

**GAO**

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May 2006

**GUIDE TO GAO  
PROTECTIVE  
ORDERS**



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# I. Introduction

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Under the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(b)(2), as amended, and GAO's Bid Protest Regulations, 4 C.F.R. § 21.3(c) (2006), a contracting agency is required to provide with its report on the protest all relevant documents to GAO and interested parties. Often these documents contain a company's proprietary or confidential data or the agency's source-selection-sensitive information that cannot be released publicly.

GAO may issue a protective order to allow limited access to such "protected" information to attorneys, or consultants retained by attorneys, who meet certain requirements. 31 U.S.C. § 3553(f)(2); 4 C.F.R. § 21.4. A copy of section 21.4 of GAO's Bid Protest Regulations is included in Appendix A. 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. Where no protective order is issued, the agency may withhold from the parties the portions of its report which would ordinarily be subject to a protective order; GAO will review in camera all information withheld from the parties. 4 C.F.R. § 21.4(b).

In December of 2005, GAO implemented changes to its protective order and application for access to material under a protective order. These changes were made in response to suggestions for improvements made by practitioners, the growing reliance on e-mail transmission of documents, and GAO's experience in its 15 years of issuing protective orders. Specifically, GAO now permits parties to make up to 3 copies of protected material, permits electronic transmission of protected material unless a party objects, and has reduced the reporting time for violations of our protective order from 5 years to 2 years. This guide book is updated to reflect these and other changes to the protective order and its application for access.

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## II. The Protective Order

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### A. Protected Information

Proprietary or confidential information, source-selection-sensitive information, or other information, the release of which could result in a competitive advantage to one or more firms, may be protected under a GAO protective order. Material or other information identified as protected by any party will be subject to protection under the terms of the protective order, unless GAO specifically provides otherwise. Protected material includes information whether on paper or in any electronic format.

Each party included under a protective order is entitled to receive up to 3 copies of protected material (including the original and electronic copies), and is not permitted to further duplicate that material except as is incidental to its incorporation into a submission to GAO, or as otherwise agreed to by the parties with GAO's concurrence. A "party" refers to the entity of record; therefore, multiple attorneys or law firms representing a single party must determine among them how to allocate the maximum of three copies among the individuals admitted to the protective order. Each duplication of electronic media, whether in electronic or hard copy form, constitutes a single copy. E-mails to multiple recipients should be counted as generating one copy for the sender and one for each recipient. E-mail transmission of protected material is permitted unless objected to by a party to the protest.

Information identified as protected may be disclosed by the parties only to GAO, the contracting agency, and other individuals admitted under the protective order. Protected material may also be disclosed to support staff (paralegal, clerical, and administrative personnel) who are employed or supervised by individuals admitted under the protective order and who are not involved in competitive decisionmaking.

It is the responsibility of individuals admitted under the protective order to take all precautions necessary to prevent disclosure of protected material. In addition to physically and electronically securing, safeguarding, and restricting access to the protected material in one's possession, these precautions include sending and receiving protected material using physical and electronic methods that are within the control of individuals authorized by the protective order or that otherwise restrict access to protected material to individuals authorized by the protective order. In view of these requirements, individuals who use such transmission methods as facsimile machines shared with individuals who are not authorized access to protected material under the protective order, or facsimile machines

that are not within their control or the control of their support staff, may need to take additional precautions to restrict access to protected material.

These precautions also include advising support staff of their obligations prior to providing them with access to protected material. Support staff who are not directly employed or supervised by an individual admitted under the protective order may not be provided with access to protected material; thus, for example, protected material may not be disclosed to individual(s) in a typing service working at locations other than that of the individual admitted under the protective order.

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## B. Issuance

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. Any other party may request the issuance of a protective order, however, and GAO may issue a protective order on its own initiative whenever it appears that one is appropriate and the protester is represented by counsel. 4 C.F.R. § 21.4(a). Because only attorneys and consultants they retain may be admitted under a protective order, GAO will generally not issue a protective order, even if the record will include protected information, where the protester is proceeding without an attorney.

A protective order package, which includes the protective order and the application(s) for access to material under a protective order, generally will be issued soon after a protest is filed, and in many cases simultaneously with the protest acknowledgment notice. After issuance, the protective order will apply to all proceedings associated with the protest, *e.g.*, supplemental and amended protests, requests for reconsideration, and claims for costs. A copy of the protective order can be found in Appendix B and at [www.gao.gov](http://www.gao.gov).

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## C. Redactions

It is the responsibility of the party preparing a protest filing protected under a GAO protective order to submit a version of the filing that omits protected information—a “redacted” version—to GAO and to each party authorized to receive protected material. This redacted version of the protest filing must be provided within 1 day after the protected version is filed. GAO will resolve disputes if the parties are unable to agree as to the scope of proposed redactions.

In any protest in which a protective order has been issued, a party receiving or sending documents that are not designated as protected, including proposed redacted versions of protected documents, may not release the documents to anyone not admitted under the protective order until the end of the second day

following receipt of the document by all parties. This allows parties the opportunity to identify documents that should have been designated as protected material prior to their disclosure to individuals not admitted under the protective order.

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## **D. Disposition of Protected Material**

The GAO protective order provides specific instructions regarding the disposition of protected material at the conclusion of a protest. Parties to the protective order are directed that within 60 days after the disposition of the protest (or, if a request for reconsideration or a claim for costs is filed, 60 days after the disposition of those matters), all protected material furnished to individuals admitted under the protective order, including all electronically transmitted material and copies of such material, with the exception of a single copy of a protected decision or letter issued by GAO, must be (1) returned to the party that produced them; or (2) with the prior written agreement of the party that produced the protected material, destroyed and certified as destroyed to the party that produced them; or (3) with the prior written agreement of the party that produced the protected material, retained under the terms of the protective order for such period as may be agreed. Within the same 60-day period, protected pleadings (including copies in archival files and computer backup files) and written and electronic transcripts of protest conferences and hearings must be destroyed, and the destruction certified to GAO and the other parties unless the parties agree otherwise. In the absence of such agreement and for good cause shown, GAO may extend the period for retention of the protected material.

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# III. The Application Process

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## A. Who Can Apply

Only attorneys, or consultants retained by them, who represent an interested party or intervenor may apply for admission to a GAO protective order. Outside counsel and in-house counsel are eligible for admission to a GAO protective order. Law clerks and support staff that will be working on a protest and who are admitted to a bar, regardless of whether or not they are employed by the firm as attorneys, must apply for admission to the protective order. Applicants must establish that they are not involved in competitive decisionmaking, as defined in *U.S. Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984), for any company that could gain a competitive advantage from access to protected information, and that there will be no significant risk of inadvertent disclosure of protected information. 4 C.F.R. § 21.4(c). “Competitive decisionmaking” is described as:

“[A] counsel’s activities, associations, and relationship with a client that are such as to involve counsel’s advice and participation in any or all of the client’s decisions (pricing, product design, etc.) made in light of similar or corresponding information about a competitor.” 730 F.2d at 1468 n.3.

A copy of the *U.S. Steel Corp.* decision can be found in Appendix C. *See also* *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465 (9th Cir. 1992); *Matsushita Elec. Indus. Co., Ltd. v. United States*, 929 F. 2d 1577 (Fed. Cir. 1991).

Each individual seeking admission to a GAO protective order must submit a separate application. Individuals permitted access to protected information under a GAO protective order are not allowed to disclose that information to others who are not admitted under the protective order, such as other members of the attorney’s law firm who are not themselves admitted to the protective order or the attorney’s client.

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## B. The Application

Applicants for admission to a GAO protective order must file the appropriate outside counsel, in-house counsel, or consultant application with GAO and all parties to the protest. Generally, the appropriate attorney’s application will be attached to the protective order issued in a protest. The consultant’s application can be obtained from the GAO staff attorney assigned to the protest. In addition, copies of these applications can be found in Appendix D and at [www.gao.gov](http://www.gao.gov).

The application for admission to a protective order will establish that the individual is appropriate for admission (*e.g.*, an attorney retained to represent an interested party in the protest or a consultant retained by such an attorney), is not involved in competitive decisionmaking, and has read the protective order issued by GAO in the protest and will comply in all respects with the terms and conditions of the protective order. A consultant seeking admission to the protective order should be prepared to provide a client list, and may also have to agree to certain future employment restrictions as a condition of receiving access to protected material. While GAO's consultant application suggests certain future employment restrictions, the parties may agree to different or other restrictions.

All applicants are required to provide a mailing address, direct dial telephone number, facsimile number, and e-mail address to which protected material may be sent in accordance with the terms of the protective order. This information should comport with the protective order's requirement that parties send and receive protected material using physical and electronic methods that are within the control of individuals authorized by the protective order or that otherwise restrict access to protected material to individuals authorized by the protective order.

The failure to accurately complete the application may result in denial and/or revocation of admission as well as other sanctions. For example, counsel's failure to accurately identify, as required, all instances within the last 2 years in which counsel had 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 another administrative or judicial tribunal has resulted in the denial of admission to a GAO protective order; the revocation of admission to a GAO protective order; and the imposition of a bar on access to protected material for a specified time period.

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## C. When to File

Applications for admission to a protective order should be filed as soon as possible after the issuance of the protective order. Delays in filing applications for access to protected material, as well as requests for issuance of a protective order, will generally not provide a basis for extending the time within which comments on an agency report must be filed.

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## D. Objections

Objections to an applicant's admission to a protective order should be raised within 2 days of receipt of the application. 4 C.F.R. § 21.4(c). In reviewing applications for admission to a protective order, GAO considers and balances a variety of factors, including the nature and sensitivity of the material to be protected, the attorney's need for the confidential information sought in order to adequately prepare the party's case, and whether there is opposition to an applicant expressing legitimate concerns that the individual's admission would pose an unacceptable risk of inadvertent disclosure. *See McDonnell Douglas Corp.*, B-259694.2, B-259694.3, June 16, 1995, 95-2 CPD ¶ 51.

Because the information released under a protective order is not GAO's, but rather the contracting agency's or the other parties', GAO relies upon these parties to timely object to an application for access to protected material. GAO will generally admit an applicant to a protective order where there is no objection raised. Parties who have no objections to the admission of individual applicants may waive the 2-day period for filing objections in order to expedite the admissions process.

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## E. The Admission

GAO will issue a written notice identifying all individuals who are admitted under a GAO protective order and who are thus entitled to have access to protected material. Individuals who are denied access to protected material will be informed in writing of the basis for their denial.

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### 1. Outside Counsel

Although it is often easier for outside counsel to establish that they are not involved in competitive decisionmaking, GAO approaches the admission of counsel on a case-by-case basis, and does not assume that any attorney's status as outside counsel is dispositive of whether that attorney is involved in competitive decisionmaking. *Allied-Signal Aerospace Co.*, B-250822, B-250822.2, Feb. 19, 1993, 93-1 CPD ¶ 201.

In *Allied-Signal*, GAO denied access to outside counsel for the awardee, a subsidiary of a parent corporation, because the attorney served as a corporate officer for two other subsidiaries and represented at least nine subsidiaries in the previous 3 years, suggesting that the attorney had a management relationship with the companies that cut across corporate boundaries. The attorney's role as competitive decisionmaker was found to present too great a risk of inadvertent disclosure of protected materials.

In *LeBoeuf, Lamb, Greene & MacRae*, B-283825, B2283825.3, Feb. 3, 2000, 2000 CPD ¶ 35, GAO admitted protester's counsel over the agency's objection that a partner in counsel's firm was listed as a personal reference for a key employee in the protester's proposal, finding that there was no evidence that counsel or the partner participated in competitive decisionmaking and that the nature of the relationships was limited. GAO also found without merit the objection that counsel might be witnesses regarding the evaluation of the protester's proposal because that evaluation was not challenged and because there was no showing that the remote possibility the partner could be a witness might present an unacceptable risk of inadvertent disclosure. GAO finally found that the blanket objection that counsel did not have an established bid protest practice and an established process for conformity to the strictures of the GAO protective order was no reason to question counsel's representations that they had read the protective order and would abide by its terms and conditions.

In *Mine Safety Appliances Co.*, B-242379.2, B-242379.3, Nov. 27, 1991, 91-2 CPD ¶ 506, GAO admitted the protester's attorneys to a protective order even though they were associated with a law firm in which the managing partner of the law firm's home office served on the protester's board of directors. The attorneys were found not to participate in competitive decisionmaking, vowed not to discuss any protected information with the individual in the firm serving on the protester's board of directors, and agreed to special procedures to protect the information (analogous to the procedures for the protection of classified materials), including using a locked cabinet, maintaining a log and a special data processing file for the protest, and limiting access to the data processing file.

In *Maritime Berthing, Inc.*, B-284123.3, Apr. 27, 2000, 2000 CPD ¶ 89, GAO admitted outside counsel for the protester over the agency's objection that he was listed as an authorized negotiator for another firm that was awarded a contract for another part of the solicitation and which was owned by the same group of principals as owned the protester, and had been listed as an authorized negotiator for other firms owned by these principals in prior agency procurements. GAO found that his designation as an authorized negotiator required closer scrutiny of his application, but that the question of admission was to be resolved on a case-by-case basis. In this case, GAO admitted counsel because he had performed no activities in this capacity, agreed to withdraw as the contract negotiator under the contract, and agreed not to serve as or be designated as an authorized negotiator for the companies owned by these principals in the future.

In *Colonial Storage Co.; Paxton Van Lines, Inc.*, B-253501.5 *et al.*, Oct. 19, 1993, 93-2 CPD ¶ 234, GAO denied admission to outside counsel for the awardee where the record established that the attorney was involved in competitive

decisionmaking—specifically, the attorney represented the awardee at a pre-solicitation conference and participated in price discussions between the awardee and the agency in the course of the procurement.

In *Ralvin Pacific Dev., Inc.*, B-251283.3, June 8, 1993, 93-1 CPD ¶ 442, GAO did not admit outside counsel employed by protester where there was evidence in the record that these attorneys were involved in competitive decisionmaking—that is, conducting ongoing lease negotiations with the agency on behalf of the protester’s affiliate. The attorneys withdrew their applications for admission.

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## 2. In-House Counsel

In considering applications of in-house counsel, GAO considers such factors as whether the in-house counsel advises on pricing and product design decisions, including the review of bids and proposals, the degree of physical separation and security with respect to those who participate in competitive decisionmaking, and the degree and level of supervision to which in-house counsel is subject. In determining whether access is appropriate, GAO considers not only the applicant’s role with respect to competition for federal government business, but also the individual’s role in the commercial marketplace and in relation to other business activities where corporate decisions are made in light of information about competitors that might be disclosed under a protective order.

In *Robbins-Gioia, Inc.*, B-274318 *et al.*, Dec. 4, 1996, 96-2 CPD ¶ 222, GAO admitted in-house counsel for the awardee over the agency’s objection where the record established that the attorney did not participate in competitive decisionmaking; the fact that the in-house counsel reported to a competitive decisionmaker did not alone demonstrate that there was an unacceptable risk of inadvertent disclosure of protected material.

Admission of in-house counsel to a protective order was denied where, in balancing the need to protect the confidentiality of sensitive information with the party’s need to have access to the information to pursue the protest, GAO found that there was an unacceptable risk of inadvertent disclosure because the in-house counsel advised his company’s competitive strategists and there was no showing that the in-house counsel needed access to the information to help the party pursue its protest. *McDonnell Douglas Corp.*, B-259694.2, B-259694.3, June 16, 1995, 95-2 CPD ¶ 51.

GAO granted access to a senior attorney in a company litigation section where the litigation section was a separate and distinct operation devoted exclusively to litigation and the attorney was “walled off” from competitive decisionmaking.

*US Sprint Communications Co. Ltd. Partnership*, B-243767, Aug. 27, 1991, 91-2 CPD ¶ 201.

GAO has denied access to in-house counsel who provide legal counsel to senior company management, such that counsel advises or participates in competitive decisionmaking. *Earle Palmer Brown Cos., Inc.*, B-243544, B-243544.2, Aug. 7, 1991, 91-2 CPD ¶ 134; *Dataproducts New England, Inc., et al.*, B-246149.3 *et al.*, Feb. 26, 1992, 92-1 CPD ¶ 231; *Bendix Field Eng'g Corp.*, B-246236, Feb. 25, 1992, 92-1 CPD ¶ 227.

GAO denied admission to corporate counsel who was involved in competitive decisionmaking with respect to other business matters such as mergers and acquisitions, where there was more than a minimal risk of inadvertent disclosure of information from the protest concerning the competitor who was involved in the merger talks. *Atlantic Research Corp.*, B-247650, June 26, 1992, 92-1 CPD ¶ 543.

GAO has granted a limited admission to in-house counsel to permit counsel access to counsel's own company's evaluation documents concerning the company's exclusion from the competitive range. By agreement of counsel, the in-house counsel did not receive access to its competitors' proposals and evaluations. *SRI Int'l, Inc.*, B-250327.4, Apr. 27, 1993, 93-1 CPD ¶ 344.

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### 3. Consultants

GAO's policy is to allow protesters to choose the assistance they deem necessary to pursue their protest. In *Bendix Field Eng'g Corp.*, B-246236, Feb. 25, 1992, 92-1 CPD ¶ 227, GAO admitted consultants to a protective order to provide assistance to counsel in their review of the agency's cost realism evaluation where, although the agency objected that the consultants were not necessary, there was no other objection to the admissibility of the consultants. *See also Global Readiness Enters.*, B-284714, May 30, 2000, 2000 CPD ¶ 97.

However, in *EER Sys. Corp.*, B-256383 *et al.*, June 7, 1994, 94-1 CPD ¶ 354, GAO denied admission to consultants for the protester, even though it was unclear that granting access to protected material to these consultants would pose a major risk of inadvertent disclosure, where the protected material was undeniably sensitive and valuable such that disclosure of the information would cause serious competitive harm to the awardee, the awardee challenged the admissibility of the consultants, and GAO determined that it and the protester could fairly and reasonably address the specific protest issues without the admission of the protester's consultants.

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## IV. Use of Protected Material before Other Agencies and Courts

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Material to which parties gain access under a GAO protective order may only be used in the protest proceedings for which the protest was issued, absent express prior written authorization from GAO. Requests for authorization to use protected material in other fora must be made in writing, with notice to all parties, and must establish that protected material will be safeguarded, *e.g.*, by the forum's issuance of a protective order.

GAO has generally permitted the use of protected material in the filing of federal lawsuits and before other administrative tribunals where the party seeking to use such material establishes that the material will be safeguarded. For example, GAO has permitted the filing of protected material, which a party received under a GAO protective order, in court pleadings where the court was informed of the GAO protective order and the material subject to the GAO protective order and where a court protective order was issued to protect and govern the protected material. A sample notice of limited leave to release protected material to a federal court is included in Appendix E. The precise nature of GAO's leave to release protected material to another forum will depend upon the circumstances necessary to protect the information in that forum.

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# V. Violations of GAO Protective Orders

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Any violation of a protective order is a serious matter, whether or not it results in an improper disclosure of protected material. Violations of the terms of a protective order will result in the imposition of such sanctions as GAO deems appropriate, including but not limited to referral of the violation to the appropriate bar associations or other disciplinary bodies and restricting the individual's practice before GAO.

Violations of the GAO protective order have included instances where protected material has been disclosed, inadvertently or otherwise, to individuals not admitted under the GAO protective order; where protected material was disclosed to other fora without prior permission from GAO; where applicants failed to comply with the requirement to disclose prior violations of a GAO protective order; and where individuals improperly retained protected material beyond the disposition date required by the protective order. The following is a brief discussion of instances where protected material has been disclosed to individuals not admitted under the GAO protective order, the most common violation.

Most of these have been inadvertent violations resulting from counsel's failure to carefully review documents to be sent to the client to ensure that no protected material is included. Counsel have, for example, failed to ensure that all agreed-upon redactions were included in the redacted version of a document sent to the client; failed to fully read instructions from the sender regarding the releasability of documents; and failed to place a protective legend on a supplemental protest, which led to the transmission of protected material to the client. Several of these violations underscore the importance of giving support staff adequate instructions regarding their responsibilities in handling protected material. Support staff have, for example, inadvertently included protected documents along with the redacted documents to be mailed or faxed to the client; improperly forwarded a protected GAO decision to the client; and improperly faxed protected material to the client as a result of erroneous or unclear instructions from counsel. In nearly all of these cases, counsel immediately recognized the error and retrieved the protected material before the client could review its contents. Nonetheless, in all of these cases, the violations and resulting sanctions could have been avoided had counsel taken all necessary precautions to prevent disclosure of protected material.

Those precautions can be particularly critical when protected material is being transmitted from one protest party to another. In one instance, it came to GAO's attention that the facsimile number printed on the letterhead used by the protester's counsel was connected to a facsimile machine located in shared space, separate from counsel's office, not under his control, and shared by several different firms and businesses. GAO found that counsel's dissemination of a

number for a facsimile machine that was not in his control—without advising GAO and other parties to the protest of this fact—fell short of the standard of care necessary to safeguard protected information. The standard protective order expressly requires individuals to send and receive protected material using physical and electronic methods that are within the control of individuals authorized by the protective order or that otherwise restrict access to protected material to individuals authorized by the protective order.

Several violations have involved the inadvertent oral disclosure of protected information. In one instance, GAO admonished protester's counsel and a consultant where the manner in which the consultant asked questions of the protester's representative, who was not admitted to the protective order, disclosed, in part, the intervenor's technical approach. In a similar instance, GAO admonished two of intervenor's counsel where a consultant not yet admitted to the protective order was able to infer facts reflecting protected material about the protester's cost proposal on the basis of sequential conversations with counsel. As GAO advised in a letter to counsel, it is true that counsel admitted to a protective order must be vigilant in ensuring that their conversations with parties not admitted to the protective order do not include language that is protected per se, but it is equally true that counsel must be vigilant in ensuring that these conversations do not include language sufficient to disclose protected information.

In another instance, protester's counsel orally disclosed to the client features of the awardee's proposal that led to its selection. GAO rejected counsel's argument that the GAO protective order was inconsistent with his state's rules of conduct requiring counsel to explain matters to the client to the extent necessary for the client to make informed decisions. In a letter to counsel, GAO stated that the state's rules also provided that rules or court orders governing litigation might provide that information supplied to counsel may not be disclosed to the client, and directed compliance with such rules or orders. GAO also stated that if counsel believed the protective order process was invalid he should not have certified his willingness to abide by its terms in his application for admission. GAO sanctioned counsel by barring him from access to protected material for two years and by referring the matter to his bar association.

Violations have also occurred where counsel have failed to comply with the "2-day rule," which refers to the protective order's express prohibition on the release of any documents in connection with the protest to anyone not admitted under the protective order prior to the end of the second working day following receipt of the documents by all parties. In one instance, protester's counsel released to his client documents that were identified as releasable in an agency's report on the

date the report was received. The day after receipt of the report, the intervenor identified as protected certain material contained within some of the documents that the agency had indicated were releasable. GAO admonished counsel for this violation. In another instance, GAO admonished counsel who, immediately upon receipt of the agency report, copied and gave his client the parts of the report that were not designated as protected. GAO rejected counsel's explanation that, because he intended to be out of the office and thought it necessary to furnish the non-protected parties of the report to his client for its immediate assistance, he did not ask the agency if he could make the disclosure prior to the expiration of the two-day period. As the protective order itself expressly states, the two-day rule permits parties to identify documents that should have been marked protected before the documents are disclosed to individuals not admitted under the protective order.

Improper disclosures of protected material have occurred where unilateral redactions of protected material are provided to individuals not admitted under the protective order. In one instance, intervenor's counsel unilaterally prepared a redacted version of draft comments and gave it to the client. The redacted version contained protected material. Although counsel argued that their actions were inadvertent, counsel also argued that they had the right to unilaterally prepare and release redacted versions of documents that have not yet been filed with GAO or which were sent or received from another party to the protest. GAO disagreed, finding that counsel violated the requirement not to release a proposed redacted version of a protected document. Such a practice would render meaningless the essential protection afforded by the issuance of a protective order, *i.e.*, to give all other parties a fair opportunity to propose additional redactions of protectable information. GAO sanctioned counsel by restricting their access to protected material for three months.

Finally, counsel have occasionally improperly disclosed protected material to other members of the law firm based upon the erroneous belief that the protective order application was on behalf of the entire law firm. Since an attorney in the firm who is not admitted to the protective order does not fall within the category of individuals eligible to examine protected material, such as support staff, GAO admonished both counsel for violating the protective order. In letters to both, GAO stated that application for admission under a GAO protective order entails individual representations and certifications, subject to review by the parties to the protest; GAO may deny applications from individual attorneys in a law firm, while admitting other attorneys from that same firm, where that action is warranted by the individual's unique relationships or particular professional responsibilities.

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# Appendix A

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## **Sec. 21.4 Protective Orders**

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

(b) If no protective order has been issued, the agency may withhold from the parties those portions of its report that would ordinarily be subject to a protective order. GAO will review in camera all information not released to the parties. Where a protective order has been issued, documents may be filed by electronic means (other than facsimile transmission) only when specifically authorized by GAO.

(c) After a protective order has been issued, counsel or consultants retained by counsel appearing on behalf of a party may apply for admission under the order by submitting an application to GAO, with copies furnished simultaneously to all parties. The application shall establish that the applicant is not involved in competitive decision-making for any firm that could gain a competitive advantage from access to the protected information and that there will be no significant risk of inadvertent disclosure of protected information. Objections to an applicant's admission shall be raised within 2 days after receipt of the application, although GAO may consider objections raised after that time.

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

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# Appendix B

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**UNITED STATES GOVERNMENT ACCOUNTABILITY 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 material and information submitted in the above-captioned protest, so that no party obtaining access to protected material under this order will gain a competitive advantage as a result of the disclosure. Material to which parties gain access under this protective order is to be used only for the subject protest proceedings, absent express prior authorization from the Government Accountability Office (GAO). Such authorization must be requested in writing, with notice to all parties.

1. This protective order applies to all material that is identified by any party as protected, unless GAO specifically provides otherwise. Protected material includes information whether on paper or in any electronic format. This protective order applies to all proceedings associated with the protest, *e.g.*, supplemental/amended protests, requests for reconsideration, and claims for costs.

2. Protected material of any kind may be provided only to GAO and to individuals authorized by this protective order. 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  
GOVERNMENT ACCOUNTABILITY 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 this protective order by GAO, and support staff (paralegal, clerical, and administrative personnel) who are employed or supervised by individuals admitted under this 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 order. Individuals admitted under this protective order shall advise such support staff, prior to providing them access to protected material, of their obligations under this order.

4. Each party included under this protective order shall receive up to 3 copies of the protected material (the original constitutes one copy), and shall not further 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. For purpose of this provision, a "party" refers to the entity of record. Therefore, multiple attorneys or law firms representing a single party must determine among them how to allocate the maximum of 3 copies among the individuals admitted to the protective order. Each duplication of electronic media (e.g., CD Rom), whether in electronic or hard copy form, constitutes a single copy. E-mail transmissions to multiple recipients should be counted as generating one copy for the sender and one for each recipient.

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 protective 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 this protective order.

6. Each individual covered under this protective order shall take all precautions necessary to prevent disclosure of protected material. In addition to physically and electronically securing, safeguarding, and restricting access to the protected material in one's possession, these precautions include, but are not limited to, sending and receiving protected material using physical and electronic methods that are within the control of individuals authorized by this protective order or that otherwise restrict access to protected material to individuals authorized by this protective order. Protected material may be sent using electronic mail unless objected to by any party in this protest. The confidentiality of protected material shall be maintained in perpetuity.

7. Within 60 days after the disposition of the protest(s) (or if a request for reconsideration or a claim for costs is filed, 60 days after the disposition of those matters), all protected material furnished to individuals admitted under this protective order, including all electronically transmitted material and copies of such material, with the exception of a single copy of a protected decision or letter issued by our Office, shall be: (1) returned to the party that produced them; or (2) with the prior written agreement of the party that produced the protected material, destroyed and certified as destroyed to the party that produced them; or (3) with the prior written agreement of the party that produced the protected material, retained under the terms of this order for such period as may be agreed. Within the same 60-day period, protected pleadings (including copies in archival files and computer backup files) and written and electronic transcripts of protest conferences and hearings shall be destroyed, and the destruction certified to GAO and the other parties, unless the parties agree otherwise. 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 (except for the single copy of a protected decision or letter issued by our Office) beyond the 60-day period without the authorization of GAO or the prior written agreement of the party that produced the material is in violation of this order. The terms of this protective order (except those terms regarding the return or destruction of protected material) shall apply indefinitely to the single copy of the protected decision or letter issued by our Office that is retained by a party admitted under this order.

8. Any violation of the terms of this 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 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.

\_\_\_\_\_  
[Insert GAO Attorney name]

\_\_\_\_\_  
[Date]

# Appendix C

## United States Court of Appeals for the Federal Circuit

U. S. STEEL CORPORATION, ET AL., )  
Appellants, )  
v. ) Appeal No. 84-639  
THE UNITED STATES AND U. S. )  
INTERNATIONAL TRADE COMMISSION, )  
Appellees, )  
AND COSIPA, ET AL., )  
Intervenors. )

DECIDED: March 23, 1984

Before MARKEY, Chief Judge, NICHOLS, Senior Circuit Judge, and  
KASHIWA, Circuit Judge.

MARKEY, Chief Judge.

Interlocutory appeal on a certified question arising from a decision of the Court of International Trade (CIT)<sup>1/</sup> denying U. S. Steel's (USS) corporate in-house counsel access to confidential information. We vacate and return.

### Background

In Republic Steel Corp., supra, note 1, an action involving a negative preliminary injury determination by the International Trade Commission (ITC), the CIT denied a motion for access by USS' in-house counsel to certain confidential information while granting access to counsel retained by other parties. Relying on an earlier decision in U. S. Steel Corp.

<sup>1/</sup> Republic Steel Corp. v. United States, 572 F. Supp. 275 (Ct. Int'l Trade 1983).

v. United States, 569 F. Supp. 870 (Ct. Int'l Trade 1983), vacated on other grounds, slip op. 84-12 (Ct. Int'l Trade Feb. 24, 1984), the court reiterated its view that the possibility of inadvertent disclosure by in-house counsel warranted denial of access. 572 F. Supp. at 276. That earlier decision, specifically incorporated into the decision on appeal here, acknowledged USS's need for the information but said that the information's nature and volume required a focus on the possibility of inadvertent disclosure. Though it accepted representations that the present in-house counsel are not involved in competitive decisions, the CIT nonetheless denied access to in-house counsel because of their "general position" and "reasonable assumptions that they will move into other roles."

The CIT certified the access question in its decision. 572 F. Supp. at 277. This court granted USS's petition for review of that question on November 10, 1983, under 28 U.S.C. § 1292(a)(1), as amended by Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 125(a), 96 Stat. 25, 36 (1982).

The case has proceeded with access granted to retained counsel and denied to in-house counsel.

The United States joins USS in arguing that the CIT's decision constitutes a per se ban on access by in-house counsel and should be reversed in favor of a case-by-case balancing test without regard to whether counsel are in-house or retained.

The ITC takes no position on the present court-denial of access, but seeks to preserve its right to deny access by in-house counsel at the administrative level. Intervenors Companhia Siderurgica Paulista, S. A. (COSIPA) and Usinas Siderurgicas de Minas Gerais, S. A., of Brazil and Companhia Siderurgica Nacional are exporters of steel products seeking affirmance of the present denial. European exporters filed a brief amici curiae urging affirmance. Bethlehem Steel Corporation filed a brief amicus curiae in support of reversal.

Issue

Whether the CIT erred in denying the present motion for access.

OPINION

The authority of the CIT under 19 U.S.C. § 1516a(b)(2)(B) to control access to confidential information in cases before it is not in dispute.<sup>2/</sup> In exercising that control in this case, the CIT carefully reviewed Atlantic Sugar, Ltd. v. United States, 85 Cust. Ct. 133, C.R.D. 80-18 (1980) and available authorities dealing with access in other fields of law, made clear that its rationale carried no reflection

<sup>2/</sup> 19 U.S.C. § 1516a(b)(2)(B) provides:

Confidential or privileged material. -- The confidential or privileged status accorded to any documents, comments, or information shall be preserved in any action under this section. Notwithstanding the preceding sentence, the court may examine, in camera, the confidential or privileged material, and may disclose such material under such terms and conditions as it may order.

on the unquestioned integrity and unblemished record of USS' in-house counsel in adhering to protective orders, and indicated that retention of outside counsel was a reasonable way for USS to satisfy its recognized need for the requested information. Serving the interest of early and just resolution, the CIT certified to this court the question of whether access may be denied solely because of counsel's in-house status.

Emphasizing congressional concern for confidentiality and the statutory provision, 19 U.S.C. § 1516a(b)(2)(B) for maintenance of confidentiality, the CIT denied access. It did so, however, only to in-house counsel, because of its concern, as it said, "solely with the greater risk of inadvertent disclosure within the corporate setting" (CIT's emphasis).

Because what the CIT called the "extremely potent" information in this case fills several volumes and is intermixed with nonconfidential information, the CIT said "its nature and volume place it beyond the capacity of anyone to retain in a consciously separate category" and that "it is humanly impossible to control the inadvertent disclosure of some of this information in any prolonged working relationship." The CIT recognized that those statements applied equally to retained counsel, but also recognized that applying it to both in-house and retained counsel would render adversarial proceedings impossible.

The CIT's well-taken concern for the nature and scope of the information would be eminently applicable to (and would doubtless complicate) the crafting of a suitable protective order. That

concern, coupled with the CIT's emphasis on protection of confidentiality, might have justified denial of access to all and sundry. Once it became clear that access must be granted, however, it was error to deny access solely because of in-house counsel's "general position" and "reasonable assumptions" that present in-house counsel will move into other positions within USS.

The denial of access here rested on the court's stated general assumption that there is "a greater likelihood of inadvertent disclosure by lawyers who are employees committed to remain in the environment of a single company". Denial or grant of access, however, cannot rest on a general assumption that one group of lawyers are more likely or less likely inadvertently to breach their duty under a protective order. Indeed, it is common knowledge that some retained counsel enjoy long and intimate relationships and activities with one or more clients, activities on occasion including retained counsel's service on a corporate board of directors. Exchange of employees between a client and a retained law firm is not uncommon. Thus the factual circumstances surrounding each individual counsel's activities, association, and relationship with a party, whether counsel be in-house or retained, must govern any concern for inadvertent or accidental disclosure.

The CIT distinguished in-house from retained counsel because, as it said, "a clear and more sustained relationship can be presumed as an outgrowth of the employer-employee relationship". It therefore saw exclusion of in-house counsel as providing "a

meaningful increment of protection". Like retained counsel, however, in-house counsel are officers of the court, are bound by the same Code of Professional Responsibility, and are subject to the same sanctions. In-house counsel provide the same services and are subject to the same types of pressures as retained counsel. The problem and importance of avoiding inadvertent disclosure is the same for both. Inadvertence, like the thief-in-the-night, is no respecter of its victims. Inadvertent or accidental disclosure may or may not be predictable. To the extent that it may be predicted, and cannot be adequately forestalled in the design of a protective order, it may be a factor in the access decision. Whether an unacceptable opportunity for inadvertent disclosure exists, however, must be determined, as above indicated, by the facts on a counsel-by-counsel basis, and cannot be determined solely by giving controlling weight to the classification of counsel as in-house rather than retained.<sup>3/</sup>

Meaningful increments of protection are achievable in the design of a protective order. It may be that particular circumstances may require specific provisions in such orders. In such cases, the order would be developed in light of the particular counsel's relationship and activities, not solely on a counsel's status as in-house or retained.

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<sup>3/</sup> The parties have referred to involvement in "competitive decisionmaking" as a basis for denial of access. The phrase would appear serviceable as shorthand for a counsel's activities, association, and relationship with a client that are such as to involve counsel's advice and participation in any or all of the client's decisions (pricing, product design, etc.) made in light of similar or corresponding information about a competitor.

In a particular case, e.g., where in-house counsel are involved in competitive decisionmaking, it may well be that a party seeking access should be forced to retain outside counsel or be denied the access recognized as needed. Because the present litigation is extremely complex and at an advanced stage, and because present in-house counsel's divorcement from competitive decisionmaking has been accepted by the CIT, forcing USS to rely on newly retained counsel would create an extreme and unnecessary hardship.

Our decision here bears no relation to, and can have no effect on, ITC's rule establishing a per se ban on disclosure to in-house counsel in its administrative proceedings. That rule is not before the court. The policy of an administrative agency faced with specific tasks and deadlines cannot of course control a trial court's discretion in managing the litigation before it. Congress has granted discretion to control access to confidential information, in cases like the present, to the CIT. Whether the exercise of that discretion in the course of litigation would unacceptably "chill" the willingness to disclose such information at the administrative level is a matter for the Congress. On the other hand, our holding here, that access by retained as well as in-house counsel should be governed by the facts, may serve to reassure disclosers of confidential information.

It is unnecessary for us to resolve the parties' dispute over whether the apparent emphasis on confidentiality in 19 U.S.C. § 1516a(b)(2)(B), or the asserted emphasis on discovery in Rule

26, Fed.R.Civ.P. should control in this case. Though the requirement to consider the facts rather than status of counsel sounds in Rule 26 terms, it relates here only to cases in which the court has decided to grant access in accord with the authorization in the second sentence in 19 U.S.C. § 1516a(b)(2)(B), supra, note 2. Nothing here said diminishes the clear authority of the CIT to deny access to all where the specific facts indicate a probability that confidentiality, under any form of protective order, would be seriously at risk. We do not here reverse the denial of access from which the certified question arose. Nor do we order a grant of access in the case listed in note 1, supra. We hold only that status as in-house counsel cannot alone create that probability of serious risk to confidentiality and cannot therefore serve as the sole basis for denial of access.

We have considered and find it unnecessary to discuss the arguments: that the CIT was here creating a per se rule requiring denial to all in-house counsel of access to any confidential information in all future cases; that the denial of access here constituted a violation of USS' right to choice of counsel or a disenfranchising of counsel without due process; that Rule 26, Fed. R. Civ. P., rather than 19 U.S.C. § 1516a(b)(2)(B), should have been applied; and that the "staleness" of the information sought should dictate access.

CONCLUSION

The certified question (whether access may be granted to retained and denied to in-house counsel solely on a presumption that inadvertent disclosure by the latter is more likely) is answered in the negative, i.e., a denial of access sought by in-house counsel on the sole ground of their status as in-house counsel is error. In further proceedings, access should be denied or granted on the basis of each individual counsel's actual activity and relationship with the party represented, without regard to whether a particular counsel is in-house or retained.

DECISION

In light of the foregoing, the order denying access to in-house counsel in the case listed in note 1, supra, must be vacated, and the question returned.

VACATED and RETURNED



draw their marbles from our game and invite their own government to take retaliatory action against United States trade.

Under all the circumstances, Judge Watson well may have thought whatever faults his disposition might suffer from -- and hardly could he have imagined it was faultless -- alternatives were worse. Factual inquiry into the relationship of in-house counsel with the makers of business policy in their companies, has an appearance, it cannot be denied, of greater fairness. One hopes, but does not much believe, it will not degenerate in practice into an invidious effort to throw doubt on the ability -- if not the willingness -- of certain members in good standing of the CIT bar, who happen to be currently employed as in-house counsel, to resist pressures to violate protective orders or not to yield "inadvertently." Not in this case, perhaps, but in cases for which this will be a precedent. At best a way is found to prolong the litigation and make it more costly. The CIT judge will have to lay out a pretty rigid method of trial of this issue, one that will keep things within seemly limits and not take forever to implement, thus limiting the damage to what is endurable.

I would be, on remand, inclined to consider seriously adoption of a simple alternative rule which our court majority also seems not to exclude, i.e., if a document is

too sensitive to disclose to any counsel of record, in good standing as a member of the CIT bar, it is too sensitive to disclose to any or all other such counsel. This is, I suppose, rejected by the CIT on its theory, as explained by Judge Watson, that the second sentence of 19 U.S.C. § 1516a(b)(2)(B) nullifies the first once the court has examined the material in camera. Apparently the effect of the two sentences is believed to be to achieve practically nothing different from what Fed. R. Civ. P. 26 would effectuate if the Trade Agreements Act of 1979 had said nothing. The court majority here implies something different possibly to be the rule inasmuch as nothing in the second sentence requires grant of access to anyone. The supposed necessity of discriminating between retained and in-house counsel is, or may be, somewhat of a self-created dilemma. While the general rule is that sufficient necessity on the part of the discovering litigant will override any degree of sensitivity, this may not be so where § 1516a(b)(2)(B) is applicable. Such an interpretation would recognize the differences in litigation where foreign traders and governments are so strongly interested in the procedure as well as the outcome, and relieves Congress of the imputation of having enacted futile "weasel" words. The matter has not been briefed and I do not wish to seem to rule upon it, even if, writing as a

- 3 -

minority, I could. It seems to me that, without discriminating among counsel or having to decide who is trustworthy, a court might find some other way of dealing with the problem. For example, a court appointed expert, acceptable to both sides for expertise and impartiality, might examine the documents and advise the court as to what they reveal, in sanitized terms sufficient to support a legal conclusion, yet not divulging business or trade secrets.

At any rate, the effect of the decision below, if it had stood, and if United States Steel had still refused to retain outside counsel as the CIT judge hoped it would, is not necessarily denial of justice to United States Steel, but a different thing, denial of the benefit of house counsel's advocacy. If United States Steel's counsel cannot examine these papers, it becomes incumbent on the court to examine them itself, in camera, and arrive at a just and lawful decision using its own very considerable intellectual powers. If this were the result, justice might possibly gain instead of losing, and I say this not meaning to denigrate the benefit to the court of adversary counsel's advocacy. This is a benefit, a great one, but one the court, if it must, can do without.

# Appendix D

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

**Matter of:**

**File:**

**Agency:**

**APPLICATION FOR ACCESS TO MATERIAL  
UNDER A PROTECTIVE ORDER  
FOR OUTSIDE COUNSEL**

1. I, \_\_\_\_\_, hereby apply for access to protected material covered by the protective order issued in connection with this protest.
2. I am an attorney with the law firm of \_\_\_\_\_ which has 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:

(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 within the last 2 years 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 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 such 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 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. I identify below the mailing address and facsimile number at which I may receive protected material in accordance with the terms of the protective order.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date Executed

\_\_\_\_\_  
Typed Name and Title

\_\_\_\_\_  
Mailing Address

\_\_\_\_\_  
Direct Dial Telephone Number

\_\_\_\_\_  
Facsimile Number

\_\_\_\_\_  
E-mail Address

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

**Matter of:**

**File:**

**Agency:**

**APPLICATION FOR ACCESS TO MATERIAL  
UNDER A PROTECTIVE ORDER  
FOR IN-HOUSE COUNSEL**

1. I, \_\_\_\_\_, hereby apply for access to protected material 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 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 within the last 2 years 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 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 such 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 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. I identify below the mailing address and facsimile number at which I may receive protected material in accordance with the terms of the protective order.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date Executed

\_\_\_\_\_  
Typed Name and Title

\_\_\_\_\_  
Mailing Address

\_\_\_\_\_  
Direct Dial Telephone Number

\_\_\_\_\_  
Facsimile Number

\_\_\_\_\_  
E-Mail Address

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

**Matter of:**

**File:**

**Agency:**

**APPLICATION FOR ACCESS TO MATERIAL  
UNDER A PROTECTIVE ORDER  
FOR CONSULTANT**

1. I, \_\_\_\_\_, am a consultant employed by \_\_\_\_\_, and hereby apply for access to protected material 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.

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 that 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 been 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 tribunal; 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 by GAO in this protest, and I 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

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. I identify below the mailing address and facsimile number at which I may receive protected material in accordance with the terms of the protective order.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date Executed

\_\_\_\_\_  
Typed Name and Title

\_\_\_\_\_  
Mailing Address

\_\_\_\_\_  
Direct Dial Telephone Number

\_\_\_\_\_  
Facsimile Number

\_\_\_\_\_  
E-mail Address

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.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date Executed

\_\_\_\_\_  
Typed Name and Title

\_\_\_\_\_  
Name of Firm

# Appendix E



January 1, 2002

Protester's Counsel  
Agency's Counsel  
Intervenor's Counsel

**File No.:** B-123456  
**Protester:** ABC Corporation  
**Solicitation No.:** 99-999  
**Agency:** Department

## **NOTICE OF LIMITED LEAVE TO RELEASE PROTECTED INFORMATION TO A FEDERAL COURT**

This notice modifies the terms of the General Accounting Office protective order issued January 1, 2002, in connection with the above-referenced protest. The protective order is modified as follows to allow ABC Corporation to use protected material in a suit ABC Corporation intends to file in the United States Court of Federal Claims.

1. Protected information obtained pursuant to GAO's protective order must be filed under Seal with the United States Court of Federal Claims, and ABC Corporation must request that the Court issue a protective order to cover the information currently under the GAO protective order. Counsel for ABC Corporation remains responsible for any release of information, inadvertent or otherwise, that may occur prior to the Court issuing a protective order covering all the currently protected information.
2. Use of information protected under the GAO protective order will be governed by the protective order issued by the Court. ABC Corporation must provide a copy of the Court's protective order to GAO upon issuance.

All the terms of the GAO protective order not otherwise modified by this notice remain in effect.

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Assistant General Counsel