



GOVERNMENT ACCOUNTABILITY OFFICE

4 CFR Part 21

Government Accountability Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts

AGENCY: Government Accountability Office.

ACTION: Proposed rule.

SUMMARY: The Government Accountability Office (GAO) is proposing to amend its Bid Protest Regulations, promulgated in accordance with the Competition in Contracting Act of 1984 (CICA), to implement the requirements in sec. 1501 of the Consolidated Appropriations Act for Fiscal Year 2014, which was enacted on January 14, 2014, and to make certain administrative changes. The proposed amendments implement the legislation's direction to establish and operate an electronic filing and document dissemination system for the filing of bid protests with GAO. At this time, GAO believes that these proposed revisions are the only regulatory changes necessary to implement the statutory requirement of sec. 1501. The proposed amendments also include administrative changes to reflect current practice and to streamline the bid protest process.

DATES: Comments must be submitted on or before [Insert date 30 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: Comments may be submitted by e-mail at bidprotestregs@gao.gov, to the attention of Jonathan L. Kang, Senior Attorney, Government Accountability Office, 441 G Street, NW, Washington, DC 20548. GAO intends to make all comments filed available to the public, including names and other identifying information. Information in a submission that the sender does not believe should be released should be clearly marked.

FOR FURTHER INFORMATION CONTACT: Ralph O. White (Managing Associate General Counsel, whitero@gao.gov), Kenneth E. Patton (Managing Associate General Counsel, pattonk@gao.gov) or Jonathan L. Kang (Senior Attorney, kangj@gao.gov).

SUPPLEMENTARY INFORMATION:

Comments Invited

GAO is not subject to the Administrative Procedures Act and accordingly is not required by law to seek comments before issuing a final rule. However, GAO has decided to invite written comments regarding the proposed revisions. Application of the Administrative Procedures Act to GAO is not to be inferred from this invitation for comments. GAO will consider all comments received on or before the closing date for comments. GAO may change the proposed revisions based on the comments received.

Background

GAO determined to undertake these revisions to GAO's Bid Protest Regulations as the result of a statutory requirement imposed by the Consolidated Appropriations Act for 2014, Pub. L. 113-76, 128 Stat. 5 (Jan. 14, 2014). Section

1501 of this act directs GAO to establish and operate an electronic filing and document dissemination system, “under which, in accordance with procedures prescribed by the Comptroller General--(A) a person filing a protest under this subchapter may file the protest through electronic means; and (B) all documents and information required with respect to the protest may be disseminated and made available to the parties to the protest through electronic means.” Pub. L. 113-76, div. I, title I, sec. 1501, 128 Stat. 5, 433-34 (Jan. 17, 2014). At the time of this proposed rule, GAO is developing the system, which will be called the Electronic Protest Docketing System (EPDS). EPDS will be the sole means for filing a bid protest at GAO (with the exception of protests containing classified information), and will enable parties to a bid protest and GAO to file and receive documents. Additional guidance for the use of EPDS will be provided by GAO, separate from the regulations in 4 CFR Part 21.

In addition to directing GAO to establish and operate an electronic filing and document dissemination system, sec. 1501 of the Consolidated Appropriations Act for 2014 authorizes GAO to “require each person who files a protest under this subchapter to pay a fee to support the establishment and operation of the electronic system under this subsection.” Pub. L. 113-76, div. I, title I, sec. 1501, 128 Stat. 5, 434 (Jan. 17, 2014). GAO anticipates requiring persons filing a protest to pay a fee to file a protest through EPDS, which, as discussed above, will be the sole means for filing a bid protest at GAO. Additional guidance regarding procedures for payment of the fee will be provided by GAO, separate from the regulations in 4 CFR part 21.

GAO anticipates the bid protest filing fee will be \$350. GAO derived the fee using actual costs GAO has incurred to develop the system, estimates of future costs for hosting and maintaining the system (adjusted for inflation), estimates of future annual bid protest filings as determined by considering historical filings of the past five fiscal years, and a recovery period for development costs of approximately six years. System establishment costs include payments made by GAO under an interagency agreement for development of the system, as well as GAO's internal costs incurred for system development. Costs to maintain the system include estimated payments for post-development hosting and support of the electronic protest filing system, as well as estimates of GAO's internal costs associated with maintaining the system after it has been deployed. All fees collected will be maintained in a separate account established by GAO. The fee will be reviewed every two years to ensure that it is properly calibrated to recover the costs of establishing and maintaining the system.

The proposed revisions to GAO's Bid Protest Regulations to implement sec. 1501 of the Consolidated Appropriations Act for Fiscal Year 2014 and to make certain administrative changes to reflect current practice and to streamline the bid protest process are set forth below:

Interested party

GAO proposes to revise paragraph (a)(2) of 4 CFR 21.0 to clarify that the Office of Management and Budget should be abbreviated as "OMB."

Federal agency or agency

GAO proposes to revise paragraph (c) of 4 CFR 21.0 to change a reference to the Architect of the Capitol to be gender-neutral.

Electronic Protest Docket System (EPDS)

GAO proposes to redesignate paragraph (f) of 4 CFR 21.0 as paragraph (g), redesignate paragraph (g) as paragraph (h), and add a new paragraph (f). Revised paragraph (f) defines EPDS as GAO's web-based electronic docketing system. In the final rule, GAO will provide a website where additional guidance regarding the EPDS may be found.

To clarify how a document is "filed" under GAO's Bid Protest Regulations, GAO proposes to revise redesignated paragraph (g) to specify that EPDS is the sole method for filing a document with GAO for a bid protest (with the exception of protests containing classified material, as explained in a sentence added to the revised paragraph (h) of 4 CFR 21.1). The proposed revisions throughout this proposed rule reflect that all filings are presumed to be made through EPDS (with the exception of protests containing classified material), which will enable the parties and GAO to file and receive documents.

Filing a protest

GAO proposes to revise paragraph (b) of 4 CFR 21.1 to specify that EPDS will be the sole means for filing a bid protest at GAO.

GAO proposes to revise paragraph (c)(1) of 4 CFR 21.1 to ensure a consistent reference to the term "e-mail."

GAO proposes to revise the last sentence of paragraph (g) of 4 CFR 21.1 to reflect the requirement in redesignated paragraph (g) of 4 CFR 21.0 that documents must be filed through EPDS.

GAO proposes to add a sentence to paragraph (h) of 4 CFR 21.1 to reflect that documents containing classified material may not be filed through EPDS.

Time for filing a protest

GAO proposes to add a sentence to paragraph (a)(1) of 4 CFR 21.2 to clarify the time for filing challenges to a solicitation where the basis for a protest becomes known when there is no solicitation closing date or when no further submissions in response to the solicitation are anticipated. Such protests must be filed within 10 days of when the alleged impropriety was known or should have been known.

GAO proposes to revise paragraph (a)(2) of 4 CFR 21.2 to clarify that the 10-day “safe-harbor” provision in paragraph (a)(2) (i.e., the provision in paragraph (a)(2) establishing that protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required shall be filed not later than 10 days after the date on which the debriefing is held) does not apply to protests challenging alleged solicitation improprieties covered by paragraph (a)(1) of 4 CFR 21.2. This clarification resolves a potential uncertainty in 4 CFR 21.2(a)(2) that was addressed by GAO in a recent decision, Protect the Force, Inc.--Recon., B-411897.3, Sept. 30, 2015, 2015 CPD ¶ 306, wherein we denied the protester’s request to reconsider our dismissal of its protest challenging the terms of a

solicitation as untimely. The protest was filed within 10 days of a requested and required debriefing, but more than 10 days after the agency allegedly revised its solicitation. Because the solicitation did not establish a new closing date, we concluded that the challenge to the terms of the solicitation was required to be filed within 10 days of the revision to the solicitation. We concluded that the outcome in the prior dismissal was consistent with our decision in Armorworks Enters., LLC, B-400394, B-400394.2, Sept. 23, 2008, 2008 CPD ¶ 176 at 6, and the principles enunciated by the United States Court of Appeals for the Federal Circuit in Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1313-14 (Fed. Cir. 2007). The revision here is to ensure that paragraph (a)(2) of 4 CFR 21.2 expressly reflects our decision in Protect the Force, Inc.--Recon.

GAO proposes to revise paragraph (a)(3) of 4 CFR 21.2 to make a minor phrasing change for purposes of consistency to the requirement that protests to GAO following agency-level protests must be filed within 10 days of actual or constructive knowledge of initial adverse agency action.

Communications among parties

GAO proposes to revise the heading of 4 CFR 21.3.

GAO proposes to revise paragraph (a) of 4 CFR 21.3 to make minor phrasing changes for purposes of consistency, and to reflect the requirement in redesignated paragraph (g) of 4 CFR 21.0 that documents must be filed through EPDS. Revised paragraph (a) also requires that parties to a protest must provide copies of all communications with the agency or other parties to the protest to the other participating parties either through EPDS or e-mail. When

the final rule is published GAO will provide a link to a GAO website in revised paragraph (a) that will provide information concerning when communications must be made through EPDS or e-mail.

Submission of agency report

GAO proposes to revise paragraph (c) of 4 CFR 21.3 to reflect the requirement in redesignated paragraph (g) of 4 CFR 21.0 that documents must be filed through EPDS. Revised paragraph (c) also clarifies that if the fifth day for filing the agency's required response to a protester's request for documents falls on a weekend or federal holiday, the response shall be filed on the last business day that precedes the weekend or federal holiday.

GAO proposes to revise paragraph (d) of 4 CFR 21.3 to reflect the requirement in redesignated paragraph (g) of 4 CFR 21.0 that documents must be filed through EPDS. Revised paragraph (d) also deletes the requirement for the agency report to include a copy of the protest, as this document will have already been provided to all parties.

GAO proposes to revise paragraph (e) of 4 CFR 21.3 to provide that where a protester or intervenor does not have counsel admitted to a protective order, and documents are withheld from the protester or intervenor on that basis, the agency must provide appropriately-redacted documents that adequately inform the protester or intervenor of the basis for the agency's arguments in response to the protest. In the final rule, the revised paragraph (e) will provide a link to a GAO website that provides information concerning filing of documents

when no protective order is issued, or where a protester or intervenor is not admitted to a protective order.

Additional documents

GAO proposes to revise paragraph (f) of 4 CFR 21.3 to reflect the requirement in redesignated paragraph (g) of 4 CFR 21.0 that documents must be filed through EPDS. Paragraph (f) is also revised to make minor phrasing changes, consistent with the proposed revisions in paragraph (c) of 4 CFR 21.3.

GAO proposes to revise paragraphs (g) and (h) of 4 CFR 21.3 to reflect the requirement in redesignated paragraph (g) of 4 CFR 21.0 that documents must be filed through EPDS.

GAO proposes to revise paragraph (i) of 4 CFR 21.3 by replacing the previous section with new paragraphs (i)(1), (i)(2), and (i)(3), to clarify the time when comments on the agency report must be filed. New paragraph (i)(1) provides that comments on the agency report must be filed within 10 days after the agency files the report, unless GAO establishes a shorter period of time or grants an extension. New paragraph (i)(2) provides that a protest shall be dismissed if the protester does not file comments within the period of time established in revised paragraph (i)(1). New paragraph (i)(3) provides that a protest allegation or argument shall be dismissed where the agency report responds to the allegation or argument, but the protester's comments do not address the agency's response. New paragraph (i)(3) reflects a longstanding practice by GAO, described in numerous GAO bid protest decisions.

Protective orders

GAO proposes to revise paragraph (a) of 4 CFR 21.4 to reflect that GAO generally does not issue a protective order where an intervenor retains counsel, but the protester does not. This revision reflects GAO's longstanding practice of generally permitting the protester's decision whether to retain counsel to dictate whether GAO will issue a protective order. This practice is consistent with GAO's statutory mandate to provide for an inexpensive protest forum. 31 U.S.C. 3554(a)(1). Notwithstanding this general practice, GAO may, if circumstances warrant, issue a protective order where the protester is not represented by counsel.

GAO proposes to redesignate paragraph (b) of 4 CFR 21.4 as paragraph (c), redesignate paragraph (c) as paragraph (d), redesignate paragraph (d) as paragraph (e), and add a new paragraph (b). New paragraph (b) provides that when parties file documents that are covered by a protective order, the parties must provide copies of proposed redacted versions of the document to the other parties. Proposed redacted versions of documents should not be filed in EPDS; rather, the party responsible for preparing the proposed redacted version of the document should provide the document to the other parties by e-mail or facsimile. New paragraph (b) provides that, where appropriate, the exhibits to the agency report or other documents may be proposed for redaction in their entirety. New paragraph (b) also provides that the party that files the protected document must file in EPDS within 5 days a final, agreed-to redacted version of the document. New paragraph (b) also directs the parties to seek GAO's resolution of any disputes concerning redacted documents.

GAO proposes to revise redesignated paragraph (c) of 4 CFR 21.4, to reflect the requirements of revised paragraph (e) of 4 CFR 21.3.

GAO proposes to revise redesignated paragraph (d) of 4 CFR 21.4, to reflect the requirement in redesignated paragraph (g) of 4 CFR 21.0 that documents must be filed through EPDS.

Protest issues not for consideration

GAO proposes to revise paragraph (a) of 4 CFR 21.5 to reflect the recodification of statutory provisions in Title 41 of the United States Code.

GAO proposes to revise paragraph (b) of 4 CFR 21.5 to make consistent references to the Small Business Administration (SBA). GAO proposes to revise paragraph (d) of 4 CFR 21.5 to reflect the recodification of statutory provisions in Title 41 of the United States Code.

GAO proposes to revise paragraph (e) of 4 CFR 21.5 to revise the term “in GAO” to “with GAO.”

GAO proposes to revise paragraph (f) of 4 CFR 21.5 to replace the word “which” with “that” in two locations.

GAO proposes to revise paragraph (g) of 4 CFR 21.5 to reflect the recodification of statutory provisions in Title 40 of the United States Code.

GAO proposes to revise paragraph (h) of 4 CFR 21.5 to reflect the requirement in redesignated paragraph (g) of 4 CFR 21.0 that documents must be filed through EPDS.

GAO proposes to add paragraph (l) to 4 CFR 21.5 to reflect that, under the provisions of 10 U.S.C. 2304(e)(1) and 41 U.S.C. 4106(f)(1), GAO does not

have jurisdiction to review protests of orders issued under task or delivery order contracts where the order is valued at less than \$10 million, unless it is alleged that the order increases the scope, period, or maximum value of the contract under which the order was issued. At the time of this proposed rule, the provisions concerning procurements under Title 10 are permanent. The provisions concerning procurements under Title 41, however, are subject to a sunset clause, under which GAO's jurisdiction to hear protests over \$10 million will no longer be in effect after September 30, 2016. 41 U.S.C. 4106(f)(1).

GAO proposes to add paragraph (m) to 4 CFR 21.5 to clarify GAO's review of awards that are not procurement contracts. Proposed new paragraph (m) reflects GAO's longstanding view that GAO's statutory jurisdiction under CICA does not include the review of protests of awards, or solicitations for awards, or of agreements other than procurement contracts, with the exception of instances where an agency has agreed in writing to have nonstatutory protests decided by GAO, as described in 4 CFR 21.13. The new paragraph (m) proposes to clarify that GAO reviews protests that an agency is improperly using a nonprocurement instrument.

Withholding of award and suspension of contract performance

GAO proposes to revise 4 CFR 21.6 to require agencies to file a notification where it overrides a statutory requirement to withhold award or suspend contract performance and to require agencies to file any issued determination. 31 U.S.C. 3553(c)(2)(B), (d)(3)(C)(ii). GAO previously did not require this information, but believes it is necessary to implement our statutory

requirement, pursuant to 31 U.S.C. 3554(b)(2), to consider the basis for an agency's override in determining the remedy to recommend in the event GAO sustains a protest, as provided in paragraph (c) of 4 CFR 21.8.

Hearings

GAO proposes to revise paragraph (a) of 4 CFR 21.7 to reflect the requirement in redesignated paragraph (g) of 4 CFR 21.0 that documents must be filed through EPDS.

GAO proposes to revise paragraph (e) of 4 CFR 21.7 to reflect GAO's longstanding practice of not providing hearing transcripts, but permitting the parties to provide for transcription of a hearing as long as a copy of such transcript is provided to GAO at the parties' expense.

Remedies

GAO proposed to add new headings to paragraphs (e) and (f) which will distinguish the different remedial recommendations.

Recommendation for reimbursement of costs

GAO proposes to revise paragraph (e) of 4 CFR 21.8 to provide more specific guidance regarding recommendations for reimbursement of protest costs. Revised paragraph (e) requires the agency to file a response to the request within 15 days after the request is filed. The prior version of paragraph (e) provided that the agency "may" respond within 15 days. This change is intended to allow the agency to either agree to the request, which eliminates the need for GAO to issue a decision, or to provide a specific basis for the agency's objection to the request, upon which the protester must comment. Revised

paragraph (e) also requires the protester to file comments on the agency's response within 10 days, and further provides that GAO will dismiss the request if the protester fails to file comments within 10 days. This change is intended to provide an adequate record for GAO to review in issuing its decision, and also reflects that GAO will not issue a decision where the protester effectively abandons its request by failing to comment on the agency's response.

Recommendation on the amount of costs

GAO proposes to add a heading to paragraph (f) of 4 CFR 21.8 to highlight specific guidance regarding recommendations on the amount of costs to be reimbursed.

GAO proposes to revise paragraph (f)(2) by moving the discussion of disagreements between the agency and protester to revised paragraph (f)(3) for purposes of clarity.

New paragraph (f)(3) reflects GAO's longstanding practice of not recommending that an agency reimburse a protester its costs for filing and pursuing a protest where the protester does not diligently pursue its claim for costs.

GAO proposes to add a new paragraph (f)(4) to require the agency to file a response to the request within 15 days after the request is filed. The prior version of paragraph (f) did not require the agency to respond to a request. This change is intended to allow the agency to either agree to the request, which eliminates the need for GAO to issue a decision, or to provide a specific basis for the agency's objection to the request, upon which the protester must comment.

Revised paragraph (f)(4) also requires the protester to file comments on the agency's response within 10 days, and further provides that GAO will dismiss the request if the protester fails to file comments within 10 days. This change is intended to provide an adequate record for GAO to review in issuing its decision, and also reflects that GAO will not issue a decision where the protester effectively abandons its request by failing to comment on the agency's response.

GAO proposes to add a new paragraph (f)(5) to reflect that GAO will recommend the amount of costs the agency should pay, and that GAO may also recommend that the agency pay the protester the costs of pursuing a claim for costs before GAO.

GAO proposes to redesignate former paragraph (f)(3) as paragraph (f)(6). Redesignated paragraph (f)(6) is revised to require the agency to file within 60 days a notification of the action the agency took in response to the recommendation.

Time for decision by GAO

GAO proposes to revise paragraph (a) of 4 CFR 21.9 to reflect that a bid protest will be resolved within 100 days after it is filed, but that other decisions are not subject to the 100-day deadline. Revised paragraph (a) provides that GAO will attempt to resolve a request for recommendation for reimbursement of protest costs under 4 CFR 21.8(e), a request for recommendation on the amount of protest costs under 4 CFR 21.8(f), or a request for reconsideration under 4 CFR 21.14 within 100 days after the request is filed.

Express Options, flexible alternative procedures, accelerated schedules, summary decisions, and status and other conferences

GAO proposes to revise paragraphs (a), (c), (d)(1), (d)(2), and (d)(3) of 4 CFR 21.10 to reflect the requirement in redesignated paragraph (g) of 4 CFR 21.0 that documents must be filed through EPDS.

Effect of judicial proceedings

GAO proposes to revise paragraph (a) of 4 CFR 21.11 to reflect the requirement in redesignated paragraph (g) of 4 CFR 21.0 that documents must be filed through EPDS.

Distribution of decisions

GAO proposes to revise paragraph (b) of 4 CFR 21.12 to reflect that GAO will distribute decisions on protests to the parties through EPDS.

Nonstatutory protests

GAO proposes to revise paragraph (b) of 4 CFR 21.13 to reflect proposed revisions to sections 21.6 and 21.8 of this title.

Request for Reconsideration

GAO proposes to revise paragraph (b) of 4 CFR 21.14 to reflect the requirement in redesignated paragraph (g) of 4 CFR 21.0 that documents must be filed through EPDS.

GAO proposes to revise paragraph (c) of 4 CFR 21.11 to clarify that the word “our” refers to GAO.

List of Subjects in 4 CFR Part 21

Administrative practice and procedure, Appeals, Bid protest regulations, Government contracts.

For the reasons set out in the preamble, title 4, chapter i, subchapter B, part 21 of the Code of Federal Regulations is proposed to be revised to read as follows:

PART 21—BID PROTEST REGULATIONS

1. The authority citation for Part 21 continues to read as follows:

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

2. In §21.0:

- a. Amend paragraph (a)(2) introductory text by adding the abbreviation “(OMB)” between the words Budget and Circular;
- b. Amend paragraph (c) by removing the word “his” and adding in its place the words “the Architect’s”;
- c. Redesignate paragraphs (f) and (g) as paragraphs (g) and (h), respectively, and add a new paragraph (f);
- d. Revise newly redesignated paragraph (g).

The revision and addition read as follows:

§21.0 Definitions.

* * * * *

(f) Electronic Protest Docket System (EPDS) is GAO’s web-based electronic docketing system. GAO’s website includes instructions and guidance on the use of EPDS.

(g) A document is filed on a particular day when it is received in EPDS by 5:30 p.m., Eastern Time. Delivery of a protest or other document by means other than those set forth in the online EPDS instructions does not constitute a filing. Filing a document in EPDS constitutes notice to all parties of that filing.

* * * * *

3. Amend §21.1 by revising paragraphs (b) and (c)(1), the third sentence of paragraph (g), and by adding a new first sentence to paragraph (h) to read as follows:

§21.1 Filing a protest.

* * * * *

(b) Protests must be filed through the EPDS.

(c) * * *

(1) Include the name, street address, e-mail address, and telephone and facsimile numbers of the protester,

* * * * *

(g) * * * This information must be identified wherever it appears, and within 1 day after the filing of its protest, the protester must file a final redacted copy of the protest which omits the information.

(h) Protests and other documents containing classified information may not be filed through the EPDS. * * *

* * * * *

4. Amend §21.2 by adding a third sentence to paragraph (a)(1) and by revising the second sentence of paragraph (a)(2) and the first sentence of paragraph (a)(3) to read as follows:

§21.2 Time for filing.

(a)(1) * * * If no closing time has been established, or if no further submissions are anticipated, any alleged solicitation improprieties must be protested within 10 days of when the alleged impropriety was known or should have been known.

(2) * * * In such cases, with respect to any protest basis which is known or should have been known either before or as a result of the debriefing, and which does not involve an alleged solicitation impropriety covered by paragraph (a)(1) of this section, the initial protest shall not be filed before the debriefing date offered to the protester, but shall be filed not later than 10 days after the date on which the debriefing is held.

(3) If a timely agency-level protest was previously filed, any subsequent protest to GAO must be filed within 10 days of actual or constructive knowledge of initial adverse agency action, provided the agency-level protest was filed in accordance with paragraphs (a)(1) and (2) of this section, unless the agency imposes a more stringent time for filing, in which case the agency's time for filing will control. * * *

* * * * *

5. Amend §21.3 by revising the section heading and paragraphs (a), (c), (d), and (e), the first sentence of paragraph (f), paragraph (g), the first sentence of paragraph (h), and paragraph (i) to read as follows:

§21.3 Notice of protest, communications among parties, submission of agency report, and time for filing of comments on report.

(a) GAO shall notify the agency within 1 day after the filing of a protest, and, unless the protest is dismissed under this part, shall promptly provide a written confirmation to the agency and an acknowledgment to the protester. The agency shall immediately give notice of the protest to the awardee if award has been made or, if no award has been made, to all bidders or offerors who appear to have a substantial prospect of receiving an award. The agency shall provide 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 provide copies of all protest communications to the agency and to other participating parties either through EPDS or by e-mail. GAO's website includes guidance regarding when to file through EPDS versus communicating by e-mail or other means.

* * * * *

(c) The agency shall file a report on the protest within 30 days after receiving notice of the protest from GAO. The report provided to the parties need not contain documents which the agency has previously provided or otherwise made available to the parties in response to the protest. At least 5 days prior to the filing of the report, in cases in which the protester has filed a request for

specific documents, the agency shall file a response to the request for documents. If the fifth day prior to the filing of the report falls on a weekend or Federal holiday, the response shall be filed on the last business day that precedes the weekend or holiday. The agency's response shall, at a minimum, identify whether the requested documents exist, which of the requested documents or portions thereof the agency intends to produce, which of the requested documents or portions thereof the agency intends to withhold, and the basis for not producing any of the requested documents or portions thereof. Any objection to the scope of the agency's proposed disclosure or nondisclosure of documents must be filed within 2 days of receipt of this response.

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

(e) Where a protester or intervenor does not have counsel admitted to a protective order and documents are withheld from the protester or intervenor on that basis, the agency shall file redacted documents that adequately inform the

protester and/or intervenor of the basis of the agency's arguments in response to the protest. GAO's website provides guidance regarding filing documents where no protective order is issued or where a protester or intervenor does not have counsel admitted to a protective order.

(f) The agency may file a request for an extension of time for the submission of the response to be provided by the agency pursuant to §21.3(c) or for the submission of the agency report. * * *

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

(h) Upon a request filed by a party, GAO will decide whether the agency must provide any withheld documents, or portions of documents, and whether this should be done under a protective order. * * *

(i)(1) Comments on the agency report shall be filed within 10 days after the agency has filed the report, except where GAO has granted an extension of time, or where GAO has established a shorter period for filing of comments. Extensions will be granted on a case-by-case basis.

(2) The protest shall be dismissed unless the protester files comments within the period of time established in §21.3(i)(1).

(3) GAO will dismiss any protest allegation or argument where the agency's report responds to the allegation or argument, but the protester's comments fail to address that response.

* * * * *

6. In §21.4:

- a. Amend paragraph (a) by removing the word "under" in the first sentence and adding in its place the word "to"; and adding a fifth sentence;
- b. Redesignate paragraphs (b), (c), and (d) as paragraphs (c), (d), and (e), respectively, and add a new paragraph (b);
- c. Revise the first sentence of newly redesignated paragraph (c); and revise the first and third sentences of newly designated paragraph (d).

The addition and revisions read as follows:

§21.4 Protective orders.

(a) * * * GAO generally does not issue a protective order where an intervenor retains counsel, but the protester does not.

(b) Any agency or party filing a document that the agency or party believes to contain protected material shall provide to the other parties (unless they are not admitted to the protective order) an initial proposed redacted version of the document within 1 day after the protected version is filed. Where appropriate, the exhibits to the agency report or other documents may be proposed for redaction in their entirety. Within 5 days after the proposed redacted version of a document is provided, the party that authored the document shall file a final redacted version of the document, which has been agreed to by all of the parties.

Only the final agreed-to version of a redacted document must be filed. If the parties are unable to reach an agreement regarding redactions, the objecting party may submit the matter to GAO for resolution. Until GAO resolves the matter, the disputed information must be treated as protected.

(c) If no protective order has been issued, or a protester or intervenor does not have counsel admitted to a protective order, the agency may withhold from the parties those portions of its report that would ordinarily be subject to a protective order, provided that the requirements of §21.3(e) are met. * * *

(d) 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 filing an application. * * * Objections to an applicant's admission shall be filed within 2 days after the application is filed, although GAO may consider objections filed after that time.

* * * * *

7. In §21.5:

- a. Amend paragraph (a) by removing "601-613" and adding in its place "7101-7109";
- b. Revise paragraph (b)(1), the first sentence in paragraph (b)(2), and paragraph (b)(3);
- c. Amend paragraph (d) by removing "423" and adding in its place "2101-2107";
- d. Amend paragraph (e) by removing the words "in GAO" and adding in their place the words "with GAO";

- e. Amend paragraph (f) by removing the word “which” in two places and adding in its place the word “that”;
- f. Amend paragraph (g) by removing “472” and adding in its place “102”;
- g. Revise paragraph (h); and
- h. Add paragraphs (l) and (m).

The revisions and additions read as follows:

§21.5 Protest issues not for consideration.

* * * * *

(b) Small Business Administration (SBA) issues. (1) Small business size standards and North American Industry Classification System (NAICS) standards. Challenges of established size standards or the size status of particular firms, and challenges of the selected NAICS code may be reviewed solely by the SBA. 15 U.S.C. 637(b)(6).

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

(3) Procurements under sec. 8(a) of the Small Business Act. Under that section, since contracts are entered into with the SBA at the contracting officer’s discretion and on such terms as are agreed upon by the procuring agency and the SBA, 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).

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(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 filed a request that subcontract protests be decided pursuant to §21.13.

* * * * *

(l) Protests of orders issued under task or delivery order contracts. As established in 10 U.S.C. 2304c(e)(1) and 41 U.S.C. 4106(f)(1), GAO does not have jurisdiction to review protests of orders issued under task or delivery order contracts where the order is valued at less than \$10 million, unless it is alleged that the order increases the scope, period, or maximum value of the contract under which the order was issued.

(m) Protests of awards, or solicitations for awards, of agreements other than procurement contracts. GAO generally does not review protests of awards, or solicitations for awards, of agreements other than procurement contracts, with the exception of awards or agreements as described in §21.13; GAO does, however, review protests alleging that an agency is improperly using a non-procurement instrument.

8. Revise §21.6 to read as follows:

§21.6 Withholding of award and suspension of contract performance.

When a protest is filed, the 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); GAO does not administer the requirements to stay award or suspend contract performance. An agency shall file a notification in instances where it overrides a requirement to withhold award or suspend contract performance, and it shall file a copy of any issued determination and finding.

9. Amend §21.7 by revising the first sentence of paragraph (a) and revising paragraph (e) to read as follows:

§21.7 Hearings.

(a) Upon a request filed by a party or on its own initiative, GAO may conduct a hearing in connection with a protest. * * *

* * * * *

(e) GAO does not provide for hearing transcripts. If the parties wish to have a hearing transcribed, they may do so at their own expense, so long as a copy of the transcript is provided to GAO at the parties' expense.

* * * * *

10. Amend §21.8 by revising paragraphs (e), adding a paragraph (f) subject heading, revising paragraphs (f)(2) and (3), and adding paragraphs (f)(4) through (6) to read as follows:

§21.8 Remedies.

* * * * *

(e) Recommendation for reimbursement of costs. If the agency decides to take corrective action in response to a protest, GAO may recommend that the agency pay the protester the reasonable 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 not later than 15 days after the date on which the protester learned (or should have learned, if that is earlier) that GAO had closed the protest based on the agency's decision to take corrective action. The agency shall file a response within 15 days after the request is filed. The protester shall file comments on the agency response within 10 days of receipt of the response. GAO shall dismiss the request unless the protester files comments within the 10-day period, except where GAO has granted an extension or established a shorter period.

(f) Recommendation on the amount of costs.

* * * * *

(2) The agency shall issue a decision on the claim for costs as soon as practicable after the claim is filed.

(3) If the protester and the agency cannot reach agreement regarding the amount of costs within a reasonable time, the protester may file a request that GAO recommend the amount of costs to be paid, but such request shall be filed within 10 days of when the agency advises the protester that the agency will not participate in further discussions regarding the amount of costs.

(4) Within 15 days after receipt of the request that GAO recommend the amount of costs to be paid, the agency shall file a response. The protester shall

file comments on the agency response within 10 days of receipt of the response. GAO shall dismiss the request unless the protester files comments within the 10-day period, except where GAO has granted an extension or established a shorter period.

(5) In accordance with 31 U.S.C. 3554(c), GAO may recommend the amount of costs the agency should pay. In such cases, GAO may also recommend that the agency pay the protester the costs of pursuing the claim for costs before GAO.

(6) Within 60 days after GAO recommends the amount of costs the agency should pay the protester, the agency shall file a notification of the action the agency took in response to the recommendation.

11. Amend §21.9 by revising paragraph (a) to read as follows:

§21.9 Time for decision by GAO.

(a) GAO shall issue a decision on a protest within 100 days after it is filed. GAO will attempt to resolve a request for recommendation for reimbursement of protest costs under §21.8(e), a request for recommendation on the amount of protest costs under §21.8(f), or a request for reconsideration under §21.14 within 100 days after the request is filed.

* * * * *

12. Amend §21.10 by revising paragraph (a), the first sentence of paragraph (c), and paragraphs (d)(1) and (2) and (e) as follows:

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

(a) Upon a request filed by a party or on its own initiative, GAO may decide a protest using an express option.

* * * * *

(c) Requests for the express option shall be filed not later than 5 days after the protest or supplemental/amended protest is filed. * * *

(d) * * *

(1) The agency shall file a complete report 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 within 5 days after receipt of the report.

* * * * *

(e) GAO, on its own initiative or upon a request filed by the parties, may use flexible alternative procedures to promptly and fairly resolve a protest, including alternative dispute resolution, establishing an accelerated schedule, and/or issuing a summary decision.

* * * * *

13. Amend §21.11 by revising paragraph (a) to read as follows:

§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 copies of all relevant court documents.

* * * * *

14. Amend §21.12 by revising paragraph (b) to read as follows:

§21.12 Distribution of decisions.

* * * * *

(b) Decisions will be distributed to the parties through the EPDS.

15. Amend §21.13 by revising paragraph (b) to read as follows:

§21.13 Nonstatutory protests.

* * * * *

(b) The provisions of this part shall apply to nonstatutory protests except for:

(1) §21.8(d) pertaining to recommendations for the payment of costs; and

(2) §21.6 pertaining to the withholding of award and the suspension of

contract performance pursuant to 31 U.S.C. 3553(c) and (d).

13. Amend §21.14 by revising paragraph (b) and the second sentence of paragraph (c) to read as follows:

§21.14 Request for reconsideration.

* * * * *

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

(c) * * * To obtain reconsideration, the requesting party must show that GAO's prior decision contains errors of either fact or law, or must present information not previously considered that warrants reversal or modification of the decision; GAO will not consider a request for reconsideration based on repetition of arguments previously raised.

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