Part 5333 - Protests, Disputes, and Appeals

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DAF Contracting Compass Part 33

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Subpart 5333.1 – PROTESTS

5333.102 General

(a) The contracting officer must inform the SSA prior to rendering a decision to take corrective action or to settle a protest in any other manner before submitting its recommendation to the GAO, courts, or the arbitrator.

(b)(3)(ii) See MP5301.601(a)(i).

5333.103 Protests to the Agency

(d)(4) When an agency protest is denied, an offeror may request an independent review by the SCO. See Agency Level Protest Summary Dismissal template.

(h) The contracting officer must prepare the protest file following an agency protest (including a protest of a non-appropriated funds procurement) regardless of the level at which the protest is filed. The contracting officer must request guidance from the cognizant HCA for any protest likely to generate significant Congressional interest. The decision to deny a protest must be made at a level no lower than that at which the protest was filed. Protests may be sustained at any level in the review process, with the concurrence of the cognizant legal office.

5333.104 Protests to GAO

(a) The Air Force Commercial Litigation Field Support Center (AF/JACQ) serves as agency counsel before the GAO and defends Department of the Air Force interests (see MP5333.104)**.**

(b) *Protests before award*

(1) Forward the determination and finding through the SCO to AF/JACQ and, for approval, to the cognizant HCA workflow within seven days of the protest notification (see MP5301.601(a)(i)).

(c) *Protests after award*

(2) Forward the determination and finding through the SCO to AF/JACQ and, for approval, to the cognizant HCA workflow within seven days of the protest notification (see MP5301.601(a)(i)).

(g) *Notice to GAO*

Forward the report through the SCO to AF/JACQ and to the cognizant HCA for signature and submission to GAO within fifty-five days of date of receipt of the GAO recommendations (see MP5301.601(a)(i)). Provide a copy of the report submission to the SAF/AQC Workflow.

(h) For purposes of post-award stay of contract awards under broad agency announcements, commercial solution openings, the Small Business Innovation Research (SBIR) program, and the Small Business Technology Transfer (STTR) program, each proposal received by the agency constitutes a separate procurement, provided funding is available to the government to award the contract to the protester in consequence of sustained protest or the government’s corrective action.

5333.105 Protests to the United States Court of Federal Claims (COFC)

The Air Force Commercial Litigation Field Support Center (AF/JACQ) serves as the Department of the Air Force agency counsel to the Department of Justice (DoJ) for protests at the COFC and assists the assigned DoJ attorney in defending Department of the Air Force interests. The contracting officer must inform AF/JACQ of any notice of protest at the COFC and provide support as requested by AF/JACQ. The contracting officer must also notify the SCO and its supporting legal office/local attorney who provides contract law advice.

5333.170 Briefing Requirement for Protested Acquisitions Valued at $1B or More

Within seven (7) days of the filing of the protest, forward the briefing slide deck through the SCO

and cognizant HCA to AF/JACQ and the SAF/AQC Workflow for DAS(C) review and processing to OUSD(A&S)/DPCAP. See the tailorableDPCAP Protest Briefing template for acquisitions valued at $1B or more.

Subpart 5333.2 – DISPUTES AND APPEALS

5333.211 Contracting Officers Decision

See the tailorable Contracting Officers Final Decision template.

5333.214 Alternate Dispute Resolution (ADR)

(a) For ACAT I and II programs, the contracting officer must establish an agreement between the Government and the contractor, such as a memorandum of understanding, that outlines the intent of the parties with respect to the use of ADR. Contracting officers must consider establishing ADR agreements for other programs and acquisitions.

(c) The acquisition team must use ADR to the maximum extent practicable (See DAFPD 51-12 , *Negotiation and Dispute Resolution*). ADR must also be used to resolve protests to the maximum extent practicable. The acquisition team must attempt to use ADR prior to the commencement of litigation once unassisted negotiations have reached an impasse. Further, ADR must be offered in litigation, unless one of the exceptions in 5 U.S.C. 572(b) applies or the policy set forth by Deputy General Counsel (Contractor Responsibility & Conflict Resolution (SAF/GCR)) indicates that ADR is not appropriate.

5333.215 Contract Clause

(3) See MP5301.601(a)(i).

5333.290 Claims and Terminations for Default

(a) If a contractor submits an uncertified claim exceeding $100,000, the contracting officer must notify the contractor, in writing, of its failure to certify as required by the Contract Disputes statute (41 U.S.C. §§ 7101-7109). The notice must state that a final decision will not be issued until the claim is certified.

(b) If the potential dispute regards any intellectual property (IP) matter, the contracting officer shall request DAF IP Cadre review by contacting the DAF IP Cadre Workflow. The term "IP matter" includes, but is not limited to, failure to deliver IP (e.g., technical data, computer software, contract administration information) that complies with the contract, nonconforming/unjustified markings affixed to IP deliverables).

(c) Prior to making a final decision on a claim or termination for default (including a termination for cause under FAR Part 12), the contracting officer must refer the proposed final decision to the cognizant legal office for legal advice, ADR suitability, and appropriate dispute resolution strategies.

The contracting officer, with the assistance of the cognizant legal office, must seek review by AF/JACQ of all proposed final decisions. At the same time, the contracting officer must provide SAF/GCR with any proposed final decision on a claim involving PEO programs and any proposed final decision on a claim greater than $500,000. The contracting officer or the referring person must promptly notify SAF/GCR and their SCO with all known information relating to any recommended termination for default.

(d) The contracting officer must use ADR to the maximum extent practicable to resolve a Department of the Air Force affirmative contract claim (such as defective pricing, liquidated damages, etc.) when unassisted negotiations reach an impasse as determined by the SCO. The contracting officer must provide to AF/JACQ, with a copy to SAF/GCR, any audit or other findings indicating Department of the Air Force entitlement torecovery greater than $500,000 where unassisted negotiations have reached an impasse, in order to develop a dispute resolution strategy. Government claims must be formally asserted [issuance of a Contracting Officer's Final Decision (FAR33.206)]within 6 years after the accrual of the claim.

5333.291 Appeals to the Armed Services Board of Contract Appeals (ASBCA)

(a) AF/JACQ represents the Department of the Air Force in appeals to the ASBCA.

(b) If the contractor files an appeal with the ASBCA, the contracting officer must notify the SCO and forward to AF/JACQ and the cognizant legal office a copy of any notice of appeal to the ASBCA, along with the envelope in which the notice was received. If the contractor files an appeal with the contracting officer instead of the ASBCA, the contracting officer must immediately notify AF/JACQ of the date the appeal was received and forward to AF/JACQ and the cognizant legal office a copy of the appeal and a copy of the envelope in which the appeal was received. The contracting officer must forward the original appeal and envelope to AF/JACQ, which will then forward the appeal and envelope to the ASBCA, as necessary**.**

(c) The contracting officer must prepare a "Rule 4 file" for any appeal to the ASBCA in accordance with Rule 4 of the ASBCA rules (see DFARS Appendix A, Part 2). The contracting officer must consult with AF/JACQ before including in the Rule 4 file any legal opinions or intra-governmental or inter-governmental documents as described in DoD Directive 5400.07, *DoD Freedom of Information Act Program,* and FAR 24.2.

(d) While an appeal is pending, the contracting officer along with the program manager/user/functional Commander and SJA will support the assigned trial attorney as required including; identifying and locating government witnesses, gathering contractual documents and other physical evidence for conferences and hearings necessary to defend or otherwise dispose of an appeal.

(e) Once the Rule 4 file is complete, AF/JACQ will file it with the ASBCA on behalf of the contracting officer.

5333.292 Appeals to the United States Court of Federal Claims (COFC)

(a) The Department of Justice represents the Department of the Air Force in appeals brought before the COFC. The Air Force Commercial Litigation Field Support Center (AF/JACQ) serves as the Department of the Air Force counsel with the Department of Justice in such appeals.

(b) The contracting officer must notify the cognizant legal office and the SCO of any notice of appeal to the COFC. The cognizant legal office must forward a copy of the notice to SAF/GCR and AF/JACQ.

(c) The contracting officer must assist the cognizant legal office in preparing the litigation report. The contracting officer must obtain approval from the AF/JACQ trial attorney prior to releasing the litigation report outside government.