the telephonic notification of the protest. In

exceptional cases, GAO may allow the agency a longer period.

2. Document Production

GAO bid protest regulations now also provide for document production procedures. "Document production" means that a protester may request in writing specific documents relevant to its protest grounds. Such a request must be filed concurrently with the filing of the protest. The documents will be furnished by the agency with the agency's report unless the documents are not relevant to the protest, would give the protester or other interested parties a competitive advantage, or the parties are not otherwise authorized by law to receive them. A protester may also request documents if the existence or relevance of the documents first becomes evident from the agency report. Such a request must be filed with GAO within 2 days of the receipt of the agency report. In all cases, however, GAO will be furnished with the requested documents. Within 5 days after receipt, GAO will decide whether any documents withheld from the protester or other interested parties shall be released, and if it determines the documents should be released, it will either furnish them directly or request that the agency do so. Detailed procedures for the request and processing of requests for the release of relevant documents are set forth in §21.3(c)-(i) of the Bid Protest Regulations, 4 CFR §21.3. These procedures should be carefully studied before a request for documents is made.

3. Report Comments

Once a report is furnished, the protester and others are given 10 working days to file comments on the report. A copy of these comments must be provided to the agency office that furnished the report and to all other interested parties of record. The protester, within the 10-day period, *must* either file comments, request an extension of time to do so, or state *in writing* that it wants the case to be decided on the existing record; failure to comply with this



requirement will result in dismissal of the protest. GAO will assume that the protester received the agency report no later than the scheduled due date specified in the acknowledgment of protest furnished by GAO unless otherwise advised by the protester.

The time for comment *differs when a request for documents has been made and the agency does not furnish them to the protester with the report*. In that case, the time for filing comments is 7 days from the time of receipt of the documents, except in those circumstances when the requested documents are determined to have been properly withheld, in which event comments must be filed within 10 working days of the receipt of the agency report. Extensions of the time for filing comments may be requested by any party to the protest. However, such extensions will rarely be granted.

Summary Dismissal

GAO will summarily dismiss a protest that on its face is clearly without legal merit, is untimely (unless it is to be considered under one of the exceptions to the timeliness requirements), fails to set forth the detailed grounds for protest, or involves a matter that GAO does not consider. In such cases, GAO will not require the submission of an agency report. If GAO learns of the basis of the dismissal from information provided by the agency after the protest is filed, GAO will dismiss the protest at that time.

Conferences

1. Informal Conferences

An informal conference may be held at the sole discretion of GAO at the request of the protester, the agency involved, or any participating interested party. All parties should be represented by individuals who are knowledgeable about the subject matter of the protest. Although the majority of bid

protest cases are decided without a conference, the informal conference can serve to clarify issues and factual situations and provide a better understanding of each party's positions. These conferences do not involve such formal procedures as transcripts, sworn testimony, and cross examination. However, all participating interested parties are invited to attend.

The informal conference should be requested as early as possible. If GAO, in its discretion, decides to hold such a conference, it will be held as soon as practicable after the parties have received the agency report. When an informal conference is held, separate comments on the report are not to be filed. Instead, comments on both *the report and the conference* are to be submitted within 7 working days of the conference date, with a copy to the agency and all parties of record. Again, the protester, within that 7-day period, must file comments, request an extension, or submit a written request that a decision be based on the existing record. Failure to do so will result in dismissal of the protest.

2. Fact Finding Conference

Fact finding conferences differ significantly from the informal conferences described above. Fact finding conferences are conducted under more formal procedures in the sense that witnesses will be called upon to testify under oath or affirmation, each party to the conference will be given the opportunity to examine the witnesses, and a transcript of the proceedings will be made and will be available to the participants. As in the informal conference procedures, a fact finding conference will be held only at the sole discretion of GAO upon the request of any party or upon the initiative of GAO. A fact finding conference may be held in order to resolve a specific factual dispute that is essential to the resolution of the protest and that cannot be otherwise resolved on the written record. Each party may submit written comments to the GAO *within 3 days* of receipt of the transcript. Relevant

findings of fact by the hearing official will be included in the bid protest decision. If any party refuses to attend such a conference or a witness fails to answer a relevant question, GAO may draw an inference unfavorable to the party refusing to cooperate.

3. Limitations

Ordinarily, only one informal will be permitted for a bid protest. The conference also will be permitted only with respect to the legal merits of a protest; a conference will not be held to discuss such things as jurisdiction, timeliness, and interested party status.

Protection of Proprietary Information

As indicated above, protesters can expect that copies of their protests will be furnished to other parties having an interest in the protests. In cases where copies of a protest and supplemental material have not been furnished to other parties by the contracting agency or by the protester directly, GAO will, upon request of another party, furnish a copy of the requested material, except to the extent that the withholding of information is permitted or required by law or regulation. Accordingly, if a protester considers that the protest documents contain material that may properly be withheld from other parties, a statement advising of this fact must be placed on the front page of the document and the allegedly proprietary information must be identified wherever it appears.

Effect of Protest on Award and Performance

When an agency is notified that a protest has been filed prior to contract award, the agency is required by law not to make an award prior to resolution of the protest unless the head of the procuring activity decides that there are urgent and compelling circumstances significantly affecting the interests of the United States that will not permit waiting for the GAO decision. When an agency is notified of a protest within 10 days after award has been made, the law requires the agency to direct the contractor

to suspend performance until the protest is resolved. Performance may continue only if the head of the procuring activity finds that performance of the contract is in the government's best interest or that urgent and compelling circumstances significantly affecting the interests of the United States will not permit waiting for a GAO decision.

In the event the agency decides to award a contract or to continue performance prior to protest resolution, the agency must notify GAO.

Decision

After all submissions have been received and after the holding of a conference if one was requested, a decision is issued by the Comptroller General. The maximum time for issuing the decision is 90 working days from the date GAO received the protest. When a decision is issued, a copy is sent (usually by mail) to the protester, the agency involved, and other interested parties.

The decision will either deny or sustain the protest. When a protest is sustained, the Comptroller General normally recommends appropriate corrective action. If the issue is decided before award, it can be expected that the contracting agency will take no procurement action inconsistent with the decision. When the case is decided after award, GAO may, when appropriate, give consideration to the extent of performance, the government's need for the supplies or services, and similar factors in recommending corrective action. In appropriate circumstances, termination of an improper award will be recommended. In other cases when this is not feasible, the Comptroller General may recommend that any renewal options in the contract not be exercised.

Under the law, the Comptroller General may also declare that the protester is entitled to be reimbursed for the cost of preparing its bid or proposal

and for the cost of filing and pursuing the protest. In such cases, GAO looks to the protester and the agency to determine the exact amount to be paid. If the protester and the agency cannot agree, GAO will decide. Note, however, that costs to be awarded *do not* include lost profits or other common-law damages.

When corrective action is recommended, the Competition in Contracting Act requires the agencies affected to report to the Comptroller General whenever they have not fully implemented the recommendation within 60 days. The Comptroller General, in turn, annually reports to the Congress on each instance where recommendations were not fully implemented.

Request for Reconsideration

GAO will consider requests for reconsideration of a decision from the protester, any agency involved in the protest, and from any participating interested party who submitted comments during consideration of the protest. However, the request for reconsideration must be received in GAO not later than 10 working days after the basis for requesting reconsideration is known or should have been known. The request must contain a detailed statement of the factual and legal grounds upon which reversal or modification of the decision is warranted. Requests for reconsideration that indicate only that the requester disagrees with the decision will be denied. A request for reconsideration does not result in the withholding of award or the suspension of contract performance.

Express Option

Occasionally it will be important to have a bid protest decided in less than the normal time frame. GAO therefore has established accelerated procedures known as the express option. Any party may request use of the express option, but such a request must be received by GAO not later than 3 days after the protest is filed. GAO will decide within

2 days after the receipt of the request if the case is suitable for the express option and will so notify the parties. When the express option is used, the deadlines for submission of the agency report and issuance of the GAO decision are not what they are when the more usual procedures are followed. Under the express option, the report must be filed within 10 days from the date the agency is notified that the express option will be used; the GAO decision will be issued within 45 *calendar* days from the date the protest was filed. GAO may withdraw the express option after it has been granted when circumstances demonstrate that the case is not suitable for resolution within the 45-day period. In such cases, GAO may establish new deadlines within the constraints of § 21.7(a) and (c) and § 21.3(i) and (f) of the regulations. Because not many cases are appropriate for the accelerated procedures, the express option will be used sparingly. In particular, the express option is usually not appropriate for any case involving an informal or fact finding conference.

Other Protests

Prior to the enactment of the Competition in Contracting Act, GAO routinely considered protests involving sales by federal agencies. Such protests will now only be considered if the agency involved agrees to have the protest considered by GAO. In such cases, all provisions of the Bid Protest Regulations apply, except that GAO will not award the protester costs and the provisions of the Competition in Contracting Act concerning the withholding of award and suspension of performance while the protest is pending will not apply.

Bid Protest Regulations

The regulations governing the bid protest process appear in Part 21 of Title 4 of the Code of Federal Regulations. Those regulations, as in effect on January 15, 1988, are reprinted below.

§ 21.0 Definitions.

(a) "Interested party" for the purpose of filing a protest 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) "Interested party" for the purpose of participation in a protest 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) All days referred to are deemed to be "working days" of the federal government except in § 21.4, where the statutory language is repeated. Except as otherwise provided, in computing a period of time prescribed by these regulations, the day from which the designated period of time begins to run shall not be counted, but the last day of the period shall be counted unless that day is not a working day of the federal government, in which event the period shall include the next working day. Time for filing any document or copy thereof with the General Accounting Office expires at 5:30 p.m., Eastern

Standard Time or Eastern Daylight Savings Time as applicable on the last day on which such filing may be made.

(f) “Adverse agency action” is any action or inaction on the part of a contracting agency which is prejudicial to the position taken in a protest filed with the agency. It may include but is not limited to: a decision on the merits of a protest; a procurement action such as the opening of bids or receipt of proposals, the award of a contract, or the rejection of a bid despite the pendency of a protest; or contracting agency acquiescence in and active support of continued and substantial contract performance.

(g) The term “filed” regarding protests to the General Accounting Office means receipt of the protest and other submissions in the General Accounting Office.

§ 21.1 Filing a Protest.

(a) An interested party may protest to the General Accounting Office a solicitation issued by or for a federal agency for the procurement of property or services, or the proposed award or the award of such a contract. After an interested party protests a particular procurement or proposed procurement of automated data processing equipment and services to the General Services Administration Board of Contract Appeals under section III(h) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759(h)), and while that protest is pending before the Board, that procurement or proposed procurement may not be the subject of a protest to the General Accounting Office. An interested party who has filed a protest with the Board may not protest the same matter to the General Accounting Office.

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

(c) A protest filed with the General Accounting Office shall:

(1) Include the name, address and telephone number of the protester,

(2) Include an original signed by the protester or its representative, and at least one copy,

(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) Specifically request a ruling by the Comptroller General of the United States (Comptroller General), and

(6) State the form of relief requested.

(d) The protester shall furnish a copy of the protest (including relevant documents not issued by the contracting agency) to the individual or location designated by the contracting agency in the solicitation for receipt of protests. If there is no designation in the solicitation, the protester shall furnish a copy of the protest to the contracting officer. The designated individual or location, or if applicable, the contracting officer must receive a copy of the protest no later than 1 day after the protest is filed with the General Accounting Office. The protest document must indicate that a copy has been furnished or will be furnished within 1 day to the appropriate individual or location.

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

Office will time/date stamp and return a copy of the protest provided by the protester.

(f) A protest filed with the General Accounting Office may be dismissed for failure to comply with any of the requirements of this section. However, a protest shall not be dismissed for failure to comply with paragraph (d) of this section where the contracting officer has actual knowledge of the basis of protest, or the agency, in the preparation of its report, is not otherwise prejudiced by the protester's noncompliance.

§ 21.2 Time for Filing.

(a)(1) Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals shall be filed prior to bid opening or the closing date 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 date for receipt of proposals following the incorporation.

(2) In cases other than those covered in paragraph (a)(1) of this section, protests shall be filed not later than 10 days after the basis of protest is known or should have been known, whichever is earlier.

(3) If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action will be considered, provided the initial protest to the agency was filed in accordance with the time limits prescribed in 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 the General Accounting Office must be filed within the 10-day period provided by this paragraph.

(b) The General Accounting Office, for good cause shown, or where it determines that a protest raises issues significant to the procurement system, may consider any protest which is not filed timely.

§ 21.3 Notice of Protest,
Submission of Agency
Report and Time for Filing
of Comments on Report.

(a) The General Accounting Office shall notify the contracting agency by telephone within 1 day of the filing of a protest, and shall promptly mail confirmation of that notification to the contracting agency and also mail an acknowledgment of the protest 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 substantial and reasonable prospect of receiving an award if the protest is denied. The contracting agency shall furnish copies of the protest submissions to such parties with instructions to communicate further directly with the General Accounting Office. All parties shall furnish copies of any such communications to the contracting agency and to other participating interested parties.

(b) Material submitted by a protester will not be withheld from any interested party outside the government or from any federal agency which may be involved in the protest except to the extent that the withholding of information is permitted or required by law or regulation. If the protester considers that the protest contains material which should be withheld, a statement advising of this fact must be affixed to the front page of the protest submission and the allegedly protected information must be so identified wherever it appears.

(c) A protester may request in writing specific documents relevant to its protest grounds, including but also in addition to the documents described in § 21.3(i). The request must be filed with the General Accounting Office and with the individual or location referred to in § 21.1(d) concurrent with the filing of the protest. A request that fails to meet one or more of the requirements of this paragraph may be dismissed.

(d) Where a request for documents is submitted pursuant to paragraph (c) of this section, those documents shall be furnished as follows:

(1) Except as provided below, the contracting agency shall furnish copies of the requested documents along with the copy of the agency report to the protester and to interested parties who have responded to the notice in § 21.3(a).

(2) Requested documents that are not relevant to the protest or would give the protester or other interested party a competitive advantage or that the protester or the interested party is not otherwise authorized by law to receive shall not be furnished to the protester or to the interested party. Requested documents not furnished to the protester or the interested party shall be identified and the reason for not furnishing the documents stated. In any event, all requested documents shall be furnished to the General Accounting Office.

(e) The protester may subsequently request additional documents if the existence or relevance of such documents first becomes evident from the agency report. Any request for such documents must be filed with the General Accounting Office and the contracting agency within 2 days of the protester's receipt of the agency report. The contracting agency must respond within 5 days by filing with the General Accounting Office the requested documents and by identifying the documents not to be furnished to the protester or the

interested party and stating the reason for not furnishing them.

(f) The General Accounting Office shall decide within 5 days of the receipt of the contracting agency's report under paragraph (d) or its response under paragraph (e) whether any documents withheld from the protester or other interested party shall be released to the protester or other interested party. If the General Accounting Office determines that withheld documents should be released, it will furnish the documents to the party or parties entitled to receive them or advise the agency to do so.

(g) When withheld documents are so released, the protester's comments on the agency report shall be filed within 7 days of its receipt of the released documents. If the General Accounting Office determines that the documents were properly withheld, the protester's comments are due within 10 days of its receipt of the agency report as under § 21.3(k).

(h) In the event any contracting agency fails to comply with a decision that a document should be furnished to a protester or other interested party, the General Accounting Office may use any authority available under chapter 7 of title 31, United States Code, to provide the documents to the protester or other interested party or may draw an inference regarding the content of the withheld document unfavorable to the contracting agency.

(i) The contracting agency shall file a complete report on the protest with the General Accounting Office within 25 days from the date of the telephone notice of the protest from the General Accounting Office. The report shall contain copies of all relevant documents 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, the solicitation, including the specifications or portions relevant to the protest,

the abstract of bids or offers or relevant portions, any other documents that are relevant to the protest, and the contracting officer's statement setting forth findings, actions, recommendations and any additional evidence or information deemed necessary in determining the validity of the protest. The statement shall be fully responsive to all allegations of the protest which the agency contests. Pursuant to section 3553(f) of the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(f) (Supp. III 1985), the contracting agency shall simultaneously furnish a copy of the report to the protester and interested parties who have responded to the notice given under paragraph (a) of this section. Copies of reports furnished to such parties shall include relevant documents that would not give the party a competitive advantage and that the party is otherwise authorized by law or regulation to receive. If documents are withheld from any of the parties, the agency must include in the report filed with the General Accounting Office and in the copies of the report provided to the protester and interested parties a list of the withheld documents. The copy of the report filed with the General Accounting Office shall also identify the parties who have been furnished copies of the report.

(j) The contracting agency may request, in writing, an extension of the 25-day report submission time period. The request shall set forth the reasons for which the extension is needed. The General Accounting Office will determine, in writing, whether the specific circumstances of the protest require a period longer than 25 days for the submission of the report and, if so, will set a new date for the submission of the report. Extensions are to be considered exceptional and will be granted sparingly. The agency should make its request for an extension as promptly as possible to permit it to submit a timely report should the General Accounting Office deny the request.

(k) Comments on the agency report shall be filed with the General Accounting Office within 10 days after receipt of the report, with a copy furnished by the commenting party to the contracting agency and other participating interested parties. Failure of the protester to file comments, or to file a written statement requesting that the case be decided on the existing record, or to request an extension under this section within the 10-day period will result in dismissal of the protest. The General Accounting Office will assume the protester received the agency report no later than the scheduled due date as specified in the acknowledgment of protest furnished by the General Accounting Office, unless otherwise advised by the protester. The General Accounting Office, upon a showing that the specific circumstances of the protest require a period longer than 10 days for the submission of comments on the agency report, may set a new date for the submission of such comments. Extensions are to be considered exceptional and will be granted sparingly.

(l) The General Accounting Office may at its discretion permit the submission of additional statements by the parties, including the contracting agency, if the party requests to do so and the General Accounting Office determines such statements are necessary for the fair resolution of the protest. The General Accounting Office may at its discretion permit the submission of statements relevant to the protest from parties other than interested parties as defined in §§ 21.0(a) and (b) such as federal agencies other than the contracting agency or trade associations.

(m) Notwithstanding any other provision of this section, when on its face a protest does not state a valid basis for protest or is untimely (unless the protest is to be considered pursuant to § 21.2(b)) or otherwise is not for consideration, the General Accounting Office will summarily dismiss the protest without requiring the submission of an agency

report. When the propriety of a dismissal becomes clear only after information is provided by the contracting agency or is otherwise obtained by the General Accounting Office, it will dismiss the protest at that time. If the General Accounting Office has dismissed the protest, it will notify the contracting agency that a report need not be submitted. Among the protests which may be dismissed without consideration of the merits are those concerning the following:

(1) **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. 601-13.

(2) **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 are for review solely by the Small Business Administration. 15 U.S.C. 637(b)(6); 13 CFR 121.3-6.

(3) **Small Business Certificate of Competency Program.** Any referral made to the Small Business Administration pursuant to section 8(b)(7) of the Small Business Act, or any issuance of a certificate of competency or refusal to issue a certificate under such section is not reviewed by the General Accounting Office absent a showing of possible fraud or bad faith on the part of the government officials.

(4) **Procurements under section 8(a) of the Small Business Act.** Since contracts are let under section 8(a) of the Small Business Act to the Small Business Administration at the contracting officer's discretion and on such terms as 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 and the award of an 8(a) subcontract are not subject to review absent a showing of possible fraud or bad faith on the part of government officials or that regulations may have been violated. 15 U.S.C. 637(a).

(5) Affirmative Determination of Responsibility by the Contracting Officer. Because a 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 that such determination was made fraudulently or in bad faith or that definitive responsibility criteria in the solicitation were not met.

(6) Procurement Protested to the General Services Administration Board of Contract Appeals. Interested parties may protest a procurement or proposed procurement of automated data processing equipment and services to the General Services Administration Board of Contract Appeals. After a particular procurement or proposed procurement is protested to the Board, the procurement may not, while the protest is before the Board, be the subject of a protest to the General Accounting Office. An interested party who has filed a protest with the Board may not protest the same matter to the General Accounting Office. Competition in Contracting Act of 1984, 40 U.S.C. 759(h) (Supp. III 1985).

(7) Protests not filed either in the General Accounting Office or the contracting agency within the time limits set forth in § 21.2.

(8) Procurements by Agencies Other Than Federal Agencies as Defined by Section 3 of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. 472. Protests of procurements or proposed procurements by such agencies (e.g., U.S. Postal Service, Federal Deposit Insurance Corporation, nonappropriated fund activities) are beyond the

General Accounting Office bid protest jurisdiction as established in section 2741 of the Competition in Contracting Act of 1984; 31 U.S.C. 3551-3556 (Supp. III 1985).

(9) Walsh-Healey Public Contracts Act. Challenges of the legal status of a firm as a regular dealer or manufacturer within the meaning of the Walsh-Healey Act are for determination solely by the procuring agency, the Small Business Administration (if a small business is involved) and the Secretary of Labor. 41 U.S.C. 35-45.

(10) Subcontractor Protests. The General Accounting Office will not consider subcontractor protests except where the subcontract is by or for the government under the provisions of § 21.11.

(11) Judicial Proceedings. The General Accounting Office will not consider protests where the matter involved is the subject of litigation before a court of competent jurisdiction, unless the court requests a decision by the General Accounting Office. The General Accounting Office will not consider protests where the matter involved has been decided on the merits by a court of competent jurisdiction.

(n) A protest may not be delayed by the failure of a party to file a submission within the specified time limits. Consequently, the failure of any party or contracting agency to comply with the prescribed time limits may result in resolution of the protest without consideration of the untimely submission.

§ 21.4 Withholding of Award and Suspension of Contract Performance.

Sections 3553(c) and (d) of the Competition in Contracting Act of 1984, 31 U.S.C. 3553(c) and (d) (Supp. III 1985), set forth the following requirements regarding the withholding of award and suspension of contract performance when a protest is filed with the General Accounting Office. The requirements are included here for informational purposes.

(a) When the contracting agency receives notice of a protest from the General Accounting Office prior to award of a contract, it may not award a contract under the protested procurement while the protest is pending unless the head of the procuring activity responsible for award of the contract determines in writing and reports to the General Accounting Office that urgent and compelling circumstances significantly affecting interests of the United States will not permit waiting for the General Accounting Office decision. This finding may be made only if the award is otherwise likely to occur within 30 days.

(b) When the contracting agency receives notice of a protest from the General Accounting Office after award of a contract, but within 10 days of the date of contract award, it shall immediately direct the contractor to cease contract performance and to suspend related activities that may result in additional obligations being incurred by the government under that contract while the protest is pending. The head of the procuring activity responsible for award of the contract may authorize contract performance notwithstanding the pending protest if he determines in writing and reports to the General Accounting Office that:

(1) Performance of the contract is in the government's best interest, or

(2) Urgent and compelling circumstances significantly affecting interests of the United States will not permit waiting for the General Accounting Office's decision.

§ 21.5 Conferences.

(a) A conference on the merits of the protest may, at the sole discretion of the General Accounting Office, be held at the request of the protester, interested parties who have responded to the notice given under § 21.3(a), or the contracting agency.

Requests for a conference should be made at the earliest possible time in the protest proceeding.

(1) Conferences will be held on a date set by the General Accounting Office as soon as practicable after receipt by the protester and participating interested parties of the agency report. All such interested parties shall be invited to attend. All parties should be represented by individuals who are knowledgeable about the subject matter of the protest. Ordinarily, only one conference will be held on a bid protest.

(2) If a conference is held, no separate comments under § 21.3(k) will be considered. The protester, all participating interested parties and the contracting agency may file comments on the conference and report as appropriate with the General Accounting Office, with copies furnished to the other parties, including the contracting agency, within 7 days of the date on which the conference was held.

(3) The General Accounting Office may request that a conference be held if at any time during the protest proceeding it decides that such a conference is needed to clarify material issues. If such a conference is held, the General Accounting Office shall make such adjustments in the submission deadlines as it determines to be fair to all parties.

(4) Failure of the protester to file comments, or to file a written statement requesting that the case be decided on the existing record, or to request an extension under this section within the 7-day period set forth in paragraph (a)(2) of this section will result in dismissal of the protest. The General Accounting Office may set a new date for the submission of comments under the circumstances set forth in § 21.3(k).

(b) A fact finding conference may, at the sole discretion of the General Accounting Office, be held at the request of any party or on the initiative of the

General Accounting Office. The fact finding conference may be held in order to resolve a specific factual dispute essential to the resolution of the protest which cannot be otherwise resolved on the written record.

(1) A fact finding conference may be held at any time during the protest proceeding. The General Accounting Office will notify all parties in writing, at least 5 days before such a conference is scheduled, and inform them of the factual issue or issues to be resolved and of any specific witness to be produced.

(2) The fact finding conference will be held at the General Accounting Office before a General Accounting Office official. Witnesses will testify under oath or affirmation, and a transcript of the proceeding will be made. Each party must pay for its copy of the transcript and will be given the opportunity to question the witnesses. Fact finding conferences shall be as informal as is reasonable and appropriate under the circumstances. Evidence shall be admitted in the sound discretion of the presiding General Accounting Office official.

(3) Each party may submit written comments to the General Accounting Office on the matter raised in the conference within 3 days of receipt of the transcript. Relevant findings of fact by the General Accounting Office hearing official shall be part of the bid protest decision.

(4) If any party refuses to attend such a conference, or a witness fails to attend or fails to answer a relevant question, the General Accounting Office may draw an inference unfavorable to the party refusing to cooperate.

§ 21.6 Remedies.

(a) If the General Accounting Office determines that a solicitation, 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 which it deems appropriate under the circumstances:

- (1) Refrain from exercising options under the contract;
- (2) Terminate the contract;
- (3) Recompete the contract;
- (4) Issue a new solicitation;
- (5) Award a contract consistent with statute and regulation; or
- (6) Such other recommendations as the General Accounting Office determines necessary to promote compliance.

(b) In determining the appropriate recommendation, the General Accounting Office shall, except as specified in paragraph (c) of this section, consider all the circumstances surrounding the procurement or proposed procurement including, but not limited to, the seriousness of the procurement deficiency, the degree of prejudice to other interested parties or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, cost to the government, the urgency of the procurement and the impact of the recommendation on the contracting agency's mission.

(c) If the head of the procuring activity makes the finding referred to in § 21.4(b)(1) that performance of the contract notwithstanding a pending protest is in the government's best interest, the General Accounting Office shall make its recommendation under paragraph (a) of this section without regard to any cost or disruption from terminating, recompeting or reawarding the contract.

(d) If the General Accounting Office determines that a solicitation, proposed award, or award does not comply with statute or regulation it may declare the protester to be entitled to reasonable costs of:

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

(2) Bid and proposal preparation.

(e) If the General Accounting Office decides that the protester is entitled to the recovery of such costs, the protester and the contracting agency shall attempt to reach agreement on the amount of the costs. If the protester and the contracting agency cannot reach agreement within a reasonable time, the General Accounting Office will determine the amount.

§ 21.7 Time for Decision by the General Accounting Office.

(a) The General Accounting Office shall issue a decision on a protest within 90 days from the date the protest is filed with it.

(b) In those protests for which the General Accounting Office invokes the express option under § 21.8, the General Accounting Office shall issue a decision within 45 calendar days from the date the protest is filed with it. (c) Under exceptional circumstances the General Accounting Office may extend the deadline in paragraph (a) of this section on a case-by-case basis by stating in writing the reasons that the specific circumstances of the protest require a longer period.

§ 21.8 Express Option.

(a) At the request of the protester, the contracting agency or an interested party for an expeditious decision, the General Accounting Office will consider the feasibility of using an express option.

(b) The express option will be invoked solely at the discretion of the General Accounting Office only in

those cases suitable for resolution within 45 calendar days.

(c) Requests for the express option must be in writing and received in the General Accounting Office no later than 3 days after the protest is filed. The General Accounting Office will determine within 2 days of receipt of the request whether to invoke the express option and will notify the contracting agency, protester and interested parties who have responded to the notice under § 21.3(a).

(d) When the express option is used the filing deadlines in § 21.3 and the provisions of § 21.5 shall not apply and:

(1) The contracting agency shall file a complete report with the General Accounting Office on the protest within 10 days from the date it receives notice from the General Accounting Office that the express option will be used and furnish copies of the report to the protester and interested parties who have responded to the notice under § 21.3(a).

(2) Comments on the agency report shall be filed with the General Accounting Office within 5 days after receipt of the report with a copy furnished by the commenting party to the contracting agency and other participating interested parties.

(3) The General Accounting Office may arrange a conference to ascertain and clarify the material issues at any time deemed appropriate during the protest proceedings.

(4) The General Accounting Office shall issue its decision within 45 calendar days from the date the protest is filed with it.

(e) Where circumstances demonstrate that the case is no longer suitable for resolution within 45 calendar days, the General Accounting Office may establish new deadlines within the constraints



established in § 21.7(a) and (c) regarding the issuance of a decision and in § 21.3(i) and (j) regarding the submission of the agency report.

§ 21.9 Effect of Judicial Proceedings.

(a) The General Accounting Office will dismiss any protest where the matter involved is the subject of litigation before a court of competent jurisdiction, unless the court requests a decision by the General Accounting Office. The General Accounting Office will dismiss any protest where the matter involved has been decided on the merits by a court of competent jurisdiction.

(b) Where the court requests a decision by the General Accounting Office, the times for filing the agency report (§ 21.3(i)), filing comments on the report (§ 21.3(k)), holding a conference and filing comments (§ 21.5), and issuing a decision (§ 21.7) may be changed if the court so orders.

§ 21.10 Signing and Distribution of Decisions.

Each bid protest decision shall be signed by the Comptroller General or a designee for that purpose. A copy of the decision shall be made available to all participating interested parties, the protester, the head of the contracting activity responsible for the protested procurement, the senior procurement executive of each federal agency involved, and any member of the public.

§ 21.11 Nonstatutory Protests.

(a) The General Accounting Office may consider protests concerning sales by a federal agency or procurements by agencies of the government other than federal agencies as defined in § 21.0(c) if the agency involved has agreed in writing to have its protests decided by the General Accounting Office.

(b) All of the provisions of these Bid Protest Regulations shall apply to any nonstatutory protest decided by the General Accounting Office except for the provisions of § 21.6(d) pertaining to entitlement

to reasonable costs of filing and pursuing the protest, including attorneys' fees. Sections 3553(c) and (d) of the Competition in Contracting Act of 1984, 31 U.S.C. 3553(c) and (d) (Supp. III 1985), pertaining to withholding of award and suspension of contract performance shall not apply.

§ 21.12 Request for Reconsideration.

(a) Reconsideration of a decision of the General Accounting Office may be requested by the protester, any interested party who participated in the protest, and any federal agency involved in the protest. The General Accounting Office will not consider any request for reconsideration which 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) Request for reconsideration of a decision of the General Accounting Office shall be filed, with copies to any federal agency and interested 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. The term "filed" as used in this section means receipt in the General Accounting Office.

(c) A request for reconsideration shall be subject to these bid protest regulations consistent with the need for prompt and fair resolution of the matter. The filing of a request for reconsideration will not invoke Section 3553(c) or (d) of the Competition in Contracting Act of 1984, 31 U.S.C. 3553(c) and (d) (Supp. III 1985), relating to the withholding of award and the suspension of contract performance.

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