

**Fifth Edition
1995**

Bid Protests at GAO: A Descriptive Guide

Introduction

The laws and regulations that govern contracting with the federal government are designed to ensure 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 they have been unfairly denied a contract or an opportunity to compete for a contract. A major avenue of relief for those concerned about the propriety of an award has been the General Accounting Office, which for almost 75 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 considering bid protests. This is the fifth edition of Bid Protests at GAO: A Descriptive Guide, prepared by the Office of the General Counsel to aid those interested in GAO's 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 and we have revised it over the years to reflect changes in our bid protest procedures. This edition incorporates changes made to our Bid Protest Regulations, effective October 1, 1995, to implement the Federal Acquisition Streamlining Act of 1994 and to streamline the bid protest process at GAO.

Introduction

We have improved this edition of the booklet by providing practice tips to assist parties participating in a bid protest at GAO. In addition, we have added appendixes which contain a sample protective order and sample applications for access to materials under a protective order.

A handwritten signature in black ink, reading "Robert P. Murphy". The signature is written in a cursive style with a large, sweeping "M" and "P".

Robert P. Murphy
General Counsel

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The Bid Protest Process

Background

For almost 75 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 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. Although protesters may be represented by counsel, filing a bid protest with GAO is easy and inexpensive and does not require the services of an attorney. In addition, matters can usually be resolved more quickly by protests filed with GAO than by court litigation.

This booklet is an informal, practical guide to the bid protest process at GAO; however, it is not the law. The legal rules governing this process are set forth in GAO's Bid Protest Regulations. Since 1985, GAO has had detailed regulations to inform protesters of the rules concerning where and how to file a protest, what to expect in the way of subsequent actions, and the time frames established for completion of those actions. These regulations were promulgated to implement the Competition in Contracting Act of 1984 and were revised in response to the Federal Acquisition Streamlining Act of 1994. The revised regulations will appear in Title 4 of the Code of Federal Regulations (C.F.R.), Part 21, and are reproduced in this booklet for ease of reference.

GAO changes its regulations from time to time because of changes in applicable statutes, a binding court decision, or when experience dictates that a modification is appropriate. These changes are published in the Federal Register, and then incorporated into the Code of Federal Regulations, which is published annually and reflects the revisions or additions to the regulations that were published in

the Federal Register during the preceding year. Because the regulations are published in the Federal Register, protesters and other parties are held to have “constructive knowledge” of them, meaning that they are expected to comply with the regulations, even if they have never actually read the regulations.

In deciding bid protests, GAO considers whether federal agencies have complied with statutes and regulations controlling government procurements. The main statutes controlling federal procurements are 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 of 1984 and the Federal Acquisition Streamlining Act of 1994. These statutes are found in the United States Code, titles 10 and 41, respectively, and 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 telecommunications needs. GAO’s Bid Protest Regulations govern GAO’s handling of protests and impose certain requirements on contracting agencies, protesters, and others who participate in bid protests.

Overview of the Bid Protest Process

The bid protest process at GAO begins with the filing of a written protest. In response, the contracting agency is required to file an agency report with GAO and to provide a copy of that report to the protester. The protester then has an opportunity to file written comments on the report. Other parties may be permitted to intervene, which means that they will also receive a copy of the report and will be allowed to file written comments on the report.

GAO may find that a hearing is necessary to gather additional facts about a case. If it decides to hold a hearing, GAO will usually conduct a pre-hearing conference to decide the issues that will be considered at the hearing, to identify the witnesses, and to settle procedural questions. After the hearing, all parties will be allowed to submit written comments on the hearing.

After the record is complete, GAO will consider the facts and legal issues raised and will issue a decision, a copy of which will be sent to all the parties participating in the protest. GAO may sustain the protest (that is, find that the agency violated a procurement statute or regulation), in which case GAO will recommend appropriate corrective action. Alternatively, GAO may deny the protest or dismiss the protest without reviewing the matter. GAO will issue its decision no later than 125 calendar days from the date the protest was filed. (In these regulations, all “days” are calendar days.) The exact date on which GAO issues the decision depends on the urgency of the procurement, the complexity of the factual and legal issues in the protest, and GAO’s work load.

Filing a Protest

Who May Protest

By law, a GAO protest must be filed by an “interested party,” which means an actual or prospective bidder or offeror with a direct economic interest in the procurement. 4 C.F.R. § 21.0(a). In challenges of the evaluation of proposals and the award of contracts, this generally means an offeror that would potentially be in line for award if the protest were sustained.

Although many parties retain an attorney in order to benefit from the attorney’s familiarity with GAO’s bid

protest process and with procurement statutes and regulations, an attorney is not required for purposes of filing a protest. However, where the record includes another company's proprietary information or the agency's source-selection-sensitive information, only attorneys (and then only if the attorneys are admitted under a protective order, as discussed below) will be allowed to see that information.

What to Protest

Although most protests challenge the acceptance or rejection of a bid or proposal and the award or proposed award of a contract, GAO considers protests of defective solicitations (e.g., allegedly restrictive specifications, omission of a required provision, or ambiguous or indefinite evaluation factors), as well as certain other procurement actions (e.g., the cancellation of a solicitation). The termination of a contract may be protested if the protest alleges that the termination was based on improprieties in the award of the contract. 4 C.F.R. § 21.1(a). Where the agency involved has agreed in writing, GAO will consider protests concerning (1) awards of subcontracts by or for a federal agency, (2) sales by a federal agency, and (3) procurement actions by government entities which do not fall within the strict definition of federal agencies in 4 C.F.R. § 21.0(c). 4 C.F.R. § 21.13(a).

There are some matters that cannot be protested to GAO. The most common grounds for dismissal of a protest in whole or in part are set forth in 4 C.F.R. § 21.5.

Preparation of a Protest

There is no prescribed form for filing a protest, except that the protest must be in writing. 4 C.F.R.

§ 21.1(b). Protests of different procurements must be separately filed. 4 C.F.R. § 21.1(f).

GAO does not require formal briefs or other technical forms of pleadings. However, at a minimum, a protest shall:

- (1) Include the name, address, and telephone and facsimile (fax) numbers of the protester (or its representative, if any);
- (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. 4 C.F.R. § 21.1(c).

In addition, a protest may include a request for a protective order, specific documents relevant to the protest, and a hearing. 4 C.F.R. § 21.1(d).

The protest document must be clearly labeled if it contains information which the protester believes is

proprietary, confidential, or otherwise not releasable to the public. In those cases, within 1 day after the filing of the unredacted protest with GAO, the protester must provide a redacted version of the document which omits such information to GAO and the contracting agency. 4 C.F.R. § 21.1(g).

A party may request that GAO decide a protest using an express option or accelerated schedule. 4 C.F.R. § 21.10(a) and (e).

When to Protest

The regulations set forth the timeliness requirements for filing protests at GAO. 4 C.F.R. § 21.2. Because bid protests may delay the procurement of needed goods or services, GAO, except under limited circumstances, strictly enforces these time limits.

Protests alleging improprieties in a solicitation must be filed prior to bid opening or the time set for receipt of initial proposals if the improprieties were apparent prior to that time. 4 C.F.R. § 21.2(a)(1). A solicitation defect that was not apparent before that time must be protested no later than 14 days after the defect became apparent. In negotiated procurements, if an alleged impropriety did not exist in the initial solicitation but was later incorporated into the solicitation by an amendment, a protest based on that impropriety must be filed before the next closing time established for submitting proposals. Id.

In all other cases, protests must be filed no later than 14 days after the protester knew or should have known the basis of protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Because GAO generally enforces this rule strictly, potential protesters should not delay filing a protest simply to gather additional information from the agency if the delay would mean that the

protest would be filed more than 14 days after the protester first learned the basis of protest.

Special timeliness rules govern protests initially filed with the contracting agency. In those cases, the protest to GAO must be filed no later than 14 days after the protester learned of “initial adverse agency action.” 4 C.F.R. § 21.2(a)(3). Deciding when adverse agency action occurs is straightforward when the protester receives oral or written notice that the agency is denying the agency-level protest. Protesters should keep in mind, however, that GAO views any action that makes clear that the agency is denying the agency-level protest as adverse agency action. Examples of adverse agency action include the agency’s proceeding with bid opening or the receipt of proposals, the rejection of a bid or proposal, or the award of a contract despite the agency-level protest. Firms which have filed an agency-level protest and are considering protesting to GAO should be alert to any possible agency action that could be viewed as indicating that the agency is denying the agency-level protest.

Even if the firm files a protest with GAO within 14 days of initial adverse agency action, GAO will consider the protest untimely if the agency-level protest was not timely filed (under GAO’s timeliness rules, or under an agency’s rules if those rules are stricter). 4 C.F.R. § 21.1(a)(3). For example, if a firm waits until after bid opening to file an agency-level protest of an apparent solicitation impropriety, even if the subsequent protest to GAO is filed within 14 days of the firm’s learning that the agency denied the agency-level protest, GAO will not consider a protest of that impropriety.

GAO may consider an untimely protest where exceptional circumstances beyond the protester’s

control caused the delay in filing the protest, or where the protest presents novel or significant legal issues of interest to the procurement community. 4 C.F.R. § 21.2(c).

Practice tip: Supplemental Protests

Protesters should keep in mind that each new ground of protest must independently satisfy GAO's timeliness requirements. For example, if GAO grants an extension of time for filing comments on an agency report, the comment extension does not extend the 14-day time frame for filing a supplemental protest. As a result, if a protester waits until the extended due date for filing comments to raise new protest grounds, those grounds may be dismissed as untimely if they were raised more than 14 days after the protester learned or should have learned of them.

Where to Send a Protest

Protests must be addressed to the General Counsel, General Accounting Office, 441 G St., N.W., Washington, DC 20548, Attention: Procurement Law Control Group. 4 C.F.R. § 21.1(b). GAO's office hours are from 8:30 a.m. to 5:30 p.m., eastern time, Monday through Friday.

Protests may be filed by hand delivery, mail, commercial carrier, or fax. 4 C.F.R. § 21.0(g). Protests filed by hand delivery or commercial carrier must be delivered to the window located in the G Street lobby in GAO's main building at the above-referenced

address. Protesters filing their protests by fax should verify GAO's fax number prior to transmission. GAO's current bid protest fax number is (202) 512-9749. Fax users should take into account the risk that GAO's receiving fax machine might be busy, particularly near the end of the business day. GAO will time/date stamp a fax transmission as of the time that the last page is received, which may affect the timeliness of the entire submission. Additional recorded information concerning the filing of protests at GAO may be obtained by calling the Procurement Law Control Group at (202) 512-5282.

A copy of the protest, including all attachments, must be filed with the individual or location identified for that purpose in a solicitation, or with the contracting officer, within 1 day after the protest is filed with GAO. 4 C.F.R. § 21.1(e).

Initial Steps After a Protest Is Filed

Acknowledgment of a Protest

Upon receipt of a protest, GAO generally mails the protester a written notice acknowledging receipt of the protest. 4 C.F.R. § 21.3(a). The only instance in which an acknowledgment notice is not sent is where the protest is summarily dismissed, in which case a notice of dismissal will be furnished.

The acknowledgment notice includes important information. First, it provides the file number by which GAO identifies the protest. That number consists of a letter followed by six digits (e.g., B-123456). Second, the notice contains the date on which the contracting agency's response to the protest, the agency report, is due. The notice warns that GAO will assume that the protester receives the

report on that date and may dismiss the protest if the protester's written comments in response to the report are not received by GAO within 14 days of that date. Third, the notice contains the date by which a written decision will be issued by GAO.

Finally, the acknowledgment notice identifies the GAO attorney or the GAO contact person handling the protest and that individual's telephone number. That individual is the GAO employee who should generally be contacted with any procedural questions about the protest. Inquiries about the status of the case may be directed to GAO's bid protest status line at (202) 512-5436. This telephone number also appears on the notice.

**Confirmation of
Report Requirement**

Within 1 day of receipt of the protest, GAO will telephone the contracting agency to advise it that a protest has been filed. 4 C.F.R. § 21.3(a). That telephone call is important because it is the official notice that may trigger a statutorily imposed delay in award or of performance of a contract pending GAO's decision. For this reason, protesters should file their protests sufficiently in advance of the expiration of the statutory period after award or after a statutorily required debriefing to allow GAO time to notify the agency that a protest has been filed for purposes of triggering the statutorily imposed delay. GAO follows up the telephone notice with a written confirmation of report requirement which includes essentially the same information provided to the protester in the acknowledgment notice.

Practice tip: Statutorily Imposed Delay

Although the telephone notice from GAO to the contracting agency may trigger a statutorily imposed delay, GAO does not review agency decisions in this regard, and will not consider a protest challenging an agency's decision whether or not to delay a procurement.

Practice tip: Notice of Appearance

It is helpful for the attorney who will represent the contracting agency in the protest to send a written notice to GAO and the protester advising of his or her name, address, and telephone and fax numbers. This ensures that communications between the parties are not delayed.

Intervenors

Immediately after receiving notice of the protest from GAO, the contracting agency must give notice of the protest to the contractor if an award has been made or, if no award has been made, the agency must notify all bidders or offerors which have a reasonable chance of receiving an award. GAO may permit other firms to participate in the protest as "intervenors." 4 C.F.R. § 21.0(b). If the award has been made, GAO permits only the awardee to intervene. If the award has not been made, firms wishing to intervene should

so advise GAO and the other parties, and then contact GAO to learn whether they will be permitted to intervene. The notice of intervention can be a brief letter which includes the name, address, and telephone and fax numbers of the intervenor or its representative, if any, and which advises GAO and all other parties of the intervenor's status.

Summary Dismissal

If a protest is summarily dismissed, GAO will not review the merits of the protest. 4 C.F.R. § 21.5. For example, if the protest is untimely on its face or if it raises issues that GAO does not consider (such as the awardee's business size status), GAO will dismiss it without requiring the contracting agency to submit a report. GAO may also summarily dismiss individual grounds of protest. *Id.* For example, if a protest alleges that a solicitation uses overly restrictive technical specifications and uses the incorrect definition of a small business, GAO may dismiss the latter ground (which is for consideration by the Small Business Administration, not GAO), but request an agency report on the remaining ground.

As a general rule, GAO will dismiss a protest that fails to set forth a detailed statement of the legal and factual grounds of protest or that fails to clearly state legally sufficient grounds of protest. 4 C.F.R. § 21.5(f), citing 4 C.F.R. § 21.1(c)(4) and 4 C.F.R. § 21.1(f), respectively.

Once it receives the protest, the contracting agency and/or an intervenor may request that GAO summarily dismiss the protest or some of its grounds. 4 C.F.R. § 21.3(b). Where summary dismissal may be appropriate, the request for dismissal should be made as soon as practicable after the protest is filed. *Id.* The request should be in writing and sent to all parties. Unless it is clear that dismissal is appropriate, GAO

will generally permit the protester to file a written response to the dismissal request. If the request for dismissal is received by GAO soon after the protest is filed, GAO may grant the request without requiring the agency to prepare a report in response to the protest.

Protective Orders

If the record in a protest contains “protected” information, that is, a company’s proprietary or confidential data or the agency’s source-selection-sensitive information, that information cannot be made public. In order to allow limited access to protected information relevant to a protest, GAO may issue a protective order. 4 C.F.R. § 21.4. The protective order strictly controls who has access to protected material and how that material is labeled, distributed, stored, and disposed of at the conclusion of the protest. GAO will send out applications for access to materials under a protective order at the same time it issues the protective order.

Only individuals who apply to GAO, and whose applications are approved by GAO, will be permitted access to protected information. Those individuals must be attorneys or consultants retained by attorneys; the attorneys may be outside or in-house counsel. The applicants need to show that they are not involved in competitive decisionmaking for any company that could gain a competitive advantage from access to the protected information and that there will be no significant risk of inadvertent disclosure of the information. 4 C.F.R. § 21.4(c). Individuals permitted access to the protected information will not be allowed to disclose it to others. This means, for example, that a protester’s attorney permitted access to protected information under a protective order is prohibited from revealing such information to the client. GAO may impose

sanctions on any individual who violates a protective order. 4 C.F.R. § 21.4(d).

The information released under the protective order is not GAO's, but rather the contracting agency's or one of the private parties. For this reason, GAO relies on these parties to carefully review applications for access to materials under a protective order and to call to GAO's attention any potential violation of a protective order. If no party objects to an individual's application, GAO will generally admit the applicant to the protective order. It is important that any objections to an individual's application be promptly raised. By the end of the second day after receiving the application, the objecting party must advise GAO and the other parties that there is an objection to the applicant's admission. 4 C.F.R. § 21.4(c). The GAO attorney will generally permit the objecting party to submit the specific objection, which should be in writing, the next day. Even after the 2 days have passed, GAO may withhold its ruling on an application (or revoke an admission) if information comes to light which indicates that the applicant does not meet the criteria for admission.

A sample protective order, as well as sample applications for access to materials under a protective order for outside counsel, in-house counsel, and consultants retained by counsel, are reproduced in the appendixes to this booklet. These sample documents are provided for informational purposes only and are subject to change.

Practice tip: Protective Orders

Since only attorneys, or consultants they retain, may be admitted to protective orders, GAO will generally not issue a protective order in a protest, even if the record will include protected information, if the protester is proceeding without an attorney. Also, because a protective order is meant to help the protester, through counsel, learn the relevant facts, GAO views it as the responsibility of protester's counsel in the first instance to request a protective order and to submit timely applications. 4 C.F.R. § 21.4(a). If protester's counsel delays submitting applications for access to materials under a protective order (for example, until after receipt of the agency report), GAO will generally not consider this delay as a reason to extend the period of time for protester's counsel to file comments on the report.

Agency Report

The contracting agency is to provide GAO, the protester, and any intervenors a complete report responding to the protest, including all relevant documents and an explanation of the agency's position. The agency report is the agency's written response to the protest and must be provided within 35 days after it receives telephonic notice of the protest from GAO. 4 C.F.R. § 21.3(c). The report generally includes a statement of the relevant facts signed by the contracting officer, a memorandum of law explaining the agency's position in terms of

procurement law, and an index and a copy of all relevant documents. Id.

The agency report filed with GAO is to be sent to the protester and any intervenors. The agency may omit documents, or parts of documents, from the copy of the report provided to these parties if the omitted information is protected and the party receiving the report is not represented by counsel admitted to the protective order. 4 C.F.R. § 21.3(d). Where the protester is proceeding without counsel admitted to the protective order and documents are withheld, it is important that the protester receive sufficient information to make the agency's position clear, so that the protester may comment intelligently on the report.

Occasionally, the agency may be aware of the existence of relevant documents that only the protester possesses. In appropriate cases, the agency may request that the protester produce those documents. 4 C.F.R. § 21.3(c). If GAO agrees that the documents are relevant, it may ask the protester to provide a copy of the documents to GAO and the other parties.

**Additional
Document Requests**

If a protester learns of the existence or relevance of additional documents that it believes GAO needs to consider in deciding the protest, it may request the production of those documents by filing a supplemental document request. 4 C.F.R. § 21.3(f). Typically, this arises where the protester, in reading the agency report, sees references to documents that the agency relies on in support of its position, but has not produced. A protester seeking the production of additional documents should submit a written request for those documents to GAO and the other parties within 2 days after the existence or relevance of the

documents is known or should have been known, whichever is earlier. Id. The agency should respond to the request promptly (and in any event, no later than 5 days after receiving the request), by either producing the documents or explaining why the documents are not being produced. Id.

Comments on the Agency Report

The protester and any intervenors may file written comments on the agency report. 4 C.F.R. § 21.3(h). Comments generally are due at GAO within 14 days after receipt of the report. Id. GAO will assume that the protester received the report no later than the due date specified in the acknowledgment notice furnished by GAO, unless otherwise advised by the protester. Id. Comments themselves should be sent to all parties, as well as to GAO. Copies of comments should be received by the other parties no later than the day after the comments are received at GAO.

If the contracting agency produces withheld documents at the direction of GAO after the report has been submitted, comments will be due 10 days after receipt of these documents, unless otherwise specified by GAO. 4 C.F.R. § 21.3(g).

Failure of the protester to file comments, request that the case be decided on the existing written record, or request an extension of time within the 14-day period will result in dismissal of the protest. 4 C.F.R. § 21.3(h).

Practice tip: Additional Submissions

After comments on the agency report are filed, unless a hearing is held, the record is considered closed. At this point, a party wishing to respond to another party's submission must obtain GAO's permission to do so. Also, GAO may determine that to fully understand the record, it must request additional information from the parties. In such cases, all parties will be apprised of GAO's request for additional information, and, where appropriate, GAO will permit all parties to make additional submissions to clarify the record. 4 C.F.R. § 21.3(i).

Ex Parte Communications

Parties should not attempt to engage in ex parte communications with the GAO attorney assigned to the protest, or with any other GAO employee. An ex parte communication refers to any oral or written communication with a GAO official, which excludes one or more parties to a protest, about the merits of the protest, or about significant issues which might affect the outcome of the protest. Although it may be necessary during the proceedings to clarify a fact in the record or to explain in greater detail a party's position in the case, GAO will not entertain, and no one may submit to GAO, off the record, any evidence, explanation, analysis, or advice, whether written or oral, regarding any substantive matter affecting the disposition of the protest. Where it is necessary to discuss any substantive issue with GAO, a telephone conference should be requested. A copy of all written

submissions to GAO, redacted where necessary, should be provided to all parties to the protest.

Hearings

At the request of a party or on its own initiative, GAO may conduct a hearing where it concludes that the protest cannot otherwise be resolved on the written record alone. 4 C.F.R. § 21.7(a).

Hearings increase the cost and burden of protests and GAO therefore holds hearings only when necessary. A request for a hearing should explain why one is necessary, and point out, for example, factual and legal questions that GAO must resolve to decide the protest. GAO has issued several decisions which discuss reasons for holding hearings. While the regulations do not establish a deadline for requesting a hearing, a request should be submitted as early as possible in the protest process in order to avoid unnecessary delays and disruption. On the other hand, the need for a hearing is often not clear until after the contracting agency has filed its report and, in many cases, not until the protester has submitted its comments on the report.

Where GAO decides to hold a hearing, it will generally conduct a pre-hearing conference with all the parties. 4 C.F.R. § 21.7(b). The purpose of that conference is to review the scope of the hearing, identify the appropriate witnesses and their availability, establish the date and location of the hearing, and discuss other logistical matters. Where GAO determines that only some of the protest issues require a hearing, the hearing will generally be limited to those issues. The GAO attorney handling the protest will conduct both the pre-hearing conference and the hearing. The format of hearings varies from formal (direct- and cross-examination of witnesses conducted by counsel for the parties) to informal (a discussion of the issues

by counsel and others). For this reason, the pre-hearing conference is usually the best opportunity to clarify how the GAO attorney expects to conduct the hearing, as well as to raise any other questions about the hearing.

A GAO hearing is, in principle, open to the public. In practice, however, protest hearings often involve protected information. As a result, most hearings are closed except to agency personnel and those individuals admitted to the protective order.

The GAO hearing room is equipped with video cameras and microphones which automatically record the proceedings. That system produces a video transcript, a copy of which is provided to the parties at no charge at the conclusion of the hearing. In addition, parties may wish to have a court reporter attend the hearing to prepare a written transcript. A request to that effect should be presented before the day of the hearing to the GAO attorney handling the case. Such a request will usually be granted as long as all parties have access to a written transcript.

If a hearing is held, all parties, including the agency, will be permitted to file written comments on the hearing. 4 C.F.R. § 21.7(g). Those comments are due 7 days after the hearing ends, unless GAO sets a different date. Id. If GAO decides to hold a hearing before receipt of comments on the agency report, GAO may direct the private parties not to submit separate comments on the report, but to include their views on the report in their comments on the hearing. Id.

Decision Timetable

Once the record is complete, GAO will consider the protest and decide the case through a written decision issued by the Comptroller General. At the

latest, the decision will be issued 125 days after the protest is filed, unless GAO decides the case under the 65-day express option schedule. 4 C.F.R. § 21.9(a) and (b). If a protester has filed a supplemental (or amended) protest, GAO will endeavor to resolve the supplemental protest within the 125-day time frame for the initial protest. If that is not feasible, GAO may consider using the express option schedule for the supplemental protest. 4 C.F.R. § 21.9(c).

Express Option

GAO may decide at the request of a party or on its own initiative that a protest can be resolved under an expedited schedule, referred to as the “express option.” 4 C.F.R. § 21.10(a). A party requesting that GAO decide the case on this basis should submit a written request to that effect no later than 3 days after the protest is filed. 4 C.F.R. § 21.10(c).

Under the express option schedule, the agency report is due within 20 days after the contracting agency receives notice from GAO that the express option will be used. 4 C.F.R. § 21.10(d)(1). Comments on the report generally are due within 7 days after receipt of the report. 4 C.F.R. § 21.10(d)(2). If a hearing is needed, GAO will set a schedule for post-hearing comments. 4 C.F.R. § 21.10(d)(3). Under the express option schedule, GAO’s decision will be issued no later than 65 days after the protest is filed. 4 C.F.R. §§ 21.9(b), 21.10(b). GAO may decide at any time that the express option is no longer appropriate, and may set a different schedule for the protest, which will not exceed the time frame (125 days) for deciding a non-express option case.

Accelerated Schedule and Summary Decision

Notwithstanding any other provision in these regulations, at the request of a party or on its own initiative, GAO may resolve any protest using an

accelerated schedule and/or may issue a summary decision for any protest. This provision is intended to provide a flexible, accelerated protest resolution procedure at GAO which will minimize any disruption to the procurement process.

Protest Disposition

GAO will either dismiss, deny, or sustain the protest. GAO generally sustains protests where it determines that the contracting agency violated procurement statutes or regulations, unless it concludes that the violation did not prejudice the protester. Where a protest is sustained, GAO will recommend appropriate corrective action. In fashioning its recommendation, GAO will take into account the circumstances of the procurement, such as the agency's stated need for the goods or services at issue, the extent performance has been completed (in post-award protests in which performance has not been stayed), and similar factors. In appropriate circumstances, GAO will recommend termination of an improper award or, where this is not feasible, that the agency not exercise any renewal options in the improperly awarded contract. 4 C.F.R. § 21.8(a) and (b).

If the protest is sustained, GAO will recommend that the protester be reimbursed for the cost of filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees. Occasionally, where there is no other relief available, GAO will recommend that the protester also be reimbursed for the cost of preparing its bid or proposal. 4 C.F.R. § 21.8(d).

Where GAO has recommended reimbursement of costs, the protester must submit a detailed claim for costs, certifying the time expended and costs incurred in pursuing the protest, directly to the contracting

agency within 90 days after receipt of GAO's recommendation that the agency pay these costs. 4 C.F.R. § 21.8(f)(1). GAO expects the protester and the agency to determine the exact amount to be paid. If the protester and the agency cannot agree, GAO may, upon request of the protester, decide the matter. 4 C.F.R. § 21.8(f)(2). Protesters should keep in mind that, except in very limited circumstances, the costs for attorneys' fees may not exceed \$150 per hour. GAO never recommends that agencies pay lost profits or other common-law damages.

When GAO recommends corrective action, the Competition in Contracting Act of 1984 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 each instance where recommendations were not fully implemented.

Practice tip: Distributing GAO's Decision

Protesters may check on the status of a protest by calling GAO's current bid protest status line at (202) 512-5436. Once signed, a copy of the decision is generally available from GAO's electronic distribution system within 2 days of the case being closed. This system was established to facilitate expedited access to GAO decisions. Information on accessing this system may be obtained by calling GAO's Procurement Law Control Group at (202) 512-5282. Decisions also will be mailed to the parties.

Where a decision contains protected information, it will not be posted to the electronic distribution system or otherwise made available to the public. Instead, a redacted version of the decision, which omits the protected information, will be prepared as soon as possible for release to the public, including posting to the system. 4 C.F.R. § 21.12.

Judicial Proceedings

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. 4 C.F.R. § 21.11(a). GAO will not consider a protest where the matter involved is the subject of litigation in court. 4 C.F.R. § 21.11(b). For example, if a party files a protest with GAO concerning the award of a contract, and thereafter

files a complaint in court also challenging the award, GAO will dismiss the protest. However, at the request of the court, GAO may review the protest and issue an advisory opinion or a decision for the court's consideration. Id. In such a case, the time frames for filing the agency report, filing comments on the report, conducting a hearing and filing comments, and issuing a decision may be modified to respond promptly to the court's request. Id.

GAO also will not review a protest where the issues involved have already been decided on the merits by a court. Id.

Requests for Reconsideration

Any party who participated in the protest, including the protester, any intervenor, and the contracting agency, may request that GAO reconsider its decision in the protest. 4 C.F.R. § 21.14(a). A request for reconsideration does not result in the withholding of award or the suspension of contract performance. 4 C.F.R. § 21.14(c).

GAO must receive the request for reconsideration within 14 days after the basis of reconsideration is known or should have been known, whichever is earlier. 4 C.F.R. § 21.14(b). The request must identify the alleged factual or legal error in the decision. 4 C.F.R. § 21.14(a). GAO will not consider a request which merely repeats the party's views already expressed in the protest; a request which simply expresses disagreement with the decision; or a request which provides information or raises an argument that could have been, but was not, provided or raised during the protest.

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 October 1, 1995, are reprinted below.

§ 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 a period of time for the purpose of this part, the day from which the period begins to run is not counted. 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.

§ 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,

Bid Protest Regulations

- (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 relevant to the protest grounds, and
 - (3) Request a hearing.
- (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 no 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, within 1 day after the filing of its protest with GAO, a redacted copy of the protest which omits the information.

(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.

§ 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) In cases other than those covered in paragraph (a)(1) of this section, protests shall be filed not later than 14 days after the basis of protest is known or should have been known, whichever is earlier.

(3) If a timely agency-level protest was previously filed, any subsequent protest to GAO filed within 14 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 14-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.

§ 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 timely 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 35 days after the telephone notice of the protest from GAO. The report shall include the contracting officer's statement of the relevant facts, a memorandum of law, and an index and a copy 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; all evaluation documents; the solicitation, including the specifications or portions relevant to the protest; the abstract of bids or offers or relevant portions; and any other relevant documents. The contracting agency

shall provide any additional documents requested in the protest or explain why it is not required to produce the documents. In appropriate cases, the contracting agency may request that the protester produce relevant documents that are not in the agency's possession.

(d) Subject to any protective order issued in the protest pursuant to § 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 and shall identify in an index any documents, or portions of documents, withheld from any party and the reason for the withholding. 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.

(e) The contracting agency may request an extension of time for the submission of the agency report. Extensions will be granted on a case-by-case basis.

(f) The protester may request additional documents 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 and an index to GAO and the other parties within 5 days or explain why it is not required to produce the documents.

(g) Upon the request of a party, GAO will decide whether the contracting agency must provide any

withheld 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 10 days after its receipt of the documents, unless otherwise specified by GAO.

(h) Comments on the agency report shall be filed with GAO within 14 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 14-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 14 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.

(i) GAO may permit or request 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.

§ 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, in the first instance, 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 decisionmaking 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 sanctions as GAO deems appropriate, including referral to appropriate bar associations or other disciplinary bodies and restricting the individual's practice before GAO.

§ 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 § 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 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 protest to the Board, the same procurement generally may not be the subject of a protest to GAO. 40 U.S.C. 759(f).

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

(f) Protests which lack a detailed statement of the legal and factual grounds of protest as required by § 21.1(c)(4), or which fail to clearly state legally sufficient grounds of protest as required by § 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 § 21.13.

§ 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) and are implemented by 48 CFR part 33.

§ 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.

(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.

(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 7 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.

§ 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, reopening, 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 14 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 14 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 90 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.

§ 21.9 Time for decision by GAO.

(a) GAO shall issue a decision on a protest within 125 days after it is filed.

(b) In protests where GAO uses the express option procedures in § 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, within the time limit established in paragraph (a) of this section for decision on the initial protest. If an amended protest cannot be resolved within that time limit, GAO may resolve the amended protest using the express option procedures in § 21.10.

§ 21.10 Express option, accelerated schedule, and summary decision.

(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 no later than 3 days after the protest or supplemental 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 § 21.3 and § 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 7 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 7 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) At the request of a party or on its own initiative, GAO may resolve any protest using an accelerated schedule and/or may issue a summary decision for any protest.

§ 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 (§ 21.3(c)), filing comments on the report (§ 21.3(h)), holding a hearing and filing comments (§ 21.7), and issuing a decision (§ 21.9) shall apply.

§ 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.

§ 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 § 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 § 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.

§ 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 14 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).

Sample Protective Order

The sample protective order and the sample applications for access to materials under a protective order are provided for informational purposes only and are subject to change.

GAO

United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

File No. :
Protester:
Solicitation No. :
Agency:

NOTIFICATION OF PROTECTIVE ORDER

Attached is a copy of the protective order issued in connection with the above-referenced protest. Counsel seeking admission shall complete and submit the attached application to our Office, with a copy provided simultaneously to all parties; applications for consultants are available upon request. A party objecting to any individual's application shall so advise our Office by the second working day following receipt of the application. While applications may be filed by facsimile transmission, a hard copy with original signature must also be submitted.

Please note that the protective order and application reflect substantial revisions implemented in October 1994.

--For the Senior Associate General Counsel

FOR FURTHER INFORMATION:

GAO attorney: _____ (202/512-97__)
Case status calls: 202/512-5436
Facsimile transmissions: 202/512-9749

Appendix I
Sample Protective Order

**UNITED STATES GENERAL ACCOUNTING OFFICE
OFFICE OF THE GENERAL COUNSEL
PROCUREMENT LAW DIVISION
Washington, D.C. 20548**

Matter of:

File:

Agency:

PROTECTIVE ORDER

This protective order limits disclosure of certain materials and information submitted in the above-captioned protest, so that no party obtaining access to protected materials under this order will gain a competitive advantage as a result of the disclosure. Materials to which parties gain access under this order are to be used only for the subject protest, absent express prior authorization from the General Accounting Office (GAO). Such authorization must be requested in writing, with notice to all parties.

1. This protective order applies to all materials that are identified by any party as protected, unless GAO specifically provides otherwise.
2. Protected materials of any kind may be provided only to GAO and to individuals authorized by this order, and must be in a sealed parcel containing the legend "PROTECTED MATERIAL ENCLOSED," conspicuously placed on the outside of the parcel containing the protected information. The first page of each document containing protected material is to be clearly marked as follows:

**PROTECTED MATERIAL
TO BE DISCLOSED ONLY IN ACCORDANCE WITH
GENERAL ACCOUNTING OFFICE PROTECTIVE ORDER**

The party claiming protection must clearly identify the specific portion of the material for which it is claiming protection. Wherever such protection is claimed for a protest pleading, the party filing the pleading shall submit a proposed redacted version for public release when the protected version is filed.

3. Only individuals who are admitted under the protective order by GAO, and support staff (paralegal, clerical and administrative personnel) who are employed or supervised by individuals admitted under this protective order, and who are not involved in competitive decisionmaking for a party to the protest or for any firm that might gain a competitive advantage from access to the protected material disclosed under this order, shall have access to information covered by this protective order. Individuals admitted under the protective order shall advise such support staff, prior to

Appendix I Sample Protective Order

providing them access to protected material, of their obligations under the protective order.

4. Each party included under this protective order shall receive a single copy of the protected material and shall not duplicate that material, except as incidental to its incorporation into a submission to GAO or as otherwise agreed to by the parties with GAO's concurrence.

5. When any party sends or receives documents in connection with this protest that are not designated as protected, including proposed redacted versions of protected documents, the party shall refrain from releasing the documents to anyone not admitted under this order, including clients, until the end of the second working day following receipt of the documents by all parties. This practice permits parties to identify documents that should have been marked protected before the documents are disclosed to individuals not admitted under the protective order.

6. Each individual covered under this protective order shall take all necessary precautions to prevent disclosure of protected materials, including but not limited to physically securing, safeguarding, and restricting access to the protected materials. The confidentiality of protected material shall be maintained in perpetuity.

7. Within 20 working days after the disposition of this protest (or if a request for reconsideration is filed, 20 working days after disposition of that request), all protected materials furnished to individuals admitted under this order, including all copies of such materials, shall be: (1) returned to the party which produced them; or (2) with the prior written agreement of the party which produced the protected material, destroyed and certified as destroyed to the party which produced them; or (3) with the prior written agreement of the party which produced the protected material, retained under the terms of this protective order for such period as may be agreed. Within the same 20-day period, protected pleadings (including copies in archival files and computer backup files) and written transcripts of protest conferences and hearings shall be destroyed, and the destruction certified to GAO and the other parties, unless the parties agree otherwise; video transcripts produced by GAO shall be returned to our Office. In the absence of such agreement and for good cause shown, the period for retention of the protected material under this paragraph may be extended by order of GAO. Any individual retaining material received under this protective order beyond the 20-day period without the authorization of GAO or the prior written agreement of the party which produced the material is in violation of the protective order.

8. Any violation of the terms of this protective order may result in the imposition of sanctions as GAO deems

Appendix I
Sample Protective Order

appropriate, including but not limited to referral of the violation to appropriate bar associations or other disciplinary bodies, and restricting the practice of counsel before GAO. A party whose protected information is improperly disclosed shall be entitled to all remedies under law or equity, including breach of contract.

Senior Attorney or
Assistant General Counsel

Date

SAMPLE

Sample Applications for Access to Materials Under a Protective Order

UNITED STATES GENERAL ACCOUNTING OFFICE
OFFICE OF THE GENERAL COUNSEL
PROCUREMENT LAW DIVISION
Washington, D.C. 20548

Matter of:

File:

Agency:

APPLICATION FOR ACCESS TO MATERIALS
UNDER PROTECTIVE ORDER
FOR OUTSIDE COUNSEL

1. I, _____, hereby apply for access to protected materials covered by the protective order issued in connection with this protest.

2. I am an attorney with the law firm of _____ and have been retained to represent _____ a party to this protest.

3. I am a member of the Bar(s) of _____; my bar membership number(s) is/are _____.

4. My professional relationship with the party I represent in this protest and its personnel is strictly one of legal counsel. I am not involved in competitive decisionmaking as discussed in U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984), for or on behalf of the party I represent, any entity that is an interested party to this protest, or any other firm that might gain a competitive advantage from access to the material disclosed under the protective order. I do not provide advice or participate in any decisions of such parties in matters involving similar or corresponding information about a competitor. This means that I do not, for example, provide advice concerning or participate in decisions about marketing or advertising strategies, product research and development, product design or competitive structuring and composition of bids, offers, or proposals with respect to which the use of protected material could provide a competitive advantage.

5. I identify here (by writing "none" or listing names and relevant circumstances) those attorneys in my firm who, to the best of my knowledge, cannot make the representations set forth in the preceding paragraph:

Appendix II
Sample Applications for Access to
Materials Under a Protective Order

(Attach additional pages for this and the following questions, if needed.)

6. I identify here (by writing "none" or listing names, position, and responsibilities) any member of my immediate family who is an officer or holds a management position with an interested party in the protest or with any other firm that might gain a competitive advantage from access to the material disclosed under the protective order:

7. I identify here (by writing "none" or identifying the name of the forum, case number, date, and circumstances) instances in which I have been denied admission to a protective order, or had admission revoked, or been found to have violated a protective order issued by GAO or by an administrative or judicial tribunal:

8. I identify here (by writing "none" or listing the protest name and file number) any pending application for admission to a protective order issued by GAO:

9. I have read the protective order issued by GAO in this protest, and I will comply in all respects with that protective order and will abide by its terms and conditions in handling any protected material filed or produced in connection with the protest.

10. I acknowledge that any violation of the terms of the protective order may result in the imposition of sanctions as GAO deems appropriate, including but not limited to referral of the violation to appropriate bar associations or other disciplinary bodies, and restricting my practice before GAO. I further acknowledge that a party whose protected information is improperly disclosed shall be entitled to all remedies under law or equity, including breach of contract.

**Appendix II
Sample Applications for Access to
Materials Under a Protective Order**

CERTIFICATION

By my signature, I certify that, to the best of my knowledge, the representations set forth above (including any attached statements) are true and correct. I recognize that knowingly making a false statement on this application could render me liable to a \$10,000 fine or 5 years imprisonment, or both, pursuant to 18 U.S.C. § 1001.

Signature

Date Executed

Typed Name and Title

Name of Firm

SAMPLE

Appendix II
Sample Applications for Access to
Materials Under a Protective Order

UNITED STATES GENERAL ACCOUNTING OFFICE
OFFICE OF THE GENERAL COUNSEL
PROCUREMENT LAW DIVISION
Washington, D.C. 20548

Matter of:

File:

Agency:

APPLICATION FOR ACCESS TO MATERIALS
UNDER PROTECTIVE ORDER
FOR IN-HOUSE COUNSEL

1. I, _____, hereby apply for access to protected materials covered by the protective order issued in connection with this protest.
2. I am in-house counsel for _____, a party to this protest.
3. I am a member of the bar(s) of _____; my bar membership number(s) is/are _____.
4. My professional relationship with the party I represent in this protest and its personnel is strictly one of legal counsel. I am not involved in competitive decisionmaking as discussed in U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984), for or on behalf of the party I represent, any entity that is an interested party to this protest, or any other firm that might gain a competitive advantage from access to the material disclosed under the protective order. I do not provide advice or participate in any decisions of such parties in matters involving similar or corresponding information about a competitor. This means that I do not, for example, provide advice concerning or participate in decisions about marketing or advertising strategies, product research and development, product design or competitive structuring and composition of bids, offers, or proposals with respect to which the use of protected material could provide a competitive advantage.
5. I have attached a detailed narrative providing the following information:
 - (a) my position and responsibilities as in-house counsel, including my role in providing advice in procurement-related matters;
 - (b) the person(s) to whom I report, and their position(s) and responsibilities;
 - (c) the number of in-house counsel at the office in which I work, and their involvement, if any, in

Appendix II
Sample Applications for Access to
Materials Under a Protective Order

competitive decisionmaking and in providing advice in procurement-related matters;

- (d) my relationship to the nearest person involved in competitive decisionmaking (both in terms of physical proximity and corporate structure); and
- (e) measures taken to isolate me from competitive decisionmaking and to protect against the inadvertent disclosure of protected material to persons not admitted under the protective order.

6. I identify here (by writing "none" or listing names, position, and responsibilities) any member of my immediate family who is an officer or holds a management position with an interested party in the protest or with any other firm that might gain a competitive advantage from access to the material disclosed under the protective order:

(Attach additional pages for this and the following questions, if needed.)

7. I identify here (by writing "none" or identifying the name of the forum, case number, date, and circumstances) instances in which I have been denied admission to a protective order, or had admission revoked, or been found to have violated a protective order issued by GAO or by an administrative or judicial tribunal:

8. I identify here (by writing "none" or listing the protest name and file number) any pending application for admission to a protective order issued by GAO:

9. I have read the protective order issued by GAO in this protest, and I will comply in all respects with that protective order and will abide by its terms and conditions

Appendix II
Sample Applications for Access to
Materials Under a Protective Order

in handling any protected material filed or produced in connection with the protest.

10. I acknowledge that any violation of the terms of the protective order may result in the imposition of sanctions as GAO deems appropriate, including but not limited to referral of the violation to appropriate bar associations or other disciplinary bodies, and restricting my practice before GAO. I further acknowledge that a party whose protected information is improperly disclosed shall be entitled to all remedies under law or equity, including breach of contract.

CERTIFICATION

By my signature, I certify that, to the best of my knowledge, the representations set forth above (including attached statements) are true and correct. I recognize that knowingly making a false statement on this application could render me liable to a \$10,000 fine or 5 years imprisonment, or both, pursuant to 18 U.S.C. § 1001.

Signature

Date Executed

Typed Name and Title

Appendix II
Sample Applications for Access to
Materials Under a Protective Order

UNITED STATES GENERAL ACCOUNTING OFFICE
OFFICE OF THE GENERAL COUNSEL
PROCUREMENT LAW DIVISION
Washington, D.C. 20548

Matter of:

File:

Agency:

APPLICATION FOR ACCESS TO MATERIALS
UNDER PROTECTIVE ORDER
FOR CONSULTANT

1. I, _____, am a consultant employed by _____, and hereby apply for access to protected materials covered by the protective order issued in connection with this protest.
2. I have been retained by _____ and will, under the direction and control of that attorney, assist in the representation of _____ in this protest.
3. I hereby certify that I am not involved in competitive decisionmaking for or on behalf of any party to this protest or any other firm that might gain a competitive advantage from access to the material disclosed under the protective order. Neither I nor my employer provides advice or participates in any decisions of such parties in matters involving similar or corresponding information about a competitor. This means, for example, that neither I nor my employer provides advice concerning or participates in decisions about marketing or advertising strategies, product research and development, product design or competitive structuring and composition of bids, offers, or proposals with respect to which the use of protected material could provide a competitive advantage.
4. My professional relationship with the party for whom I am retained in this protest and its personnel is strictly as a consultant on issues relevant to the protest. Neither I, my spouse, nor any member of my immediate family holds office or a management position in any company that is a party in this protest, or in any competitor or potential competitor of a party.

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Sample Applications for Access to
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5. I have attached the following information:

(a) a current resume describing my education and employment experience to date;

(b) a list of all clients for whom I have performed work within the 2 years prior to the date of this application, and a brief description of the work performed;

(c) a list of all clients for whom my employer has performed work within the 2 years prior to the date of this application and for whom the use of protected material could provide a competitive advantage, and a brief description of the work performed;

(d) a statement of the services I am expected to perform in connection with this protest;

(e) a description of the financial interests which I, my spouse, and/or my family has in any entity that is an interested party in this protest or whose protected material will be reviewed; if none, I have so stated;

(f) a list identifying by name of forum, case number, date, and circumstances all instances in which I have been granted admission or denied admission to a protective order, or had a protective order admission revoked, or been found to have violated a protective order issued by GAO or by an administrative or judicial forum; if none, I have so stated; and

(g) a statement of the professional associations to which I belong, including membership numbers.

6. I have read a copy of the protective order issued in this protest and will comply in all respects with all terms and conditions of that order in handling any protected material filed or produced in connection with the protest. I will not disclose any protected material to any individual other than those individuals admitted under the protective order by GAO.

7. For a period of 2 years from the date this application is granted, I will not engage or assist in the preparation of a proposal to be submitted to any agency of the United States government for _____
*
where I know or have reason to know that any party to the protest, or any successor entity, will be a competitor, subcontractor, or teaming member. *Describe subject of procurement at issue in the protest.

**Appendix II
Sample Applications for Access to
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8. For a period of 2 years from the date this application is granted, I will not engage or assist in the preparation of a proposal for submission to _____
for _____
nor will I have any personal involvement in any such activity. *Name of contracting agency **Describe procurement at issue in the protest

9. I acknowledge that any violation of the terms of the protective order may result in the imposition of such sanctions as GAO deems appropriate, including but not limited to referral of the violation to appropriate disciplinary bodies or professional associations and restricting my practice before GAO. I further acknowledge that a party whose protected information is improperly disclosed shall be entitled to all remedies under law or equity, including breach of contract.

CERTIFICATION

By my signature, I certify that, to the best of my knowledge, the representations set forth above (including attached statements) are true and correct. I recognize that knowingly making a false statement on this application could render me liable to a \$10,000 fine or 5 years imprisonment, or both, pursuant to 18 U.S.C. § 1001.

Signature

Date

Print name and title

Appendix II
Sample Applications for Access to
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ATTORNEY'S CERTIFICATION

The consultant named above has been retained by me to assist in the representation of _____ in this protest and will perform his/her duties in connection with this protest under my direction and control.

Print name

Signature

Name of firm

Date

SAMPLE

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