
BID PROTESTS AT GAO

A DESCRIPTIVE GUIDE

Second Edition
1985

**U.S. GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C.
20548**



"It seems to me that they partake of a judiciary quality as well as executive. . . The principal duty seems to be deciding upon the lawfulness and justice of the claims and accounts subsisting between the United States and particular citizens: this partakes strongly of the judicial character. . ."

Words of James Madison concerning the Office of the Comptroller, spoken in the debate on the Act of 1789 establishing the Department of the Treasury. 1 Annals of Congress 635-6.

INTRODUCTION

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

Over the years, GAO has developed a substantial body of law and standard procedures for consideration of bid protests. This booklet is the second edition of a guide prepared by our Office of General Counsel to aid those interested in the bid protest process. The first edition, in describing the nature and mechanics of a bid protest, focused on the procedures GAO published in 1975. This second edition incorporates the regulations we have issued to implement the Competition in Contracting Act of 1984, which provides, for the first time, a specific statutory basis for the resolution of bid protests and, importantly, recognizes and continues GAO as the primary forum for deciding protests.

The Act imposes certain requirements on GAO and the contracting agencies, authorizes GAO to take a variety of actions to further the protest process, and provides for certain specific types of relief if a protest is upheld. This booklet provides ready and concise information about how to protest, and what to expect once a protest is set in motion.

Charles A. Dowsley
Comptroller General
of the United States

PREFACE

The first edition of this booklet was designed as a comprehensive response to the public's need for greater familiarity with the bid protest process. We described the where, when, and how to file bid protests, as well as how GAO handles them and what to expect in the way of remedies. This second edition has the same aim and approach, but incorporates the new regulations we have issued to implement the Competition in Contracting Act of 1984, which required GAO to make numerous revisions in the procedures that govern a protester's pursuit of a complaint, and in the mechanics of the protest resolution process.

Harry R. Van Cleave
General Counsel

BACKGROUND

For more than 60 years the GAO has provided an objective, independent, and impartial forum for the resolution of disputes concerning the award of contracts. Over the years the decisions of the Comptroller General of the United States (the head of the GAO) in these bid protest cases have resulted in a uniform body of law applicable to the procurement process which is relied upon by the Congress, the courts, contracting agencies, and the public. The filing of a bid protest with GAO is easy and inexpensive, and requires neither the services of an attorney (although many protesters do retain counsel) nor any particular expertise on the part of the protester with respect to procurement or administrative law. In addition, matters can usually be resolved more quickly by protests filed with GAO than by litigation.

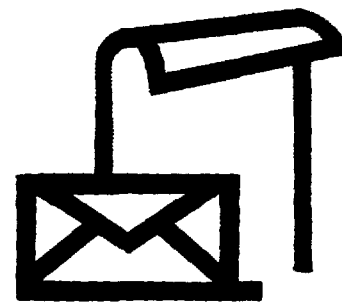
GAO receives more than two thousand five hundred bid protests annually and for many years has had detailed procedures to provide for uniform and expeditious processing of such cases. In 1984 the Congress enacted the Competition in Contracting Act, which specifically provides for GAO's consideration of bid protests and requires GAO to issue implementing regulations. The GAO Bid Protest Regulations inform protesters where and how to file, what to expect in the way of subsequent actions, and the time frames established for completion of those actions. It is the purpose of this booklet to set forth, in

nonlegal terms, the basic steps involved in that process together with the advantages and limitations. GAO's detailed regulations are included at the end of this booklet.

LAW AND REGULATIONS

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

BID PROTESTS-GENERAL



A bid protest at GAO is initiated by filing a written protest with GAO's Office of General

Counsel. This initial filing must contain a detailed statement of the grounds for protest if the protest is to be considered. The agency will furnish a report to GAO and will provide a copy of its report to the protester, who is given an opportunity to comment. Other interested parties may also be provided with copies of the protest and the agency report for comment. In some cases an informal conference may be held in which the protester and others are afforded an opportunity to present their views directly to the GAO attorneys responsible for the case. GAO then considers the facts and issues raised by the protest and issues a decision in the name of the Comptroller General. A copy of the decision is sent to the protester, to interested parties, and to the agency involved. The agency normally takes action in accordance with the decision. Processing time from date of receipt of the protest to date of decision usually takes up to 90 working days depending on urgency and complexity.

WHO MAY PROTEST

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

WHAT MAY BE PROTESTED

GAO considers protests against solicitations and against the

award or proposed award of procurement contracts by federal agencies. Although most protests are against the acceptance or rejection of a bid or proposal, protests against solicitation defects are also considered. Alleged restrictive specifications, omission of a required provision, or ambiguous or indefinite evaluation factors are bases for protest. There are some matters, however, that cannot be protested to GAO. Among them are:

1. Subcontract awards

Protests against subcontract awards generally are not considered except in certain very limited circumstances where the award is made by or for the government, such as where a contractor acts as purchasing agent for the government.

2. Size and manufacturer/regular dealer determinations

GAO does not consider protests involving matters which, under the law, are to be determined by other agencies. For example, disputes over whether a firm is a regular dealer or manufacturer under the Walsh-Healey Act are resolved by the Small Business Administration, if a small business is involved, and by the Department of Labor, while it is the Small Business Administration that has authority to establish industry size standards and to determine whether a firm is a small business when measured against the applicable standard.

3. Responsibility

As a matter of policy, GAO does

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

4. Matter in court

Also as a matter of policy, GAO generally will not render a decision on a protest where the matter involved is the subject of litigation before a court of competent jurisdiction or has been decided on the merits by such a court. However, if the court requests a Comptroller General decision the protest will be ruled upon. Thus, GAO will issue a decision in cases where a protester obtains a temporary restraining order or preliminary injunction enjoining agency procurement action *until* GAO has decided the matter.

5. Contract administration

GAO does not consider protests involving contract administration. Contract administration includes disputes arising during

contract performance, such as whether the contractor is entitled to additional compensation, and agency decisions not to exercise options.

6. Section 8(a) contracts

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

7. Protests to the GSA Board of Contract Appeals

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

8. Exempt agencies and activities

GAO has no authority to issue decisions on bid protests involving procurement actions of agencies or activities that are not federal agencies. Such agencies include the U.S. Postal Service, the Government of Puerto Rico, and Government corporations such as the Federal Deposit In-

insurance Corporation that are not wholly-owned by the government. Also included in this category are nonappropriated fund activities, such as the Army and Air Force Exchange Service, Navy Exchange, and military clubs and theatres.

WHERE TO PROTEST

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

FORM OF PROTEST

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

1. name and address and telephone number of the protester,
2. identity of the contracting activity and the number of the solicitation or contract,
3. a detailed statement of the grounds for protest, with reasons why the protest

should be sustained,

4. a specific request for a ruling by the Comptroller General and a statement of the relief requested, and
5. indication that a copy of the protest was or is being filed with the contracting officer or the appropriate individual or location within one day.

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

ACKNOWLEDGMENT OF PROTEST

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

TIME FOR FILING

S	M	T	W	T	F	S
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	
28	29	30	31			

The bid protest process may delay the procurement of goods and services needed by the government. In order to minimize the possible adverse effect of these delays, GAO has established time limits for bid protest actions. GAO believes that these time limits provide would-be protesters

with a reasonable opportunity to submit protests, and therefore it will normally refuse to consider protests that are not filed in accordance with those time limits. However, under certain circumstances GAO will consider protests that are not filed timely. The various time frames established, the manner in which timeliness is determined, and the exceptions to the timeliness requirement are described below.

1. Time for filing protests

a. Protests filed initially with contracting agencies.

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

b. Protests based upon solicitation improprieties.

Protests which are based upon

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

c. All other cases.

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

with the agency was filed within the 10 working-day period.

2. Determining Timeliness

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

3. Consideration of untimely protests

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

PROCESSING OF PROTEST

Upon receipt of a protest, GAO will notify the contracting agency immediately by telephone and confirm that notice in writing. The agency will then give notice of the protest to the contractor if award has been made, or, if no

award has been made, to all bidders or proposers who might be adversely affected if the protest is sustained and furnish copies of the protest documents to those parties. The agency will prepare a documented report which is responsive to the protest and furnish the report to GAO with a copy to the protester and other interested parties. In most cases, the agency must furnish a report within 25 working days of its receipt of the telephonic notification of the protest. In exceptional cases GAO may allow the agency a period longer than 25 working days.

Once the report is furnished, the protester and others are given 7 working days to submit comments on the report. A copy of these comments must be provided to the agency office which furnished the report and to all other interested parties of record. If these time limits are not complied with, GAO may resolve the protest without consideration of the comments. The protester, however, within the 7-day period, must either file comments, request an extension of time to do so, or state in writing that it wants the case to be decided on the existing record. Extensions of the time for filing comments may be requested by any party to the protest. Such extensions will be rarely granted.

SUMMARY DISMISSAL

GAO will summarily dismiss a protest that on its face is clearly without legal merit, is untimely (unless it is to be considered under one of the exceptions to the

timeliness requirements), fails to set forth the detailed grounds for protest, or involves a matter that GAO does not consider. In such cases, GAO will not require the submission of an agency report. If GAO learns of the basis of the dismissal from information provided by the agency after the protest is filed, GAO will dismiss the protest at that time.

CONFERENCE

A conference at the request of the protester, the agency involved, or any interested party may be held. Although the majority of bid protest cases are decided without a conference, the conference can serve to clarify issues and factual situations and provide a better understanding of each party's positions. These conferences are informal and do not involve such formal procedures as transcripts, sworn testimony, and cross examination. However, all interested parties are invited to attend.

The conference should be requested as early as possible. If GAO, in its discretion, decides to hold a conference, the conference will be held not later than 5 days after the parties have received the agency report. When a conference is held, separate comments on the report are not to be submitted. Instead, comments on both the *report and the conference* are to be submitted within 5 working days of the conference date, with a copy to the agency and all parties of record. Again, the protester, within that period, must file comments, request an

extension, or submit a request that a decision be based on the existing record.

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

PROTECTION OF PROPRIETARY INFORMATION

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

and will advise the protester to raise the issue directly with the contracting agency in the event the protester does not agree that the information should not be released.

EFFECT OF PROTEST ON AWARD AND PERFORMANCE

When an agency is notified that a protest has been filed prior to contract award, the agency is required by law not to make the award prior to resolution of the protest unless the head of the procuring activity decides that there are urgent and compelling circumstances significantly affecting interests of the United States which will not permit waiting for the GAO decision. When an agency is notified of a protest within 10 days after award has been made, the law requires the agency to direct the contractor to suspend performance until the protest is resolved. Performance may continue if the head of the procuring activity decides that performance of the contract is in the government's best interest or that urgent and compelling circumstances significantly affecting the interests of the United States will not permit waiting for a GAO decision.

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

DECISION

After all submissions have been

received and after the holding of a conference if one was requested, the GAO attorney assigned to the case drafts a decision which is reviewed at various levels within the Office of General Counsel. After any necessary revisions are made, the draft decision is signed on behalf of the Comptroller General. Except in unusual circumstances, the decision will be issued within 90 working days from the date GAO received the protest.

When a decision is issued, a copy is sent (usually by mail) to the protester, the head of the agency involved, and other interested parties.

The decision will either deny or sustain the protest. A protest is denied unless it is shown that the award or proposed award was improper or illegal and the protester was prejudiced as a result. Where a protest is sustained, the Comptroller General normally recommends appropriate corrective action. If the issue is decided before award, it can be expected that the contracting agency will take no procurement action inconsistent with the decision on the protest. Where the case is decided after award consideration may be given to the extent of performance, the government's need for the supplies of services and similar factors. In appropriate circumstances an improper award will be recommended for termination. In other cases where this is not feasible the Comptroller General may recommend that any renewal options in the contract not be exercised.

Under the law, the Comptroller General may also declare that the protester is entitled to be reimbursed for the cost of preparing its bid or proposal and for the cost of filing and pursuing the protest. In such cases, GAO looks to the protester and the agency to determine the exact amount to be paid. If the protester and the agency cannot agree, GAO will decide.

When corrective action is recommended, the Comptroller General is required by law (the Legislative Reorganization Act of 1970) to notify certain committees of the Congress, and the federal departments and agencies in turn are required to report to those same committees on the action taken in response to the recommendation. Also, under the Competition in Contracting Act, the agencies are required to report to the Comptroller General whenever they have not fully implemented the recommendation within 60 days. The Comptroller General, in turn, annually reports to the Congress on each instance where recommendations were not fully implemented.

REQUEST FOR RECONSIDERATION

GAO will consider requests for reconsideration of a decision from the protester, any agency involved in the protest, and from any interested party who submitted comments during consideration of the protest. However, the request for reconsideration must be received in GAO not later than 10 working days after the basis for requesting

reconsideration is known or should have been known, and must contain a detailed statement of the factual and legal grounds upon which reversal or modification of the decision is deemed warranted. Requests for reconsideration which indicate only that the requester disagrees with the decision will not be honored. A request for reconsideration does not result in the withholding of award or the suspension of contract performance.

EXPRESS OPTION

Occasionally it will be important to have a bid protest decided in less than the normal time frame. GAO therefore has established accelerated procedures known as the express option. Any party may request use of the express option, but such a request must be received by GAO not later than 3 days after the protest is filed. If GAO decides that the case is suitable for the express option, it will so notify the parties. When the express option is used, the deadlines for submission of the agency report and issuance of the GAO decision are not what they are when the more usual procedures are followed. Under the express option, the report must be filed within 10 days from the date the agency is notified that the express option will be used; the GAO decision will be issued within 45 calendar days from the date the protest was filed. Because not many cases are appropriate for the accelerated procedures, the express option will be used sparingly.

OTHER PROTESTS

Prior to enactment of the Competition in Contracting Act, GAO routinely considered protests involving sales by federal agencies and procurements by such entities as the Government of the District of Columbia. GAO still considers such protests, provided the agency involved agrees to have the protests considered by GAO. In such cases, all provisions of the Bid Protest Regulations apply, except that GAO will not award the protester the cost of filing and pursuing the protest. The provisions of the Competition in Contracting Act concerning the withholding of award and suspension of performance while the protest is pending also will not apply.

APPENDIX

PART 21—BID PROTEST REGULATIONS

Sec.

- 21.0 Definitions.**
- 21.1 Filing of protest.**
- 21.2 Time for filing.**
- 21.3 Notice of protest, submission of agency report and time for filing of comments on report.**
- 21.4 Withholding of award and suspension of contract performance.**
- 21.5 Conference.**
- 21.6 Remedies.**
- 21.7 Time for decision by the General Accounting Office.**
- 21.8 Express Option.**
- 21.9 Effect of judicial proceedings.**
- 21.10 Signing and distribution of decisions.**
- 21.11 Nonstatutory protests.**
- 21.12 Request for reconsideration.**

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

§ 21.0 Definitions.

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

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

(c) "Contracting agency" means a federal agency which has awarded or proposes to award a contract under a protested procurement.

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

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

§ 21.1 Filing of protest.

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

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

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

- (1) Include the name, address and telephone number of the protester.
 - (2) Include an original signed by the protester or its representative, and at least one copy.
 - (3) Identify the issuing agency and the solicitation and/or contract number.
 - (4) Set forth a detailed statement of the legal and factual grounds of protest including copies of relevant documents.
 - (5) Specifically request a ruling by the Comptroller General of the United States (Comptroller General), and
 - (6) State the form of relief requested.
- (d) The protester shall furnish a copy

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

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

(f) A protest filed with the General Accounting Office may be dismissed for failure to comply with any of the requirements of this section.

§ 21.2 Time for filing.

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

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

(3) If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action will be considered, provided the initial protest to the agency was filed in accordance with the time limits prescribed in paragraph (a)(1) and (a)(2) of this section, unless the contracting agency

imposes a more stringent time for filing, in which case the agency's time for filing will control. In cases where an alleged impropriety in a solicitation is timely protested to a contracting agency, any subsequent protest to the General Accounting Office must be filed within the 10-day period provided by this paragraph.

(b) The term "filed" regarding protests to the General Accounting Office means receipt of the protest submission in the General Accounting Office.

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

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

(a) The General Accounting Office shall notify the contracting agency by telephone within 1 day of the filing of a protest, and shall promptly mail confirmation of that notification to the contracting agency. The contracting agency shall immediately give notice of the protest to the contractor if award has been made or, if no award has been made, to all bidders or offerors who appear to have a substantial and reasonable prospect of receiving an award if the protest is denied. The contracting agency shall furnish copies of the protest submissions to such parties with instructions to communicate further directly with the General Accounting Office. Copies of any such communications from any such parties shall be furnished to the contracting agency.

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

(c) The contracting agency shall file a complete report on the protest with the

General Accounting Office within 25 days from the date of the telephone notice of the protest from the General Accounting Office. The report shall contain copies of relevant documents including, as appropriate: the protest, the bid or proposal submitted by the protester, the bid or proposal of the firm which is being considered for award, or whose bid or proposal is being protested, the solicitation, including the specifications or portions relevant to the protest, the abstract of bids or offers or relevant portions, any other documents that are relevant to the protest, and the contracting officer's statement setting forth findings, actions, recommendations and any additional evidence or information deemed necessary in determining the validity of the protest. The statement shall be fully responsive to all allegations of the protest which the agency contests. Pursuant to section 3553(f) of the Competition In Contracting Act of 1984, Pub. L. 98-369, the contracting agency shall simultaneously furnish a copy of the report to the protester and interested parties who have responded to the notice given under paragraph (a) of this section. Copies of reports furnished to such parties shall include relevant documents that would not give the party a competitive advantage and that the party is otherwise authorized by law or regulation to receive. If documents are withheld from any of the parties, the agency must include in the report filed with the General Accounting Office and in the copies of the report provided to the protester and interested parties a list of the withheld documents. The copy of the report filed with the General Accounting Office shall also identify the parties who have been furnished copies of the report.

(d) The contracting agency may request, in writing, an extension of the 25-day report submission time period. The request shall set forth the reasons for which the extension is needed. The General Accounting Office will determine, in writing, whether the specific circumstances of the protest require a period longer than 25 days for the submission of the report and, if so, will set a new date for the submission of the report. Extensions are to be considered exceptional and will be

granted sparingly. The agency should make its request for an extension as promptly as possible to permit it to submit a timely report should the General Accounting Office deny the request.

(e) Comments on the agency report shall be filed with the General Accounting Office within 7 days after receipt of the report, with a copy furnished by the commenting party to the contracting agency and other participating interested parties. Failure of the protester to file comments, or to file a statement requesting that the case be decided on the existing record, or to request an extension under this section within the 7-day period will result in dismissal of the protest. The General Accounting Office upon a showing that the specific circumstances of the protest require a period longer than 7 days for the submission of comments on the agency report, may set a new date for the submission of such comments. Extensions are to be considered exceptional and will be granted sparingly.

(f) Notwithstanding any other provision of this section, when on its face a protest does not state a valid basis for protest or is untimely (unless the protest is to be considered pursuant to § 21.2(c)) or otherwise not for consideration by the General Accounting Office, it will summarily dismiss the protest without requiring the submission of an agency report. When the propriety of a dismissal becomes clear only after information is provided by the contracting agency or is otherwise obtained by the General Accounting Office, it will dismiss the protest at that time. If the General Accounting Office has dismissed the protest, it will notify the contracting agency that a report need not be submitted. Among the protests which may be dismissed without consideration of the merits are those concerning the following:

(1) Contract Administration. The administration of an existing contract is within the discretion of the contracting agency. Disputes between a contractor and the agency are resolved pursuant to the disputes clause of the contract and the Contract Disputes Act of 1978. 41 U.S.C. 601-13.

(2) Small Business Size Standards and Standard Industrial Classification.

Challenges of established size standards or the size status of particular firms, and challenges of the selected standard industrial classification are for review solely by the Small Business Administration. 15 U.S.C. 637(b)(6); 13 CFR 121.3-6 (1984).

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

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

(5) Affirmative Determination of Responsibility by the Contracting Officer. Because a determination that a bidder or offeror is capable of performing a contract is based in large measure on subjective judgments which generally are not readily susceptible of reasoned review, an affirmative determination of responsibility will not be reviewed, absent a showing that such determination was made fraudulently or in bad faith or that definitive responsibility criteria in the solicitation were not met.

(6) Procurement Protested to the General Services Administration Board of Contract Appeals. Interested parties may protest a procurement or proposed procurement of automated data processing equipment and services to the General Services Administration Board of Contract Appeals. After a particular procurement or proposed procurement is protested to the Board, the procurement may not, while the protest is before the Board, be the subject of a protest to the General

Accounting Office. An interested party who has filed a protest with the Board may not protest the same matter to the General Accounting Office. 40 U.S.C. 759(h), as amended by section 2713 of the Competition In Contracting Act of 1984, Pub. L. 98-369.

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

(8) Procurements by Agencies Other Than Federal Agencies as Defined by Section 3 of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. 472. Protests of procurements of proposed procurements by such agencies (e.g., U.S. Postal Service, Federal Deposit Insurance Corporation nonappropriated fund activities) are beyond the General Accounting Office bid protest jurisdiction as established in section 2741 of the Competition In Contracting Act of 1984, Pub. L. 98-369.

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

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

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

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

§ 21.4 Withholding of award and suspension of contract performance.

Sections 3553 (c) and (d) of the Competition in Contracting Act of 1984, Pub. L. 98-369, set forth the following requirements regarding the withholding of award and suspension of contract performance when a protest is filed with the General Accounting Office. The requirements are included here for informational purposes.

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

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

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

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

§ 21.5 Conference.

(a) As conference on the merits of the protests may, at the sole discretion of the General Accounting Office, be held at the request of the protester, interested parties who have responded to the

notice given under § 21.3(a), or the contracting agency. Requests for a conference should be made at the earliest possible time in the protest proceeding.

(b) Conferences will be held on a date set by the General Accounting Office no later than 5 days after receipt by the protester and interested parties of the agency report. All such interested parties shall be invited to attend. Ordinarily, only one conference will be held on a bid protest.

(c) If a conference is held, no separate comments under § 21.3(e) will be considered. The protester, all interested parties and the contracting agency may file comments on the conference and report as appropriate with the General Accounting Office, with copies furnished to the other parties, within 5 days of the date on which the conference was held.

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

(e) Failure of the protester to file comments, or to file a statement requesting that the case be decided on the existing record, or to request an extension under this section within the 5-day period set forth in paragraph (c) of this section will result in dismissal of the protest. The General Accounting Office may set a new date for the submission of comments under the circumstances set forth in § 21.3(e).

§ 21.6 Remedies.

(a) If the General Accounting Office determines that a solicitation, proposed award, or award does not comply with statute or regulation, it shall recommend that the contracting agency implement any combination of the following remedies which it deems appropriate under the circumstances:

(1) Refrain from exercising options under the contract;

(2) Terminate the contract;

(3) Reopen the contract;

(4) Issue a new solicitation;

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

(6) Such other recommendations as the General Accounting Office determines necessary to promote compliance.

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

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

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

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

(2) Bid and proposal preparation.

(e) The General Accounting Office will allow the recovery of costs under paragraph (d)(1) of this section where the contracting agency has unreasonably excluded the protester from the procurement except where the General Accounting Office recommends pursuant to paragraph (a)(5) that the contract be awarded to the protester and the protester receives the award. The General Accounting Office will only allow the recovery of costs under paragraph (d)(2) of this section where the contracting agency has unreasonably excluded the protester from the procurement and where other

remedies listed in paragraphs (a)(2)-(5) are not appropriate.

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

§ 21.7 Time for decision by the General Accounting Office.

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

(b) In those protests for which the General Accounting Office invokes the express option under § 21.8, the General Accounting Office shall issue a decision within 45 calendar days from the date the protest is filed with it.

(c) Under exceptional circumstances the General Accounting Office may extend the deadlines in paragraph (a) of this section on a case-by-case basis by stating in writing the reasons that the specific circumstances of the protest require a longer period.

§ 21.8 Express option.

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

(b) The express option will be invoked solely at the discretion of the General Accounting Office only in those cases suitable for resolution within 45 calendar days.

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

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

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

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

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

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

§ 21.9 Effect of judicial proceedings.

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

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

§ 21.10 Signing and distribution of decisions.

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

§ 21.11 Nonstatutory protests.

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

(b) All of the provisions of these Bid Protest Regulations shall apply to any nonstatutory protest decided by the General Accounting Office except for the provisions of § 21.6(d) pertaining to entitlement to reasonable costs of filing and pursuing the protest, including attorney's fees. Sections 3553 (c) and (d) of the Competition in Contracting Act of 1984, Pub. L. 98-369, pertaining to withholding of award and suspension of contract performance shall not apply.

§ 21.12 Request for reconsideration.

(a) Reconsideration of a decision of the General Accounting Office may be requested by the protester, any interested party who participated in the protest, and any federal agency involved in the protest. The General Accounting Office will not consider any request for reconsideration which does not contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.

(b) Request for reconsideration of a decision of the General Accounting Office shall be filed, with copies to any federal agency and interested parties who participated in the protest, not later than 10 days after the basis for reconsideration is known or should have been known, whichever is earlier. The term "filed" as used in this section means receipt in the General Accounting Office.

(c) A request for reconsideration shall be subject to those bid protest regulations consistent with the need for prompt and fair resolution of the matter. The filing of a request for reconsideration will not invoke Section 3553 (c) or (d) of the Competition in Contracting Act of 1984, Pub. L. 98-369 relating to the withholding of award and the suspension of contract performance.

*Charles A. Bowsher,
Comptroller General of the United States.*

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