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.

Parent topic: Subpart 33.1 - Protests