

# Subpart 33.1 - Protests

**Parent topic:** Part 33 Protests, Disputes, and Appeals

## 33.101 Definitions.

As used in this subpart-

*Day* means a calendar *day*, unless otherwise specified. In the computation of any period-

(1) The *day* of the act, event, or default from which the designated period of time begins to run is not included; and

(2) The last *day* after the act, event, or default is included unless-

(i) The last *day* is a Saturday, Sunday, or Federal holiday; or

(ii) In the case of a filing of a paper at any appropriate administrative forum, the last *day* is a *day* on which weather or other conditions cause the closing of the forum for all or part of the *day*, in which event the next *day* on which the appropriate administrative forum is open is included.

*Filed* means the complete receipt of any document by an agency before its close of business. Documents received after close of business are considered *filed* as of the next *day*. Unless otherwise stated, the agency close of business is presumed to be 4:30 p.m., local time.

*Interested party for the purpose of filing a protest* means an actual or prospective *offeror* whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.

*Protest* means a written objection by an interested party to any of the following:

(1) A *solicitation* or other request by an agency for *offers* for a contract for the *procurement* of property or services.

(2) The cancellation of the *solicitation* or other request.

(3) An award or proposed award of the contract.

(4) A termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

*Protest venue* means *protests filed* with the agency, the Government Accountability Office, or the U.S. Court of Federal *Claims*. U.S. District Courts do not have any bid *protest* jurisdiction.

## 33.102 General.

(a) Without regard to the *protest venue*, *contracting officers shall* consider all *protests* and seek

legal advice, whether *protests* are submitted before or after award and whether *filed* directly with the agency, the Government Accountability Office (GAO), or the U.S. Court of Federal *Claims*. (See [19.302](#) for *protests* of small business status, [19.305](#) for *protests* of disadvantaged business status, [19.306](#) for *protests* of HUBZone small business status, and [19.307](#) for *protests* of service-disabled veteran-owned small business status, and M) for *protests* of the status of an economically disadvantaged *women-owned small business concern* or of a *women-owned small business concern* eligible under the Women-Owned Small Business Program.)

(b) If, in connection with a *protest*, the head of an agency determines that a *solicitation*, proposed award, or award does not comply with the requirements of law or regulation, the *head of the agency may*-

(1) Take any action that could have been recommended by the Comptroller General had the *protest* been *filed* with the Government Accountability Office;

(2) Pay appropriate costs as stated in [33.104\(h\)](#); and

(3) Require the awardee to reimburse the Government's costs, as provided in this paragraph, where a postaward *protest* is sustained as the result of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification. In addition to any other remedy available, and pursuant to the requirements of [subpart 32.6](#), the Government *may* collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government.

(i) When a *protest* is sustained by GAO under circumstances that *may* allow the Government to seek reimbursement for *protest* costs, the *contracting officer* will determine whether the *protest* was sustained based on the awardee's negligent or intentional misrepresentation. If the *protest* was sustained on several issues, *protest* costs *shall* be apportioned according to the costs attributable to the awardee's actions.

(ii) The *contracting officer shall* review the amount of the debt, degree of the awardee's fault, and costs of collection, to determine whether a demand for reimbursement ought to be made. If it is in the best interests of the Government to seek reimbursement, the *contracting officer shall* notify the contractor *in writing* of the nature and amount of the debt, and the intention to collect by offset if necessary. Prior to issuing a final decision, the *contracting officer shall* afford the contractor an opportunity to inspect and copy agency records pertaining to the debt to the extent permitted by statute and regulation, and to request review of the matter by the *head of the contracting activity*.

(iii) When appropriate, the *contracting officer shall* also refer the matter to the agency *debarment* official for consideration under [subpart 9.4](#).

(c) In accordance with [31 U.S.C.1558](#), with respect to any *protest filed* with the GAO, if the funds available to the agency for a contract at the time a *protest* is *filed* in connection with a *solicitation* for, proposed award of, or award of such a contract would otherwise expire, such funds *shall* remain available for obligation for 100 days after the date on which the final ruling is made on the *protest*. A ruling is considered final on the date on which the time allowed for filing an appeal or request for reconsideration has expired, or the date on which a decision is rendered on such appeal or request, whichever is later.

(d) *Protest likely after award*. The *contracting officer may* stay performance of a contract within the time period contained in paragraph [33.104\(c\)\(1\)](#) if the *contracting officer* makes a written determination that-

(1) A *protest* is likely to be *filed*; and

(2) Delay of performance is, under the circumstances, in the best interests of the *United States*.

(e) An interested party wishing to *protest* is encouraged to seek resolution within the agency (see [33.103](#)) before filing a *protest* with the GAO, but *may protest* to the GAO in accordance with GAO regulations (4 CFR Part 21).

(f) No person *may* file a *protest* at GAO for a *procurement* integrity violation unless that person reported to the *contracting officer* the information constituting evidence of the violation within 14 days after the person first discovered the possible violation ([41 U.S.C.2106](#)).

### **33.103 Protests to the agency.**

(a) *Reference*. Executive Order 12979, *Agency Procurement Protests*, establishes policy on agency *procurement protests*.

(b) Prior to submission of an agency *protest*, all parties *shall* use their best efforts to resolve concerns raised by an interested party at the *contracting officer* level through open and frank discussions.

(c) The agency *should* provide for inexpensive, informal, procedurally simple, and expeditious resolution of *protests*. Where appropriate, the use of alternative dispute resolution techniques, third party neutrals, and another agency's personnel are acceptable *protest* resolution methods.

(d) The following procedures are established to resolve agency *protests* effectively, to build confidence in the Government's *acquisition* system, and to reduce *protests* outside of the agency:

(1) *Protests shall* be concise and logically presented to facilitate review by the agency. Failure to substantially comply with any of the requirements of paragraph (d)(2) of this section *may* be grounds for dismissal of the *protest*.

(2) *Protests shall* include the following information:

(i) Name, address, and fax and telephone numbers of the protester.

(ii) *Solicitation* or contract number.

(iii) Detailed statement of the legal and factual grounds for the *protest*, to include a description of resulting prejudice to the protester.

(iv) Copies of relevant documents.

(v) Request for a ruling by the agency.

(vi) Statement as to the form of relief requested.

(vii) All information establishing that the protester is an *interested party for the purpose of filing a protest*.

(viii) All information establishing the timeliness of the *protest*.

(3) All *protests filed* directly with the agency will be addressed to the *contracting officer* or other official designated to receive *protests*.

(4) In accordance with agency procedures, interested parties *may* request an independent review of their *protest* at a level above the *contracting officer*; *solicitations should* advise potential bidders and *offerors* that this review is available. Agency procedures and/or *solicitations shall* notify potential bidders and *offerors* whether this independent review is available as an alternative to consideration by the *contracting officer* of a *protest* or is available as an appeal of a *contracting officer* decision on a *protest*. Agencies *shall* designate the official(s) who are to conduct this independent review, but the official(s) need not be within the *contracting officer's* supervisory chain. When practicable, officials designated to conduct the independent review *should* not have had previous personal involvement in the *procurement*. If there is an agency appellate review of the *contracting officer's* decision on the *protest*, it will not extend GAO's timeliness requirements. Therefore, any subsequent *protest* to the GAO *must* be *filed* within 10 days of knowledge of initial adverse agency action (4 CFR21.2(a)(3)).

(e) *Protests* based on alleged apparent improprieties in a *solicitation shall* be *filed* before bid opening or the closing date for receipt of proposals. In all other cases, *protests shall* be *filed* no later than 10 days after the basis of *protest* is known or *should* have been known, whichever is earlier. The agency, for good cause shown, or where it determines that a *protest* raises issues significant to the agency's *acquisition* system, *may* consider the merits of any *protest* which is not timely *filed*.

(f) Action upon receipt of *protest*.

(1) Upon receipt of a *protest* before award, a contract *may* not be awarded, pending agency resolution of the *protest*, unless contract award is justified, *in writing*, for urgent and compelling reasons or is determined, *in writing*, to be in the best interest of the Government. Such justification or determination *shall* be approved at a level above the *contracting officer*, or by another official pursuant to agency procedures.

(2) If award is withheld pending agency resolution of the *protest*, the *contracting officer* will inform the *offerors* whose *offers* might become eligible for award of the contract. If appropriate, the *offerors should* be requested, before expiration of the time for acceptance of their *offers*, to extend the time for acceptance to avoid the need for resolicitation. In the event of failure to obtain such extension of *offers*, consideration *should* be given to proceeding with award pursuant to paragraph (f)(1) of this section.

(3) Upon receipt of a *protest* within 10 days after contract award or within 5 days after a debriefing date offered to the protester under a timely debriefing request in accordance with [15.505](#) or [15.506](#), whichever is later, the *contracting officer shall* immediately suspend performance, pending resolution of the *protest* within the agency, including any review by an independent higher level official, unless continued performance is justified, *in writing*, for urgent and compelling reasons or is determined, *in writing*, to be in the best interest of the Government. Such justification or determination *shall* be approved at a level above the *contracting officer*, or by another official pursuant to agency procedures.

(4) Pursuing an agency *protest* does not extend the time for obtaining a stay at GAO. Agencies *may* include, as part of the agency *protest* process, a voluntary *suspension* period when agency *protests* are denied and the protester subsequently files at GAO.

(g) Agencies *shall* make their best efforts to resolve agency *protests* within 35 days after the

*protest is filed*. To the extent permitted by law and regulation, the parties *may* exchange relevant information.

(h) Agency *protest* decisions *shall* be well-reasoned, and explain the agency position. The *protest* decision *shall* be provided to the protester using a method that provides evidence of receipt.

### **33.104 Protests to GAO.**

Procedures for *protests* to GAO are found at 4 CFR Part 21 (GAO Bid *Protest* Regulations). In the event guidance concerning GAO procedure in this section conflicts with 4 CFR Part 21, 4 CFR Part 21 governs.

(a) General procedure.

(1) A protester is required to furnish a copy of its complete *protest* to the official and location designated in the *solicitation* or, in the absence of such a designation, to the *contracting officer*, so it is received no later than 1 *day* after the *protest* is *filed* with the GAO. The GAO *may* dismiss the *protest* if the protester fails to furnish a complete copy of the *protest* within 1 *day*.

(2) Immediately after receipt of the GAO's written notice that a *protest* has been *filed*, the agency *shall* give notice of the *protest* to the contractor if the award has been made, or, if no award has been made, to all parties who appear to have a reasonable prospect of receiving award if the *protest* is denied. The agency *shall* furnish copies of the *protest* submissions to such parties with instructions to (i) communicate directly with the GAO, and (ii) provide copies of any such communication to the agency and to other participating parties when they become known. However, if the protester has identified sensitive information and requests a protective order, then the *contracting officer shall* obtain a redacted version from the protester to furnish to other interested parties, if one has not already been provided.

(3)

(i) Upon notice that a *protest* has been *filed* with the GAO, the *contracting officer shall* immediately begin compiling the information necessary for a report to the GAO. The agency *shall* submit a complete report to the GAO within 30 days after the GAO notifies the agency by telephone that a *protest* has been *filed*, or within 20 days after receipt from the GAO of a determination to use the express *option*, unless the GAO-

(A) Advises the agency that the *protest* has been dismissed; or

(B) Authorizes a longer period in response to an agency's request for an extension. Any new date is documented in the agency's file.

(ii) When a *protest* is *filed* with the GAO, and an actual or prospective *offeror* so requests, the procuring agency *shall*, in accordance with any applicable protective orders, provide actual or prospective *offerors* reasonable access to the *protest* file. However, if the GAO dismisses the *protest* before the documents are submitted to the GAO, then no *protest* file need be made available. Information exempt from disclosure under [5 U.S.C. 552](#) *may* be redacted from the *protest* file. The *protest* file *shall* be made available to non-intervening actual or prospective *offerors* within a reasonable time after submittal of an agency report to the GAO. The *protest* file *shall* include an

index and as appropriate-

- (A) The *protest*;
- (B) The *offer* submitted by the protester;
- (C) The *offer* being considered for award or being protested;
- (D) All relevant evaluation documents;
- (E) The *solicitation*, including the specifications or portions relevant to the *protest*;
- (F) The abstract of *offers* or relevant portions; and

(G) Any other documents that the agency determines are relevant to the *protest*, including documents specifically requested by the protester.

(iii) 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* provide to all parties and the GAO a list of those documents, or portions of documents, that the agency has released to the protester or intends to produce in its report, and those documents that the agency intends to withhold from the protester and the reasons for the proposed withholding. Any objection to the scope of the agency's proposed disclosure or nondisclosure of the documents *must be filed* with the GAO and the other parties within 2 days after receipt of this list.

(iv) The agency report to the GAO *shall* include-

(A) A copy of the documents described in 33.104(a)(3)(ii);

(B) The *contracting officer's* signed statement of relevant facts, including a best estimate of the contract value, and a memorandum of law. The *contracting officer's* statement *shall* set forth findings, actions, and recommendations, and any additional evidence or information not provided in the *protest* file that *may be necessary* to determine the merits of the *protest*; and

(C) A list of parties being provided the documents.

(4)

(i) At the same time the agency submits its report to the GAO, the agency *shall* furnish copies of its report to the protester and any intervenors. A party *shall* receive all relevant documents, except-

(A) Those that the agency has decided to withhold from that party for any reason, including those covered by a protective order issued by the GAO. Documents covered by a protective order *shall* be released only in accordance with the terms of the order. Examples of documents the agency *may* decide to exclude from a copy of the report include documents previously furnished to or prepared by a party; *classified information*; and information that would give the party a competitive advantage; and

(B) Protester's documents which the agency determines, pursuant to law or regulation, to withhold from any interested party.

(i) If the protester requests additional documents within 2 days after the protester knew the existence or relevance of additional documents, or *should* have known, the agency *shall* provide the

requested documents to the GAO within 2 days of receipt of the request.

(A) The additional documents *shall* also be provided to the protester and other interested parties within this 2-day period unless the agency has decided to withhold them for any reason (see subdivision (a)(4)(i) of this section). This includes any documents covered by a protective order issued by the GAO. Documents covered by a protective order *shall* be provided only in accordance with the terms of the order.

(B) The agency *shall* notify the GAO of any documents withheld from the protester and other interested parties and *shall* state the reasons for withholding them.

(5) The GAO *may* issue protective orders which establish terms, conditions, and restrictions for the provision of any document to an interested party. Protective orders prohibit or restrict the disclosure by the party of *procurement* sensitive information, trade secrets or other proprietary or confidential research, development or commercial information that is contained in such document. Protective orders do not authorize withholding any documents or information from the *United States* Congress or an *executive agency*.

(i) *Requests for protective orders*. Any party seeking issuance of a protective order *shall* file its request with the GAO as soon as practicable after the *protest* is *filed*, with copies furnished simultaneously to all parties.

(ii) *Exclusions and rebuttals*. Within 2 days after receipt of a copy of the protective order request, any party *may* file with the GAO a request that particular documents be excluded from the coverage of the protective order, or that particular parties or individuals be included in or excluded from the protective order. Copies of the request *shall* be furnished simultaneously to all parties.

(iii) *Additional documents*. If the existence or relevance of additional documents first becomes evident after a protective order has been issued, any party *may* request that these additional documents be covered by the protective order. Any party to the protective order also *may* request that individuals not already covered by the protective order be included in the order. Requests *shall* be *filed* with the GAO, with copies furnished simultaneously to all parties.

(iv) *Sanctions and remedies*. The GAO *may* impose appropriate sanctions for any violation of the terms of the protective order. Improper disclosure of protected information will entitle the aggrieved party to all appropriate remedies under law or equity. The GAO *may* also take appropriate action against an agency which fails to provide documents designated in a protective order.

(6) The protester and other interested parties are required to furnish a copy of any comments on the agency report directly to the GAO within 10 days, or 5 days if express *option* is used, after receipt of the report, with copies provided to the *contracting officer* and to other participating interested parties. If a hearing is held, these comments are due within 5 days after the hearing.

(7) Agencies *shall* furnish the GAO with the name, title, and telephone number of one or more officials (in both field and headquarters offices, if desired) whom the GAO *may* contact who are knowledgeable about the subject matter of the *protest*. Each agency *shall* be responsible for promptly advising the GAO of any change in the designated officials.

(b) *Protests* before award.

(1) When the agency has received notice from the GAO of a *protest filed* directly with the GAO, a contract *may* not be awarded unless authorized, in accordance with agency procedures, by the *head*

of the contracting activity, on a nondelegable basis, upon a written finding that-

(i) Urgent and compelling circumstances which significantly affect the interest of the *United States* will not permit awaiting the decision of the GAO; and

(ii) Award is likely to occur within 30 days of the written finding.

(2) A contract award *shall* not be authorized until the agency has notified the GAO of the finding in paragraph (b)(1) of this section.

(3) When a *protest* against the making of an award is received and award will be withheld pending disposition of the *protest*, the *contracting officer should* inform the *offerors* whose *offers* might become eligible for award of the *protest*. If appropriate, those *offerors should* be requested, before expiration of the time for acceptance of their *offer*, to extend the time for acceptance to avoid the need for resolicitation. In the event of failure to obtain such extensions of *offers*, consideration *should* be given to proceeding under paragraph (b)(1) of this section.

(c) *Protests* after award.

(1) When the agency receives notice of a *protest* from the GAO within 10 days after contract award or within 5 days after a debriefing date offered to the protester for any debriefing that is required by [15.505](#) or [15.506](#), whichever is later, the *contracting officer shall* immediately suspend performance or terminate the awarded contract, except as provided in paragraphs (c)(2) and (3) of this section.

(2) In accordance with agency procedures, the *head of the contracting activity may*, on a nondelegable basis, authorize contract performance, notwithstanding the *protest*, upon a written finding that-

(i) Contract performance will be in the best interests of the *United States*; or

(ii) Urgent and compelling circumstances that significantly affect the interests of the *United States* will not permit waiting for the GAO's decision.

(3) Contract performance *shall* not be authorized until the agency has notified the GAO of the finding in paragraph (c)(2) of this section.

(4) When it is decided to suspend performance or terminate the awarded contract, the *contracting officer should* attempt to negotiate a mutual agreement on a no-cost basis.

(5) When the agency receives notice of a *protest filed* with the GAO after the dates contained in paragraph (c)(1), the *contracting officer need* not suspend contract performance or terminate the awarded contract unless the *contracting officer* believes that an award *may* be invalidated and a delay in receiving the *supplies* or services is not prejudicial to the Government's interest.

(d) *Findings and notice*. If the decision is to proceed with contract award, or continue contract performance under paragraphs (b) or (c) of this section, the *contracting officer shall* include the written findings or other required documentation in the file. The *contracting officer also shall* give written notice of the decision to the protester and other interested parties.

(e) *Hearings*. The GAO *may* hold a hearing at the request of the agency, a protester, or other interested party who has responded to the notice in paragraph (a)(2) of this section. A recording or transcription of the hearing will normally be made, and copies *may* be obtained from the GAO. All



parties *may* file comments on the hearing and the agency report within 5 days of the hearing.

(f) *GAO decision time.* GAO issues its recommendation on a *protest* within 100 days from the date of filing of the *protest* with the GAO, or within 65 days under the *express option*. The GAO attempts to issue its recommendation on an amended *protest* that adds a new ground of *protest* within the time limit of the initial *protest*. If an amended *protest* cannot be resolved within the initial time limit, the GAO *may* resolve the amended *protest* through an *express option*.

(g) *Notice to GAO.* If the agency has not fully implemented the GAO recommendations with respect to a *solicitation* for a contract or an award or a proposed award of a contract within 60 days of receiving the GAO recommendations, the *head of the contracting activity* responsible for that contract *shall* report the failure to the GAO not later than 5 days after the expiration of the *60-day* period. The report *shall* explain the reasons why the GAO's recommendation, exclusive of costs, has not been followed by the agency.

(h) Award of costs.

(1) If the GAO determines that a *solicitation* for a contract, a proposed award, or an award of a contract does not comply with a statute or regulation, the GAO *may* recommend that the agency pay to an appropriate protester the cost, exclusive of profit, of filing and pursuing the *protest*, including reasonable attorney, consultant, and expert witness fees, and bid and proposal preparation costs. The agency *shall* use funds available for the *procurement* to pay the costs awarded.

(2) The protester *shall* file its *claim* for costs with the *contracting* agency within 60 days after receipt of the GAO's recommendation that the agency pay the protester its costs. Failure to file the *claim* within that time *may* result in forfeiture of the protester's right to recover its costs.

(3) The agency *shall* attempt to reach an agreement on the amount of costs to be paid. If the agency and the protester are unable to agree on the amount to be paid, the GAO *may*, upon request of the protester, recommend to the agency the amount of costs that the agency *should* pay.

(4) Within 60 days after the GAO recommends the amount of costs the agency *should* pay the protester, the agency *shall* notify the GAO of the action taken by the agency in response to the recommendation.

(5) No agency *shall* pay a party, other than a small business concern within the meaning of section 3(a) of the Small Business Act (see [2.101](#), "Small business concern"), costs under paragraph (h)(2) of this section-

(i) For consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Government pursuant to [5 U.S.C.3109](#) and 5 CFR 304.105; or

(ii) For attorneys' fees that exceed \$150 per hour, unless the agency determines, based on the recommendation of the Comptroller General on a case-by-case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. The cap placed on attorneys' fees for businesses, other than small businesses, constitutes a benchmark as to a "reasonable" level for attorneys' fees for small businesses.

(6) Before paying a recommended award of costs, agency personnel *should* consult legal counsel. Section [33.104\(h\)](#) applies to all recommended awards of costs that have not yet been paid.

(7) Any costs the contractor receives under this section *shall* not be the subject of subsequent proposals, billings, or *claims* against the Government, and those exclusions *should* be reflected in the cost agreement.

(8) If the Government pays costs, as provided in paragraph (h)(1) of this section, where a postaward *protest* is sustained as the result of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification, the Government *may* require the awardee to reimburse the Government the amount of such costs. In addition to any other remedy available, and pursuant to the requirements of subpart 32.6, the Government *may* collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government.

### **33.105 Protest at the U.S. Court of Federal Claims.**

Procedures for *protests* at the U.S. Court of Federal *Claims* are set forth in the rules of the U.S. Court of Federal *Claims*. The rules *may* be found at <http://www.uscfc.uscourts.gov/rules-and-forms>.

### **33.106 Solicitation provision and contract clause.**

(a) The *contracting officer shall* insert the provision at 52.233-2, *Service of Protest*, in *solicitations* for contracts expected to exceed the *simplified acquisition threshold*.

(b) The *contracting officer shall* insert the clause at 52.233-3, *Protest After Award*, in all *solicitations* and contracts. If a cost reimbursement contract is contemplated, the *contracting officer shall* use the clause with its *Alternate I*.