



Office of the General Counsel

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(Tenth Edition)

BID PROTESTS AT GAO:

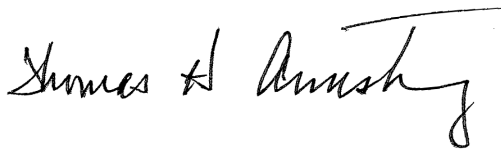
A Descriptive Guide

Introduction

The laws and regulations that govern contracting with the federal government are designed to ensure that federal procurements are conducted fairly. On occasion, 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 they have been unfairly denied a contract or an opportunity to compete for a contract. A major avenue of relief for those concerned about the propriety of an award has been the Government Accountability Office, which has historically provided an objective, independent, and impartial forum for the resolution of disputes concerning the awards of federal contracts. In fact, the first bid protest decision was published by GAO in 1926.

A bid protest is an adjudicative process; it is not an audit conducted by one of GAO's audit teams in accordance with generally accepted government auditing standards. Moreover, unlike GAO audit reports, a GAO bid protest decision does not address broad programmatic issues, such as whether a weapons program is being managed effectively and within cost, nor does a GAO bid protest decision evaluate which company's proposal is better.

Over the years, GAO has developed a substantial body of law and standard procedures for considering bid protests. This is the tenth edition of *Bid Protests at GAO: A Descriptive Guide*, prepared by the Office of the General Counsel, to aid those interested in GAO's bid protest process. We issued the first edition of this booklet in 1975 to facilitate greater public familiarity with the bid protest process at GAO and we have revised it over the years to reflect changes in our bid protest procedures. This edition incorporates changes made to our Bid Protest Regulations, effective May 1, 2018, to conform the regulations to reflect administrative changes in our procedures enacted by section 1501 of the Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 433. Section 1501 required GAO to establish an electronic filing and document dissemination system for the filing of bid protests at GAO. The statute also provided for GAO to receive a fee from filers to support the establishment and operation of the electronic system. This edition also incorporates changes to our protective order process.



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The Bid Protest Process

Background

For more than 90 years, GAO has provided an objective, independent, and impartial forum for the resolution of disputes concerning the awards of federal contracts. Over the years, the decisions of the Comptroller General of the United States, the head of GAO, in bid protest cases have resulted in a uniform body of law applicable to the procurement process upon which the Congress, the courts, agencies, and the public rely. Although protesters may be represented by counsel, filing a bid protest with GAO is easy and inexpensive and does not require the services of an attorney. In addition, matters can usually be resolved more quickly by protests filed with GAO than by court litigation.

This booklet is an informal, practical guide to the bid protest process at GAO; however, it is not the law. The legal rules governing this process are set forth in GAO's Bid Protest Regulations. Since 1985, GAO has had detailed regulations to inform protesters of the rules concerning where and how to file a protest, what to expect in the way of subsequent actions, and the time frames established for completion of those actions.

These regulations were promulgated to implement the Competition in Contracting Act of 1984. The regulations have been revised over time to implement statutory and other changes. Most recently, the regulations were revised, effective May 1, 2018, to conform to administrative changes in our procedures enacted by section 1501 of the Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 433. The revised regulations appear in Title 4 of the Code of Federal Regulations (C.F.R.), Part 21, and are reproduced in this booklet for ease of reference. See also www.gpo.gov/fdsys. Pursuant to these recent statutory changes, GAO has established an electronic filing and document dissemination system for the filing of bid protests at GAO. The statute also provided for GAO to receive a fee from filers to support the establishment and operation of the electronic system.

Additionally, since our last update of this guide, GAO's jurisdiction to hear protests of the issuance or proposed issuance of certain task and delivery orders under indefinite-delivery/indefinite-quantity contracts issued by civilian agencies, as well as by the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration, was made permanent by Congress. GAO Civilian Task and Delivery Order Protest Authority Act of 2016, Pub. L. No. 114-260, 1340 Stat. 1361; National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 830, 126 Stat. 1842.

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GAO changes its regulations from time to time because of changes in applicable statutes, a binding court decision, or when experience dictates that a modification is appropriate. These changes are published in the Federal Register, and then incorporated into the Code of Federal Regulations. Because the regulations are published in the Federal Register, protesters and other parties are deemed to have “constructive knowledge” of them, meaning that they are expected to comply with the regulations, even if they have never actually read the regulations.

In deciding bid protests, GAO considers whether federal agencies have complied with statutes and regulations controlling government procurements. The main statutes controlling federal procurements are 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 of 1984; the Federal Acquisition Streamlining Act of 1994; and the Federal Acquisition Reform Act of 1996 and the Information Technology Management Reform Act of 1996, as included in the National Defense Authorization Act for Fiscal Year 1996. These statutes are found in the United States Code, titles 10 and 41, respectively, and are implemented by the Federal Acquisition Regulation (FAR) and individual agency regulations. GAO’s Bid Protest Regulations govern GAO’s handling of bid protests and impose certain requirements on agencies, protesters, and others who participate in the bid protest process at GAO.

Overview of the Bid Protest Process

The bid protest process at GAO begins with the filing of a written protest. Unless the protest is dismissed because it is procedurally or substantively defective (for example, the protest is untimely or the protest fails to clearly state legally sufficient grounds of protest), the agency is required to file a report responding to the protest. The protester then has an opportunity to file written comments on the report. Other parties may be permitted to intervene, which means that they will also be able to access a copy of the report and will be allowed to file written comments in response to it.

During the course of a protest, GAO may schedule, as appropriate, status or other informal types of conferences to resolve procedural matters and to obtain information material to the disposition of the protest. GAO also may find that a hearing is necessary to resolve factual and legal issues raised in the protest. If GAO decides to hold a hearing, it will usually conduct a pre-hearing conference to decide the issues that will be considered at the hearing, to identify the witnesses who will testify at the hearing, and to settle procedural questions. After the hearing, all parties will be allowed to file written comments on the hearing.

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After the record is complete, GAO will consider the facts and legal issues raised and will issue a decision, a copy of which will be made available to all parties participating in the protest. GAO may sustain the protest (that is, find that the agency violated a procurement statute or regulation and that the violation prejudiced the protester), in which case, GAO will recommend appropriate corrective action. Alternatively, GAO may deny the protest or may dismiss the protest without reviewing the matter. GAO will issue its decision not later than 100 days from the date the protest was filed. The exact date on which GAO issues the decision depends on the urgency of the procurement, the complexity of the factual and legal issues raised in the protest, and GAO's workload.

At any time during the process of developing the record, GAO, at the request of one or more of the parties or on its own initiative, may determine that the protest is suitable for alternative dispute resolution (ADR). This may take the form of negotiation assistance, where the GAO attorney offers to assist the parties in reaching agreement on resolution of the matter; outcome prediction, where the GAO attorney advises the parties of the attorney's view of the likely outcome based on the record; or a litigation risk assessment, where the GAO attorney gives an informal view of the possible range of outcomes, so that a party may take appropriate action to resolve the protest.

Filing a Protest

Who May File a Protest

By law, a GAO protest must be filed by an "interested party," which means an actual or prospective bidder or offeror with a direct economic interest in the procurement. 4 C.F.R. § 21.0(a)(1). In challenges of the evaluation of proposals and the award of contracts, this generally means an offeror that would potentially be in line for award if the protest were sustained.

Additionally, in a public-private competition conducted under Office of Management and Budget Circular A-76 regarding performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private-sector performance without a competition, the official responsible for submitting the Federal agency tender (i.e., the agency tender official) and any one individual, designated as an agent by a majority of the employees performing that activity or function, who represents the affected employees (i.e., the designated employee agent), are each considered an "interested party" for purposes of filing a protest. 4 C.F.R. § 21.0(a)(2).

Although many parties retain an attorney in order to benefit from the attorney's familiarity with GAO's bid protest process and with procurement statutes and

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regulations, an attorney is not required for purposes of filing a protest. However, where the record includes another company's proprietary information or the agency's source-selection-sensitive information, only attorneys will be allowed to see that information (and then only if the attorneys are admitted under a protective order, as discussed below).

Where a protester is not represented by counsel (and, generally, in these circumstances, GAO will not issue a protective order), and documents are withheld from the protester, the agency still must provide documents or an explanation adequate to inform the protester of the basis of the agency's decision.

What to Protest

Although most protests challenge the acceptance or rejection of a bid or proposal and the award or proposed award of a contract, GAO considers protests of defective solicitations (e.g., allegedly restrictive specifications, omission of a required provision, and ambiguous or indefinite evaluation factors), as well as certain other procurement actions (e.g., the cancellation of a solicitation). The termination of a contract may be protested if the protest alleges that the termination was based on improprieties in the award of the contract. 4 C.F.R. § 21.1(a). Where the agency involved has agreed in writing, GAO will consider protests concerning (1) awards of subcontracts by or for a Federal agency, (2) sales by a Federal agency, or (3) procurement actions by government entities that do not fall within the strict definition of Federal agencies in 4 C.F.R. § 21.0(c). 4 C.F.R. § 21.13(a).

Moreover, Congress expanded GAO's bid protest jurisdiction with respect to task and delivery orders. Congress permanently authorized GAO to hear protests from interested parties involving the issuance or proposed issuance of certain task and delivery orders under indefinite-delivery/indefinite-quantity contracts issued by the Department of Defense and civilian agencies. GAO Civilian Task and Delivery Order Protest Authority Act of 2016, Pub. L. No. 114-260, 1340 Stat. 1361; National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 830, 126 Stat. 1842.

There are some matters that cannot be protested to GAO. The most common grounds for dismissal of a protest in whole or in part are set forth in 4 C.F.R. § 21.5.

Preparation of a Protest

There is no prescribed form for filing a protest, except that the protest must be in writing. Protests (with the exception of protests containing classified materials) must be filed through GAO's Electronic Protest Docketing System (EPDS) in accordance with the EPDS instructions. 4 C.F.R. § 21.1(b). Protests of different procurements must be filed separately. 4 C.F.R. § 21.1(f). Additional information

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on filing protests involving multiple procurements is set forth in the EPDS instructions.

GAO does not require formal briefs or other technical forms of pleadings. Id. However, at a minimum, a protest must:

- (1) Include the name, street address, e-mail address, and telephone and facsimile numbers of the protester (or its representative, if any);
- (2) Be signed by the protester or its representative (electronic signature is acceptable);
- (3) Identify the 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) Set forth all information establishing that the protester is an interested party for the purpose of filing a protest;
- (6) Set forth all information establishing the timeliness of the protest;
- (7) Specifically request a ruling by the Comptroller General of the United States; and
- (8) State the form of relief requested. 4 C.F.R. § 21.1(c).

In addition, a protest may include a request for a protective order, specific documents relevant to the protest, and/or a hearing. 4 C.F.R. § 21.1(d). In this regard, protesters must explain the relevance of requested documents to their protest grounds and the reason a hearing is necessary to resolve the protest. Id.

The protest document must be clearly labeled if it contains information that the protester believes is proprietary, confidential, or otherwise not releasable to the public. In those cases, within 1 day after filing the protest with GAO, the protester must file a redacted version of the protest that omits such information. 4 C.F.R. § 21.1(g).

Practice tip: Redacted Protests

A protester must file a redacted copy of its protest in EPDS within 1 day after the filing of the unredacted protest in order to facilitate the agency's notice of the protest to potential intervenors. 4 C.F.R. § 21.1(g).

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Upon request filed by a party, or on its own initiative, GAO may decide a protest using an express option schedule or other flexible alternative procedures, including establishing an accelerated schedule, issuing a summary decision, or using ADR procedures. 4 C.F.R. § 21.10(a), (e).

When to Protest

The regulations set forth the timeliness requirements for filing protests at GAO. 4 C.F.R. § 21.2. Because bid protests may delay the procurement of needed goods and services, GAO, except under limited circumstances, strictly enforces these timeliness requirements. 4 C.F.R. § 21.2(c).

Practice tip: Filing a Timely Protest

A protester should be careful to allot sufficient time to set up an account and file the protest in EPDS. The instructions for setting up an account in EPDS are located online at <https://www.gao.gov/legal/bid-protests/file-a-bid-protest>.

Protests alleging improprieties in a solicitation must be filed before bid opening or before the time set for receipt of initial proposals if the improprieties were apparent prior to those times. 4 C.F.R. § 21.2(a)(1). A solicitation defect that was not apparent before those times must be protested not later than 10 days after the defect became apparent. In negotiated procurements, if an alleged impropriety did not exist in the initial solicitation, but was later incorporated into the solicitation by an amendment, a protest based on that impropriety must be filed before the next closing time established for submitting proposals. Id.

Practice tip: Filing Protests of Solicitations with no Closing Date

Where there is no solicitation closing date or when no further submissions in response to the solicitation are anticipated, a protest must be filed within 10 days of when the alleged impropriety was known or should have been known. 4 C.F.R. § 21.2(a)(1).

In all other cases, protests must be filed not later than 10 days after the protester knew or should have known the basis of protest (whichever is earlier), with the exception of protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is “requested and, when requested, is required,” that is, a debriefing required by law. In these cases, with respect to any protest basis that was known or should have been known before the statutorily required debriefing, the protester should not file its initial protest before the

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debriefing date offered to the protester, but must file its initial protest not later than 10 days after the date on which the debriefing was held. 4 C.F.R. § 21.2(a)(2).

GAO will generally dismiss as premature a protest filed before the debriefing date offered to the protester where the protest involves a procurement conducted on the basis of competitive proposals and a debriefing is required by law. That is, the protester is not required to file a “defensive protest” (*i.e.*, a protest filed before the protester receives its required debriefing) when, for example, during the procurement, the protester learns of an agency’s evaluation judgments with which it disagrees or where the protester believes that the evaluation is not consistent with the solicitation’s evaluation scheme.

The purpose of the exception to the timeliness rules for competitive procurements, where debriefings are required by law, is to encourage offerors to seek, and agencies to give, early and meaningful debriefings prior to the offeror’s decision whether or not to file a protest. A protester, therefore, will always have up to 10 days after the required debriefing to file its initial protest.

Practice tip: Protests Filed Prior to a Debriefing Required by Law

In administering the timeliness rule at 4 C.F.R. § 21.2(a)(2), GAO may close a file without prejudice on any protest that has been filed before a statutorily required debriefing, upon appropriate notice by an agency to GAO that a debriefing date has been offered. Appropriate notice would include the agency’s furnishing a copy of its letter or other notice to the protester scheduling the debriefing. GAO anticipates that the debriefing will normally occur on the first date offered by the agency. In the event, however, that the agency subsequently agrees to another date, the debriefing held on that date will be used as the basis for determining the timeliness of the protest.

Practice tip: Debriefing Procedures

The rules governing the timing and contents of a statutorily required debriefing are contained in Part 15 of the Federal Acquisition Regulation. However, GAO will not consider protests concerning the adequacy or timing of a debriefing.

Special timeliness rules govern protests initially filed with the agency. In those cases, the protest to GAO must be filed not later than 10 days after the protester learned of “initial adverse agency action.” 4 C.F.R. § 21.2(a)(3). Deciding when adverse agency action occurs is straightforward when the protester receives oral or written notice that the agency is denying the agency-level protest. Protesters

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should keep in mind, however, that GAO views as adverse agency action any action that makes clear that the agency is denying the agency-level protest. Examples of adverse agency action include the agency's decision to proceed with bid opening or the receipt of proposals, the rejection of a bid or proposal, or the award of a contract despite the agency-level protest. Firms that have filed an agency-level protest and are considering filing a subsequent protest with GAO should be alert to any possible agency action that could be viewed as indicating that the agency is denying the agency-level protest.

Agency-level protests must be filed in accordance with GAO's timeliness rules at 4 C.F.R. § 21.2(a)(1) and (a)(2), unless the agency imposes a more stringent time for filing, in which case the agency's time for filing will control. Thus, even if a firm files a protest with GAO within 10 days of initial adverse agency action, GAO will consider the protest untimely if the agency-level protest was not timely filed under GAO's timeliness rules or under an agency's rules if those rules are stricter. 4 C.F.R. § 21.2(a)(3). For example, if a firm waits until after bid opening to file an agency-level protest of an apparent solicitation impropriety, GAO will not consider a protest of that impropriety even if it is filed within 10 days of the firm's learning that the agency has denied the agency-level protest, since the agency-level protest was not filed prior to bid opening.

In addition, protesters should keep in mind that the exception in GAO's regulations for filing a protest with GAO after receipt of a required debriefing does not apply to the filing of an initial agency-level protest, the timeliness of which is governed by the Federal Acquisition Regulation.

GAO may consider an untimely protest where exceptional circumstances beyond the protester's control caused the delay in filing the protest, or where the protest presents novel or significant issues of interest to the procurement community. 4 C.F.R. § 21.2(c). Protesters should be aware, however, that GAO will invoke these exceptions sparingly.

Finally, GAO recognizes that the North American Free Trade Agreement (NAFTA) contains a 10-working day timeliness requirement, which is inconsistent with GAO's timeliness rules. However, because of the flexibility of GAO's timeliness rules, GAO will afford a NAFTA protester all treaty rights for purposes of the timely filing of a protest.

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Practice tip: Supplemental/Amended Protests

Protesters should keep in mind that each new ground of protest must independently satisfy GAO's timeliness requirements. For example, if GAO grants an extension of time for filing comments on an agency report, the comment extension does not extend the 10-day time frame for filing a timely supplemental/amended protest. As a result, if a protester waits until the extended due date for filing comments to raise new or amended protest grounds, those grounds may be dismissed as untimely if they were raised more than 10 days after the protester learned or should have learned of them. Additionally, in the event a supplemental/amended protest is filed, GAO may provide a shortened time for production of the agency report and submission of comments regarding the supplemental/amended protest.

Practice tip: Diligent Pursuit

In all cases, protesters must diligently pursue the information that may provide a basis for protest, including requesting a prompt debriefing.

Where to file a Protest

Protests must be filed in GAO's Electronic Protest Docketing System (EPDS), except for protests containing classified information. 4 C.F.R. §§ 21.1(b) and (h). GAO's Internet Web home page (<https://www.gao.gov/legal/bid-protests/file-a-bid-protest>) includes instructions and guidance on the use of EPDS. Protesters planning to file a protest containing classified information should contact GAO for instructions.

A copy of the protest, including all attachments, must be filed with the individual or location identified for that purpose in a solicitation, or with the contracting officer, within 1 day after the protest is filed with GAO. 4 C.F.R. § 21.1(e).

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Practice tip: Filing Protests When EPDS is Unavailable

If EPDS is unavailable during normal system operating hours, (Monday through Friday, 8:00 a.m. to 5:30 p.m. Eastern Time, excluding Federal holidays or when the GAO is otherwise closed), a filer should:

- (1) Contact GAO to ascertain EPDS's operating status;
- (2) If the system is unavailable, the filer may file its submission by e-mailing it to protests@gao.gov, with courtesy copies to the other parties (subject to any requirements under an applicable protective order);
- (3) Include a detailed description of the nature of the technical error encountered in EPDS, including screen shots, if possible; and
- (4) Refile its submission when EPDS is available.

Regardless, the protester bears the risk that its protest will not be received at GAO in a timely manner.

After a Protest Is Filed

Acknowledgment of a Protest

Upon receipt of a protest, GAO generally prepares a notice acknowledging receipt of the protest. 4 C.F.R. § 21.3(a). In appropriate cases, GAO may issue a protective order package, a hearing schedule, and/or a status conference notice simultaneously with the acknowledgment notice. The only instance in which an acknowledgment notice is not filed is where the protest is summarily dismissed, in which case a notice of dismissal will be furnished.

The acknowledgment notice includes important information. First, it provides the file number by which GAO identifies the protest. That number consists of a letter followed by six digits (e.g., B-123456). This number should be referenced in all subsequent correspondence regarding the protest, no matter the manner in which such items are filed at GAO. Second, the notice contains the date on which the agency's response to the protest--the agency report--is due. The notice warns that GAO will assume that the protester receives the report on that date and may dismiss the protest if GAO does not receive the protester's written comments in

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response to the report within 10 days of that date. Third, the notice contains the date by which a written decision will be issued by GAO.

Finally, the acknowledgment notice identifies the GAO attorney or the GAO contact person handling the protest and that individual's telephone number. That individual is the GAO employee who should generally be contacted with any procedural questions about the protest. Inquiries about the status of the case may be directed to GAO's bid protest status line at (202) 512-5436. This telephone number also appears on the notice.

Practice tip: GAO's Internet Web Home Page Information

GAO's Bid Protest Docket, including information on the status of a particular protest, can be found on GAO's Internet Web home page (www.gao.gov) under the Bid Protests & Appropriations Law heading. Other useful information is available at that site, including a copy of this Descriptive Guide, the Guide to GAO Protective Orders, and GAO's Bid Protest Regulations.

Confirmation of Report Requirement

EPDS will automatically send the agency e-mail notice advising it that a protest has been filed immediately upon the filing of the protest. 4 C.F.R. § 21.3(a). That notice is important because it is the official notice that may trigger a statutory stay of the award or performance of a contract pending GAO's decision. The e-mail also triggers the agency report requirement. For this reason, protesters should file their protests sufficiently in advance of the expiration of the statutory period after award or after a statutorily required debriefing to allow GAO time to notify the agency that a protest has been filed for purposes of triggering the statutory stay. GAO follows up the e-mailed notice to the agency with a written confirmation of the report requirement that includes essentially the same information provided to the protester in the acknowledgment notice.

Practice tip: Statutory Stay

Although the notice of the filing of a new protest generated by EPDS to the agency may trigger a statutory stay, GAO does not review agency decisions in this regard. GAO will not consider a protest challenging an agency's decision that the stay does not apply to the protest, or a decision to override a stay.

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Intervenors

Immediately after receiving notice of the protest from GAO, the agency must give notice of the protest to the awardee if an award has been made; if no award has been made, the agency must notify all bidders or offerors that have a substantial chance of receiving an award. GAO may permit other firms to participate in the protest as "intervenors." 4 C.F.R. § 21.0(b). For protests filed by an interested party regarding a public-private competition conducted under Office of Management and Budget Circular A-76 regarding performance of an activity or function of a Federal agency, the agency tender official, who is responsible for submitting the Federal agency tender, and/or the agent representing the majority of affected Federal employees performing that activity or function, may also be intervenors.

Generally, if the award has been made, GAO permits only the awardee to intervene. If the award has not been made, GAO will consider a request to intervene from a bidder or offeror who appears to have a substantial prospect of receiving an award if the protest is denied. Id. However, permitting intervention in a preaward protest is generally the exception, not the rule.

The request to intervene can be a brief letter that includes the name, street address, e-mail address, and telephone and fax numbers of the intervenor or its representative, if any, and advises GAO and all other parties of the intervenor's status. A request to intervene may not be marked protected, or otherwise withheld from the parties.

Practice tip: Notice of Appearance

The attorney who will represent the agency in the protest must file a written notice of appearance in EPDS. An intervenor (or its representative) should also file a notice of appearance in EPDS. Providing such information early in the bid protest process will help to ensure that communications between the parties are not delayed.

Summary Dismissal

If GAO determines that it is appropriate to dismiss the protest on jurisdictional or procedural grounds, GAO will not review the merits of the protest and, thus, will not request an agency report. 4 C.F.R. § 21.5. For example, if the protest is untimely on its face or if it raises issues that GAO does not consider (such as the awardee's business size status), GAO will dismiss the protest without requiring the agency to submit a report. GAO may also summarily dismiss individual grounds of protest. Id. For example, if a protest alleges that a solicitation uses overly restrictive technical specifications and uses the incorrect definition of a small business, GAO will dismiss the latter ground (which is for consideration by the Small Business

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Administration, not GAO), but may request an agency report on the remaining ground.

As a general rule, GAO will dismiss a protest that fails to set forth a detailed statement of the legal and factual grounds of protest or that fails to state legally sufficient grounds of protest. 4 C.F.R. § 21.5(f), citing 4 C.F.R. § 21.1(c)(4) and 4 C.F.R. § 21.1(f), respectively.

Once the protest is received, the agency and/or an intervenor may request that GAO summarily dismiss the protest or some of its grounds. 4 C.F.R. § 21.3(b). Where summary dismissal may be appropriate, the request for dismissal should be filed as soon as practicable after the protest is filed. Id. Unless it is clear that dismissal is appropriate, GAO generally will permit the protester to file a response to the dismissal request. GAO will promptly address the dismissal request. If necessary, GAO will suspend the agency report while it considers the dismissal request. If GAO grants the request, either in whole or in part, GAO will not require the agency to prepare a report in response to the protest or in response to those grounds of protest that were dismissed.

Practice tip: Requests for Dismissal

It is important for requests for dismissal to be filed as soon as possible after the protest is filed. If an agency or intervenor files a request for dismissal close to the time set for the filing of the agency report, GAO may defer resolution of the request for dismissal until after the agency report is filed.

Protective Orders

If the record in a protest contains “protected” information, that is, a company’s proprietary or confidential data or the agency’s source-selection-sensitive information, that information cannot be made public. In order to allow limited access to protected information relevant to a protest, GAO may issue a protective order. 4 C.F.R. § 21.4. The protective order strictly controls who has access to protected material and how that material is labeled, distributed, stored, and disposed of at the conclusion of the protest. A protective order package, which includes the protective order and the application(s) for access to material under a protective order, generally will be issued soon after a protest is filed, and often simultaneously with the acknowledgment notice.

Only individuals who apply to GAO, and whose protective order applications are approved by GAO, will be permitted access to protected information. Those individuals must be attorneys or consultants retained by attorneys; the attorneys may be outside counsel or in-house counsel. The applicants need to show that they

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are not involved in competitive decision-making for any company that could gain a competitive advantage from access to protected information and that there will be no significant risk of inadvertent disclosure of such information. 4 C.F.R. § 21.4(d).

GAO has issued a number of decisions that address matters related to the admission of applicants under a protective order. Individuals permitted access to protected information are not allowed to disclose that information to others. This means, for example, that a protester's attorney who is permitted access to protected information under a protective order is prohibited from revealing such information to the client. GAO may impose sanctions on any individual who violates the terms of a protective order, 4 C.F.R. § 21.4(e), or on individuals not admitted to the protective order who actively seek and obtain information that they know is covered by the protective order. Sanctions for a violation of the terms of a protective order include referring the violation to appropriate bar associations or other disciplinary bodies, restricting the individual's practice before GAO, prohibiting the individual from participating in the remainder of the protest, or dismissing the protest.

Because the information released under a protective order is not GAO's, but rather, the agency's or a private party's, GAO relies on the parties to carefully review applications for access to material under a protective order (and to call to GAO's attention any possible violation of a protective order). If no party objects to an individual's application, GAO will generally admit the applicant under the protective order. It is important that any objections to an individual's application be promptly raised. By the end of the second day after receiving the application, the objecting party must file any objections to the applicant's admission. 4 C.F.R. § 21.4(d). GAO will promptly address any objections. Even after the period for filing an objection has passed, GAO may withhold its ruling on an application (or may revoke an admission) if information comes to light indicating that the applicant does not meet the criteria for admission.

Note that, under paragraph 1 of the protective order, a protective order issued for an initial protest is automatically extended by the terms of the order to cover all proceedings associated with the initial protest, including supplemental/amended protests, requests for reconsideration, and claims for costs. Under paragraph 7 of the protective order, GAO expressly authorizes a party admitted under a protective order to retain a single copy of a protected decision or letter issued by GAO, subject indefinitely to the terms of the order (except those terms regarding the return or destruction of protected material).

Under paragraph 4 of the protective order, each party is allowed to make up to four copies (including the original and electronic copies) of protected material. Paragraph 6 of the protective order permits the use of e-mail to transmit protected documents, and paragraph 7 requires that electronically transmitted material be disposed of at the end of the protest.

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In paragraph 7 of the application for both outside counsel and in-house counsel, GAO requires applicants to disclose those instances within the last 2 years when they have been denied admission to a protective order, or had admission revoked, or been found to have violated a protective order issued by GAO or by an administrative or judicial tribunal.

Under paragraph 8 of the protective order, material to which parties gain access under the order is to be used only for the subject protest proceeding, absent express prior authorization from GAO. However, protected material obtained under GAO's protective order may be used in a bid protest filed with the United States Court of Federal Claims without GAO's prior authorization, provided that the information is filed under seal with the Court, that the Court is informed of GAO's protective order, and that the Court is requested to issue its own protective order to cover the protected material. In addition, GAO must be immediately notified when suit is filed with the Court. The use of material protected under the GAO protective order will be governed by the Court's protective order.

Under paragraph 9 of the protective order, GAO explains that any violation of the terms of an order may result in the imposition of such sanctions as GAO deems appropriate, including but not limited to referring the violation to appropriate bar associations or other disciplinary bodies, restricting the individual's practice before GAO, prohibiting the individual from participating in the remainder of the protest, or dismissing the protest.

Further explanation of the protective order process at GAO may be found in *The Guide To GAO Protective Orders*, which may be viewed on GAO's Internet Web home page (www.gao.gov) by selecting the Bid Protests & Appropriations Law tab, then selecting Our Process. A sample protective order and sample applications for access to material under a protective order for outside counsel, in-house counsel, and consultants retained by counsel are reproduced in the appendixes to this Descriptive Guide.

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Practice tip: Protective Orders

Since only attorneys, or consultants they retain, may be admitted under a protective order, GAO generally will not issue a protective order in a protest if the protester is proceeding without an attorney, even if the record will include protected information. 4 C.F.R. § 21.4(a). Although GAO may issue a protective order on its own initiative, because a protective order is meant to help the protester, through counsel, learn the relevant facts, GAO views it as the responsibility of the protester's counsel in the first instance to request a protective order and to submit timely applications for admission. Id. If protester's counsel delays submitting applications for admission under a protective order (for example, until after receipt of the agency report), GAO generally will not consider this delay as a reason to extend the period of time for the protester's counsel to file comments on the report.

Practice tip: Violations of Protective Orders--Admonishments and Sanctions

GAO has admonished attorneys permitted access to protected material under a protective order when they themselves, or clerical or other support staff under their supervision, have inadvertently or improperly released such material.

Practice tip: Abuse of the Protest Process

GAO considers the protective order process essential to the proper functioning of the bid protest process as a whole. While the protective order applies primarily to the attorneys and consultants admitted under it, where anyone's purposeful actions (such as those of a company official) subvert that process, GAO may impose appropriate sanctions, including dismissal of the protest, to protect the integrity of the bid protest system. For a discussion of GAO's position, see PWC Logistics Servs. Co. KSC(c), B-310559, Jan. 11, 2008, 2008 CPD ¶ 25.

Agency Report

Within 30 days after an agency receives notice of a protest from GAO, the agency is required to file a complete written report responding to the protest, including all relevant documents, or portions of documents, and an explanation of the agency's

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position. 4 C.F.R. § 21.3(c). The report generally will include a statement of the relevant facts (and a best estimate of the contract value) signed by the contracting officer, a memorandum of law explaining the agency's position in terms of procurement law, a statement regarding whether a statutory stay or suspension of contract performance is in place, and a list and copies of all relevant documents, or portions of documents, not previously furnished (e.g., as appropriate, the bid or proposal of the protester; the bid or proposal of the firm which is being considered for award, or whose bid or proposal is being protested; all evaluation documents; the solicitation, including specifications; the abstract of bids or proposals; and any other relevant documents). 4 C.F.R. § 21.3(d).

GAO encourages agencies to voluntarily release to the parties documents that are relevant to the protest prior to the filing of the agency report. Documents provided to the parties before the agency report is filed, or documents that are otherwise made available to the parties by, for example, allowing them to review documents on site at the agency before the report is filed, need not be produced in the copy of the report filed. 4 C.F.R. § 21.3(c).

Practice tip: Early Document Production

GAO has found that protests can be more promptly resolved when an agency releases relevant documents before the agency report is filed since this ensures that any supplemental/amended protest grounds will be raised and developed early in the protest process. This is especially true in the case of negotiated procurements, where disclosure of core documents, such as evaluation materials and the awardee's proposal, often leads to supplemental/amended protest arguments.

In addition, so that GAO may resolve any document disputes prior to the filing of the agency report, GAO requires, at least 5 days prior to the filing of the report, in cases in which the protester has requested in its protest, or shortly thereafter, specific documents material to the disposition of the protest, that the agency file a list of those documents, or portions of documents, that it has previously released or intends to produce in its report, and of the documents, or portions of documents, that it intends to withhold and the reasons for the proposed withholding. If the fifth day prior to the filing of the agency report falls on a weekend or a federal holiday, the agency's response must be filed by the last business day that precedes the weekend or holiday. Objections to the scope of the agency's proposed disclosure or nondisclosure of documents must be filed within 2 days of the filing of the agency's list. Id.

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Practice tip: Document Disputes

GAO expects parties initially to attempt to resolve document disputes themselves, without the involvement of the GAO attorney. Where agreement cannot be reached, GAO will resolve the matter.

GAO's requirement that an agency prepare a document list 5 days prior to the filing of its agency report is intended to facilitate the expeditious development of the protest.

The agency may omit documents, or portions of documents, from the copy of the report provided to the parties if the omitted information is protected and a party receiving the report is not represented by counsel admitted under a protective order. 4 C.F.R. § 21.3(e). Where the protester is proceeding without counsel admitted under a protective order and documents are withheld, it is important that the agency provide the protester with information sufficient to clearly inform the protester of the agency's position, so that the protester may comment intelligently on the report.

Additional Document Requests

Occasionally, the agency may be aware of the existence of relevant documents that only the protester possesses. In appropriate cases, the agency may request that the protester produce those documents. 4 C.F.R. § 21.3(d). However, while an agency, in an appropriate case, may request that a protester provide specific relevant documents, of which the agency is aware and does not itself possess, this does not allow for "wide-open" document requests by an agency of broad categories of documents. If GAO agrees that the documents are relevant, it may ask the protester to provide a copy of the documents to GAO and the other parties, subject to the terms of any protective order.

If a protester learns of the existence or relevance of additional documents that it believes GAO needs to consider in deciding the protest, it may request the production of those documents by filing a supplemental document request. 4 C.F.R. § 21.3(g). Typically, this arises where the protester, in reading the agency report, sees references to documents that the agency relies on in support of its position, but has not produced. A protester seeking the production of additional documents should file a request for those documents within 2 days after the existence or relevance of the documents is known or should have been known, whichever is earlier. Id. The agency should file a response to the request not later than 2 days after the request is filed, by either producing the documents, or portions of documents, or explaining why the documents are not being produced. Id.

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Practice tip: Document Requests

When objecting to the scope of the agency's proposed document production, or when requesting additional documents, the protester should identify the protest ground for which the requested document is relevant, and clearly explain why the document is relevant to the protest ground.

Comments on the Agency Report

The protester and any intervenors may file written comments on the agency report. Comments generally are due at GAO within 10 days after the report is filed. 4 C.F.R. § 21.3(i).

Practice tip: Comments

Sometimes an agency will file its report before the date specified in GAO's acknowledgment letter. The date the agency actually files the report starts the 10-day period within which the protester and intervenor must respond.

Even if the agency produces withheld documents at the direction of GAO after the report has been submitted, comments will be due within the original 10-day comment filing period, unless GAO extends this period. 4 C.F.R. § 21.3(h).

The failure of the protester to file comments within the 10-day period, within a longer period established by an extension granted by GAO, or within a shorter period established by GAO in accordance with 4 C.F.R. § 21.10(e), will result in dismissal of the protest. 4 C.F.R. § 21.3(i).

Practice tip: Comments

Protesters should be aware that failing to address or rebut the agency's response to a protest ground will result in that protest ground being deemed abandoned, and will not be further considered by GAO. In addition, comments consisting solely of general statements requesting that GAO review the protest on the existing record generally are not sufficient to rebut the agency report. As a result, protests are rarely sustained where the protester does not file substantive comments on the report.

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Practice tip: Additional Submissions

Generally, after comments on the agency report are filed, and unless a hearing is held, the record is considered closed. However, as may be necessary to ensure the fair resolution of the protest, GAO may request or permit the submission of additional statements by the parties and by other parties not participating in the protest. 4 C.F.R. § 21.3(j). Additional statements may not be submitted unless specifically requested by GAO or permission has been granted by GAO. Id. In other words, when GAO believes that further input is necessary from an agency or other parties, GAO will not foreclose the submission of additional information and will apprise all parties in this regard. GAO reserves the right to disregard material submitted without prior approval. Id.

Ex Parte Communications

Parties should not attempt to engage in *ex parte* communications with the GAO attorney assigned to the protest or with any other GAO employee. An *ex parte* communication refers to any oral or written communication between a party and a GAO official that excludes one or more of the parties to the protest, and concerns the merits of the protest or significant issues that might affect the outcome of the protest. Although it may be necessary during the proceedings to clarify a fact in the record or to explain in greater detail a party's position in the case, GAO will not entertain, and no one may submit to GAO, on an *ex parte* basis, any evidence, explanation, analysis, or advice, whether oral or written, regarding any substantive matter affecting the disposition of the protest. Where it is necessary to discuss any substantive issue with GAO, a telephone conference should be requested. All parties should be copied on communications with GAO. 4 C.F.R. § 21.3(a).

Hearings

At the request of a party or on its own initiative, GAO may conduct a hearing in person, by telephone, or by video conference where it concludes that the protest cannot be resolved on the basis of the written record alone. 4 C.F.R. § 21.7(a), (c). Hearings are usually conducted at GAO's headquarters in Washington, D.C.

Because hearings increase the costs and burdens of protests, GAO holds hearings only when necessary. A request for a hearing should explain why a hearing is necessary to resolve the protest, and point out, for example, factual and legal

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questions that GAO must consider in order to decide the protest. 4 C.F.R. §§ 21.1(d)(3), 21.7(a). GAO has issued a number of decisions that discuss reasons for holding hearings. While the regulations do not establish a deadline for requesting a hearing, such a request should be submitted as early as possible in the protest process in order to avoid unnecessary delays and disruptions. Parties should also be aware that GAO may determine shortly after a protest is filed whether the case is one in which a hearing appears likely to be appropriate. On the other hand, the appropriateness of a hearing often is not clear until after the agency has filed its report and, in many cases, is not clear until after the protester has submitted its comments on the report. GAO may decide at these later times that a hearing is necessary to resolve the protest.

In cases where GAO decides to hold a hearing, it will generally conduct a pre-hearing conference with all parties. 4 C.F.R. § 21.7(b). The purpose of that conference is to review the scope of the hearing, identify the appropriate witnesses and their availability, establish the date and location of the hearing, and discuss other logistical and procedural matters. In cases where GAO determines that only some of the protest issues require a hearing, it will generally limit the hearing to those issues. The GAO attorney handling the protest will conduct both the pre-hearing conference and the hearing. The format of hearings varies from formal (direct- and cross-examination of witnesses conducted by counsel for the parties) to informal (a discussion of the issues by counsel and others). For this reason, the pre-hearing conference is usually the best opportunity to clarify how the GAO attorney expects to conduct the hearing, as well as to raise any other questions about the hearing.

A GAO hearing is, in principle, open to the public. In practice, however, protest hearings often involve protected information. As a result, most hearings are closed, except to agency personnel and those individuals admitted under the protective order. 4 C.F.R. § 21.7(d).

At least 24 hours prior to the hearing, parties must advise GAO of those individuals expected to attend the hearing so that these individuals may gain access to the GAO building where the hearing room is located.

The GAO hearing room is equipped with video cameras and microphones, which automatically record the proceedings. That system produces a video or electronic transcript, a copy of which is provided to the parties at no charge at the conclusion of the hearing. In addition, parties may wish to have a court reporter attend the hearing to prepare a written transcript. A request to that effect should be presented before the day of the hearing to the GAO attorney handling the protest. Such a request will usually be granted as long as all parties will have access to a written transcript. If the parties wish to have a hearing transcribed, they may do so at their own expense, and must provide a copy of the transcript to GAO at the parties'

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expense. 4 C.F.R. § 21.7(e). Where a hearing is held by electronic means, such as by telephone or video teleconferencing, the parties and GAO will determine beforehand the manner in which the hearing will be recorded.

If a hearing is held, all parties, including the agency, will be permitted to file written comments on the hearing. 4 C.F.R. § 21.7(g). Those comments are due 5 days after the hearing ends, unless GAO sets a different date. Id. Hearings generally are held after receipt of comments on the agency report.

Decision Timetable

Once the record is complete, GAO will consider the protest and decide the case through a written decision issued by the Comptroller General. At the latest, the decision will be issued 100 days after the protest is filed, unless GAO decides the case under the 65-day express option schedule. 4 C.F.R. § 21.9(a), (b). If a protester has filed a timely supplemental protest or a timely amended protest, GAO will endeavor to resolve the supplemental/amended protest within the 100-day time frame for a decision on the initial protest. 4 C.F.R. § 21.9(c). If that is not feasible, GAO may consider using the express option schedule or other accelerated schedule for the resolution of the supplemental/amended protest. Id.; 4 C.F.R. § 21.10(e).

Practice tip: Checking Status of Protest

The parties to a protest may check the status of the protest on GAO's Bid Protest Docket, found on GAO's Internet Web home page (www.gao.gov) or by calling GAO's bid protest status line at (202) 512-5436. The parties will also have access to the status of the case through EPDS.

Express Option

GAO may decide at the request of a party or on its own initiative that a protest can be resolved under an expedited schedule, referred to as the "express option." 4 C.F.R. § 21.10(a). A party requesting that GAO decide the case on this basis should submit a written request in EPDS to that effect not later than 5 days after the initial protest or the supplemental/amended protest is filed. 4 C.F.R. § 21.10(c). GAO will promptly advise the parties if the express option will be used.

Under the express option schedule, the agency report is due within 20 days after the agency receives notice from GAO that the express option will be used. 4 C.F.R.

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§ 21.10(d)(1). Comments on the report generally are due within 5 days after the protester's receipt of the report. 4 C.F.R. § 21.10(d)(2). If a hearing is needed, comments on the hearing (and on the report if not already filed) must be filed within 5 days after the hearing ends, unless GAO sets a different date. Under the express option schedule, GAO's decision will be issued not later than 65 days after the protest is filed. 4 C.F.R. §§ 21.9(b), 21.10(b). GAO may decide at any time that the express option schedule is no longer appropriate, and may set a different schedule for the protest, which will not exceed the time frame (100 days) for deciding a non-express option case. 4 C.F.R. § 21.10(d)(3).

Where a case is not appropriate for resolution under the express option, but there may be a justifiable basis for expediting the decision, the parties should discuss with the GAO attorney whether an expedited schedule is appropriate.

Flexible Alternative Procedures and Alternative Dispute Resolution

Notwithstanding any other provision in GAO's Bid Protest Regulations, at the request of a party or on its own initiative, GAO may use flexible alternative procedures, including, for example, establishing an accelerated schedule and/or issuing a summary decision, to resolve any protest. 4 C.F.R. § 21.10(e). This provision is intended to provide a flexible, accelerated protest resolution procedure at GAO that will minimize disruptions to the procurement cycle.

In addition, GAO may use alternative dispute resolution (ADR) procedures at the request of one or more of the parties, or where GAO deems the use of such procedures appropriate. The use of ADR may take the form of negotiation assistance, where the GAO attorney acts as a facilitator to provide assistance to the parties in an effort to resolve the protest issues either before or after a protest is filed; outcome prediction, where the GAO attorney will advise the parties of the likely outcome of the protest in order to allow the party likely to be unsuccessful to take appropriate action (that is, either the agency takes corrective action or the protester withdraws the protest); or litigation risk, where the GAO attorney gives an informal view of the possible range of outcomes, to resolve the protest without a written decision.

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Practice tip: ADR

A GAO attorney generally will not conduct ADR in the form of outcome prediction unless the parties indicate in advance a willingness, if identified as the likely unsuccessful party, to seriously consider taking appropriate action to resolve the protest--typically, corrective action by the agency or withdrawal of the protest by the protester. The GAO attorney will discuss these and other matters with the parties in determining whether a case is appropriate for ADR.

Status and Other Informal Conferences

To facilitate the expeditious development and resolution of a protest, GAO will conduct status and other types of informal conferences, by telephone or in person, with all parties participating in a protest. 4 C.F.R. § 21.10(f). Such conferences may be held at any time during the bid protest process and will be tailored to the circumstances of a particular case. For example, status and other types of informal conferences are beneficial for resolving protective order admission objections, document disputes, and summary dismissal requests; for discussing issues related to hearings; and, for obtaining answers to questions that are relevant and material to the disposition of a protest.

Protest Disposition

GAO will dismiss, deny, or sustain a protest. GAO generally sustains protests where it determines that the agency violated procurement statutes or regulations, unless it concludes that the violation did not prejudice the protester. Where a protest is sustained, GAO will recommend appropriate corrective action. In fashioning its recommendation, GAO will consider the circumstances of the procurement, such as the agency's stated need for the goods or services at issue, the extent to which performance has been completed (in post-award protests where performance has not been stayed), and similar factors. In appropriate circumstances, GAO will recommend that the agency terminate an improper award or, where this is not feasible, that the agency not exercise any renewal options in the improperly awarded contract. 4 C.F.R. § 21.8(a), (b).

Where GAO recommends corrective action in a decision, the Competition in Contracting Act of 1984 requires the agencies affected to report to the Comptroller General whenever they have not fully implemented the recommendation within

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60 days. 31 U.S.C. § 3554(b)(3). The Comptroller General, in turn, reports to Congress each instance where the agency declines to implement the recommendations, as required by 31 U.S.C. § 3554(e).

If the protest is sustained, GAO generally will recommend that the protester be reimbursed the costs of filing and pursuing the protest, including reasonable attorneys' fees and consultant and expert witness fees. 4 C.F.R. § 21.8(d). Occasionally, where there is no other relief available, GAO will recommend that the protester also be reimbursed the costs of preparing its bid or proposal. Id.

Where GAO has recommended reimbursement of costs, the protester must submit a detailed claim for costs, certifying the time expended and costs incurred in pursuing the protest, directly to the agency within 60 days after receipt of GAO's recommendation that the agency pay these costs. 4 C.F.R. § 21.8(f)(1). A claim must be supported by adequate documentation. GAO expects the protester and the agency to determine the exact amount to be paid. If the protester and agency cannot agree, GAO may, at the protester's request, decide the matter. 4 C.F.R. § 21.8(f)(3).

Protesters should keep in mind that, with the exception of small businesses, the cost for attorneys has been capped by statute. 31 U.S.C. § 3554(c). GAO never recommends that agencies pay lost profits or other common-law damages.

Where an agency voluntarily decides to take corrective action in response to a protest, GAO may recommend that the protester be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees and consultant and expert witness fees. 4 C.F.R. § 21.8(e). However, GAO does not contemplate reimbursement of protest costs in every case in which an agency takes corrective action, but rather, only where an agency unduly delays taking corrective action (i.e., corrective action is taken after the due date for the submission of the agency report) in the face of a clearly meritorious protest, that is, a protest that is not a close question. A protest is clearly meritorious where a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position. The mere fact that an agency takes corrective action does not establish that a statute or regulation has been violated and has prejudiced the protester's chance of receiving an award.

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Practice tip: Agency Corrective Action--Costs

Where the agency takes corrective action in the face of a clearly meritorious protest, but fails to do so promptly, GAO may recommend that the agency pay the protester its reasonable protest costs. In general, if an agency advises GAO of its intent to take corrective action by the due date of its protest report, GAO will consider that action to be prompt and will not recommend reimbursement of protest costs.

Distribution of GAO Decisions

Once a decision is signed and the file closed, a copy of the decision will be distributed to the parties through EPDS. 4 C.F.R. § 21.12(b). A copy of a decision that does not contain protected information generally is available on GAO's Internet Web home page within 24 hours of the case being closed.

Where a decision may contain protected information and is subject to the terms of a protective order, a copy of the decision will be provided only to the agency and the individuals admitted to the protective order. 4 C.F.R. § 21.12(a). A version of the decision releasable to the public will be prepared as soon as possible, and will be accessible from GAO's Internet Web home page. Id. GAO strives to issue a public version of protected decisions within 2 to 3 weeks after the protected decision is issued.

GAO will seek the views of the parties before determining which information, if any, should be redacted for the public version of the decision. Parties should provide their views in this regard expeditiously. GAO balances the propriety of any proposed redaction with its practice of producing publicly available decisions. Accordingly, when confronted with requests for redaction, GAO begins with a presumption of public access to its decisions. To overcome the presumption of public release and transparency, a party seeking redaction of information must provide compelling reasons supported by factual findings and legal justification. Conclusory explanations and claims do not overcome this presumption. Even if covered by a protective order during the protest process, information will be redacted only where it is determined to be proprietary or source-selection-sensitive, and where continuing to protect the information is necessary to safeguard the competitive process. For example, evaluation point scores and adjectival ratings, unfavorable or adverse past performance information, and total pricing generally will not be redacted from the decision. GAO's goal is to make public a meaningful and transparent decision.

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Judicial Proceedings

A party must immediately advise GAO of any court proceeding that involves a pending matter and must file with GAO copies of all relevant court documents. 4 C.F.R. § 21.11(a). GAO will not consider a protest or other matter where it is the subject of litigation in, or has been decided on the merits by, a court. 4 C.F.R. § 21.11(b). For example, if a party files a protest with GAO concerning the award of a contract, and thereafter files a complaint in court also challenging the award, GAO will dismiss the protest. However, at the request of the court, GAO may review the protest and issue an advisory opinion or a decision for the court's consideration. Id. In such a case, the time frames for filing the agency report, filing comments on the report, conducting a hearing and filing hearing comments, and issuing a decision may be modified to respond promptly to the court's request. Id.

Practice tip: Court Actions

Parties should immediately advise GAO if an action related to a pending protest is filed in court, including lawsuits filed at the United States Court of Federal Claims regarding a stay of performance. The parties should also provide copies of pleadings in the related court action to GAO as soon as possible.

Requests for Reconsideration

Any party who participated in the protest, including the protester, any intervenor, and the agency, may request that GAO reconsider its decision in the protest. 4 C.F.R. § 21.14(a). A request for reconsideration does not result in the withholding of award or the suspension of contract performance.

GAO must receive the request for reconsideration within 10 days after the basis of reconsideration is known or should have been known, whichever is earlier. 4 C.F.R. § 21.14(b). The request must identify the alleged factual and/or legal errors in the decision. 4 C.F.R. § 21.14(a). GAO will not consider a request that merely repeats the party's views already expressed in the protest; a request that simply expresses disagreement with the decision; or a request that provides information or raises an argument that could have been, but was not, provided or raised during the protest. 4 C.F.R. § 21.14(c). New information arising from events that occurred after issuance of our decision does not constitute a basis for reconsideration. It is generally GAO's practice to assign a different attorney to decide the request for reconsideration.

Bid Protest Regulations

The regulations governing the bid protest process are provided below. These regulations were revised effective May 1, 2018, and are applicable to protests filed on or after that date. The revised regulations appear in Title 4 of the Code of Federal Regulations (C.F.R.), Part 21.

§ 21.0 Definitions.

(a)(1) *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.

(2) In a public-private competition conducted under Office of Management and Budget (OMB) Circular A-76 regarding performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under OMB Circular A-76, *interested party* also means

(i) The official responsible for submitting the Federal agency tender, and

(ii) Any one individual, designated as an agent by a majority of the employees performing that activity or function, who represents the affected employees.

(b)(1) *Intervenor* means an awardee if the award has been made or, if no award has been made, all bidders or offerors who appear to have a substantial prospect of receiving an award if the protest is denied.

(2) If an interested party files a protest in connection with a public-private competition conducted under OMB Circular A-76 regarding an activity or function of a Federal agency, the official responsible for submitting the Federal agency tender, or the agent representing the Federal employees as described in paragraph (a)(2)(ii) of this section, or both, may also be *intervenors*.

(c) *Federal agency* or *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

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Senate, the House of Representatives, and the Architect of the Capitol and any activities under the Architect's direction.

(d) *Days* are calendar days. In computing any period of time described in Subchapter V, Chapter 35 of Title 31, United States Code, including those described in this part, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. Similarly, when the Government Accountability Office (GAO), or another Federal agency where a submission is due, is closed for all or part of the last day, the period extends to the next day on which the agency is open.

(e) *Adverse agency action* is any action or inaction by an agency that is prejudicial to the position taken in a protest filed with the agency, including a decision on the merits of a protest; the opening of bids or receipt of proposals, the award of a contract, or the rejection of a bid or proposal despite a pending protest; or contracting agency acquiescence in continued and substantial contract performance.

(f) *Electronic Protest Docketing System (EPDS)* is GAO's web-based electronic docketing system. GAO's website [<https://epds.gao.gov/login>] includes instructions and guidance on the use of EPDS.

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

(h) *Alternative dispute resolution* encompasses various means of resolving cases expeditiously, without a written decision, including techniques such as outcome prediction and negotiation assistance.

§ 21.1 Filing a protest.

(a) An interested party may protest a solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services; the cancellation of such a solicitation or other request; an award or proposed award of

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such a contract; and a termination of such a contract, if the protest alleges that the termination was based on improprieties in the award of the contract.

(b) Protests must be filed through the EPDS.

(c) A protest filed with GAO shall:

(1) Include the name, street address, email address, and telephone and facsimile numbers of the protester,

(2) Be signed by the protester or its representative,

(3) Identify the 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) Set forth all information establishing that the protester is an interested party for the purpose of filing a protest,

(6) Set forth all information establishing the timeliness of the protest,

(7) Specifically request a ruling by the Comptroller General of the United States, and

(8) State the form of relief requested.

(d) In addition, a protest filed with GAO may:

(1) Request a protective order,

(2) Request specific documents, explaining the relevancy of the documents to the protest grounds, and

(3) Request a hearing, explaining the reasons that a hearing is needed to resolve the protest.

(e) The protester shall furnish a complete copy of the protest, including all attachments, to the individual or location designated by the agency in the solicitation for receipt of protests, or if there is no designation, to the contracting officer. The designated individual or location (or, if applicable, the

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contracting officer) must receive a complete copy of the protest and all attachments not later than 1 day after the protest is filed with GAO. The protest document must indicate that a complete copy of the protest and all attachments are being furnished within 1 day to the appropriate individual or location.

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

(g) Unless precluded by law, GAO will not withhold material submitted by a protester from any party outside the government after issuing a decision on the protest, in accordance with GAO's rules at 4 CFR part 81. If the protester believes that the protest contains information which should be withheld, a statement advising of this fact must be on the front page of the submission. This information must be identified wherever it appears, and within 1 day after the filing of its protest, the protester must file a final redacted copy of the protest which omits the information.

(h) Protests and other documents containing classified information shall not be filed through the EPDS. Parties who intend to file documents containing classified information should notify GAO in advance to obtain advice regarding procedures for filing and handling the information.

(i) A protest may be dismissed for failure to comply with any of the requirements of this section, except for the items in paragraph (d) of this section. In addition, a protest shall not be dismissed for failure to comply with paragraph (e) of this section where the contracting officer has actual knowledge of the basis of protest, or the agency, in the preparation of its report, was not prejudiced by the protester's noncompliance.

§ 21.2 Time for filing.

(a)(1) Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals. In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation but

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which are subsequently incorporated into the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation. If no closing time has been established, or if no further submissions are anticipated, any alleged solicitation improprieties must be protested within 10 days of when the alleged impropriety was known or should have been known.

(2) Protests other than those covered by paragraph (a)(1) of this section shall be filed not later than 10 days after the basis of protest is known or should have been known (whichever is earlier), with the exception of protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required. In such cases, with respect to any protest basis which is known or should have been known either before or as a result of the debriefing, and which does not involve an alleged solicitation impropriety covered by paragraph (a)(1) of this section, the initial protest shall not be filed before the debriefing date offered to the protester, but shall be filed not later than 10 days after the date on which the debriefing is held.

(3) If a timely agency-level protest was previously filed, any subsequent protest to GAO must be filed within 10 days of actual or constructive knowledge of initial adverse agency action, provided the agency-level protest was filed in accordance with paragraphs (a)(1) and (2) of this section, unless the agency imposes a more stringent time for filing, in which case the agency's time for filing will control. In cases where an alleged impropriety in a solicitation is timely protested to an agency, any subsequent protest to GAO will be considered timely if filed within the 10-day period provided by this paragraph, even if filed after bid opening or the closing time for receipt of proposals.

(b) Protests untimely on their face may be dismissed. A protester shall include in its protest all information establishing the timeliness of the protest; a protester will not be permitted to introduce for the first time in a request for reconsideration information necessary to establish that the protest was timely.

(c) GAO, for good cause shown, or where it determines that a protest raises issues significant to the procurement system, may consider an untimely protest.

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

(a) GAO shall notify the agency within 1 day after the filing of a protest, and, unless the protest is dismissed under this part, shall promptly provide a written confirmation to the agency and an acknowledgment to the protester. The agency shall immediately give notice of the protest to the awardee if award has been made or, if no award has been made, to all bidders or offerors who appear to have a substantial prospect of receiving an award. The agency shall provide copies of the protest submissions to those parties, except where disclosure of the information is prohibited by law, with instructions to communicate further directly with GAO. All parties shall provide copies of all communications with GAO to the agency and to other participating parties either through EPDS or by email. GAO's website [<https://epds.gao.gov/login>] includes guidance regarding when to file through EPDS versus communicating by email or other means.

(b) An agency or intervenor which believes that the protest or specific protest allegations should be dismissed before submission of an agency report should file a request for dismissal as soon as practicable.

(c) The agency shall file a report on the protest within 30 days after receiving notice of the protest from GAO. The report need not contain documents which the agency has previously provided or otherwise made available to the parties in response to the protest. At least 5 days prior to the filing of the report, in cases in which the protester has filed a request for specific documents, the agency shall file a response to the request for documents. If the fifth day prior to the filing of the report falls on a weekend or Federal holiday, the response shall be filed by the last business day that precedes the weekend or holiday. The agency's response shall, at a minimum, identify whether the requested documents exist, which of the requested documents or portions thereof the agency intends to produce, which of the requested documents or portions thereof the agency intends to withhold, and the basis for not producing any of the requested documents or portions thereof. Any objection to the scope of the agency's proposed disclosure or

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nondisclosure of documents must be filed within 2 days of receipt of this response.

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

(e) Where a protester or intervenor does not have counsel admitted to a protective order and documents are withheld from the protester or intervenor on that basis, the agency shall file redacted documents that adequately inform the protester and/or intervenor of the basis of the agency's arguments in response to the protest. GAO's website [<https://epds.gao.gov/login>] provides guidance regarding filing documents where no protective order is issued or where a protester or intervenor does not have counsel admitted to a protective order.

(f) The agency may file a request for an extension of time for the submission of the response to be filed by the agency pursuant to § 21.3(c) or for the submission of the agency report. Extensions will be granted on a case-by-case basis.

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

(h) Upon a request filed by a party, GAO will decide whether the agency must file any withheld documents, or portions of

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documents, and whether this should be done under a protective order. When withheld documents are provided, the protester's comments on the agency report shall be filed within the original comment filing period unless GAO determines that an extension is appropriate.

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

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

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

(j) GAO may request or permit the submission of additional statements by the parties and by other parties participating in the protest as may be necessary for the fair resolution of the protest. The agency and other parties must receive GAO's approval before submitting any additional statements. GAO reserves the right to disregard material submitted without prior approval.

§ 21.4 Protective orders.

(a) At the request of a party or on its own initiative, GAO may issue a protective order controlling the treatment of protected information. Such information may include proprietary, confidential, or source-selection-sensitive material, as well as other information the release of which could result in a competitive advantage to one or more firms. The protective order shall establish procedures for application for access to protected information, identification and safeguarding of that information, and submission of redacted copies of documents omitting protected information. Because a protective order serves to facilitate the pursuit of a protest by a protester through counsel, it is the responsibility of protester's counsel to request that a protective order be issued and to submit timely applications for admission to that order. GAO generally does not issue a protective order where an intervenor retains counsel, but the protester does not.

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(b) Any agency or party filing a document that the agency or party believes to contain protected materials shall, if requested by another party, provide to the other parties (unless they are not admitted to the protective order) an initial proposed redacted version of the document within 2 days of the request. Where appropriate, the exhibits to the agency report or other documents may be proposed for redaction in their entirety. The party that authored the document shall file the final redacted version of the document that has been agreed to by all of the parties. Only the final agreed-to version of a redacted document must be filed. If the parties are unable to reach an agreement regarding redactions, the objecting party may submit the matter to GAO for resolution. Until GAO resolves the matter, the disputed information must be treated as protected.

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

(d) After a protective order has been issued, counsel or consultants retained by counsel appearing on behalf of a party may apply for admission under the order by filing an application. The application shall establish that the applicant is not involved in competitive decision-making for any firm that could gain a competitive advantage from access to the protected information and that there will be no significant risk of inadvertent disclosure of protected information. Objections to an applicant's admission shall be filed within 2 days after the application is filed, although GAO may consider objections filed after that time.

(e) Any violation of the terms of a protective order may result in the imposition of such sanctions as GAO deems appropriate, including referral to appropriate bar associations or other disciplinary bodies, restricting the individual's practice before GAO, prohibition from participation in the remainder of the protest, or dismissal of the protest.

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§ 21.5 Protest issues not for consideration.

A protest or specific protest allegations may be dismissed any time sufficient information is obtained by GAO warranting dismissal. Where an entire protest is dismissed, no agency report need be filed; where specific protest allegations are dismissed, an agency report shall be filed on the remaining allegations. Among the protest bases that shall be dismissed are the following:

(a) *Contract administration.* The administration of an existing contract is within the discretion of the 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. 7101-7109.

(b) *Small Business Administration (SBA) issues.*

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

(2) *Small Business Certificate of Competency Program.* Referrals made to the SBA pursuant to sec. 8(b)(7) of the Small Business Act, or the issuance of, or refusal to issue, a certificate of competency under that section will generally not be reviewed by GAO. The exceptions, which GAO will interpret narrowly out of deference to the role of the SBA in this area, are protests that show possible bad faith on the part of government officials, or that present allegations that the SBA failed to follow its own published regulations or failed to consider vital information bearing on the firm's responsibility due to the manner in which the information was presented to or withheld from the SBA by the procuring agency. 15 U.S.C. 637(b)(7).

(3) *Procurements under sec. 8(a) of the Small Business Act.* Under that section, since contracts are entered into with the SBA at the contracting officer's discretion and on such terms as are agreed upon by the procuring agency and the SBA, the decision to place or not to place a procurement under the 8(a) program is not subject to review absent a showing of possible

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bad faith on the part of government officials or that regulations may have been violated. 15 U.S.C. 637(a).

(c) *Affirmative determination of responsibility by the contracting officer.* Because the determination that a bidder or offeror is capable of performing a contract is largely committed to the contracting officer's discretion, GAO will generally not consider a protest challenging such a determination. The exceptions are protests that allege that definitive responsibility criteria in the solicitation were not met and those that identify evidence raising serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation.

(d) *Procurement integrity.* For any Federal procurement, GAO will not review an alleged violation of subsections (a), (b), (c), or (d) of sec. 27 of the Office of Federal Procurement Policy Act, 41 U.S.C. 2101-2107, as amended by sec. 4304 of the National Defense Authorization Act for Fiscal Year 1996, Public Law 104-106, 110 Stat. 186, February 10, 1996, where the protester failed to report the information it believed constituted evidence of the offense to the Federal agency responsible for the procurement within 14 days after the protester first discovered the possible violation.

(e) Protests not filed either with GAO or the agency within the time limits set forth in § 21.2.

(f) Protests that lack a detailed statement of the legal and factual grounds of protest as required by § 21.1(c)(4), or that fail to clearly state legally sufficient grounds of protest as required by § 21.1(f).

(g) *Procurements by agencies other than Federal agencies as defined by sec. 3 of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. 102.* Protests of procurements or proposed procurements by agencies such as the U.S. Postal Service, the Federal Deposit Insurance Corporation, and nonappropriated fund activities are beyond GAO's bid protest jurisdiction as established in 31 U.S.C. 3551-3556.

(h) *Subcontract protests.* GAO will not consider a protest of the award or proposed award of a subcontract except where the

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agency awarding the prime contract has filed a request that subcontract protests be decided pursuant to § 21.13.

(i) *Suspensions and debarments.* Challenges to the suspension or debarment of contractors will not be reviewed by GAO. Such matters are for review by the agency in accordance with the applicable provisions of the Federal Acquisition Regulation.

(j) *Competitive range.* GAO will not consider protests asserting that the protester's proposal should not have been included or kept in the competitive range.

(k) *Decision whether or not to file a protest on behalf of Federal employees.* GAO will not review the decision of an agency tender official to file a protest or not to file a protest in connection with a public-private competition.

(l) *Protests of orders issued under task or delivery order contracts.* As established in 10 U.S.C. 2304c(e) and 41 U.S.C. 4106(f), GAO does not have jurisdiction to review protests in connection with the issuance or proposed issuance of a task or delivery order except for the circumstances set forth in those statutory provisions.

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

§ 21.6 Withholding of award and suspension of contract performance.

When a protest is filed, the agency may be required to withhold award and to suspend contract performance. The requirements for the withholding of award and the suspension of contract performance are set forth in 31 U.S.C. 3553(c) and (d); GAO does not administer the requirements to withhold award or suspend contract performance. An agency shall file a notification in instances where it overrides a requirement to withhold award or suspend contract performance, and it shall

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file either a copy of any issued determination and finding, or a statement by the individual who approved the determination and finding that explains the statutory basis for the override.

§ 21.7 Hearings.

(a) Upon a request filed by a party or on its own initiative, GAO may conduct a hearing in connection with a protest. The request shall set forth the reasons why a hearing is needed to resolve the protest.

(b) Prior to the hearing, GAO may hold a pre-hearing conference to discuss and resolve matters such as the procedures to be followed, the issues to be considered, and the witnesses who will testify.

(c) Hearings generally will be conducted as soon as practicable after receipt by the parties of the agency report and relevant documents. Although hearings ordinarily will be conducted at GAO in Washington, DC, hearings may, at the discretion of GAO, be conducted at other locations, or by telephone or other electronic means.

(d) All parties participating in the protest shall be invited to attend the hearing. Others may be permitted to attend as observers and may participate as allowed by GAO's hearing official. In order to prevent the improper disclosure of protected information at the hearing, GAO's hearing official may restrict attendance during all or part of the proceeding.

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

(f) If a witness whose attendance has been requested by GAO fails to attend the hearing or fails to answer a relevant question, GAO may draw an inference unfavorable to the party for whom the witness would have testified.

(g) If a hearing is held, each party shall file comments with GAO within 5 days after the hearing was held or as specified by GAO. If the protester has not filed comments by the due date, GAO shall dismiss the protest.

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(h) In post-hearing comments, the parties should reference all testimony and admissions in the hearing record that they consider relevant, providing specific citations to the testimony and admissions referenced.

§ 21.8 Remedies.

(a) If GAO determines that a solicitation, cancellation of a solicitation, termination of a contract, proposed award, or award does not comply with statute or regulation, it shall recommend that the agency implement any combination of the following remedies:

(1) Refrain from exercising options under the contract;

(2) Terminate the contract;

(3) Recompete the contract;

(4) Issue a new solicitation;

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

(6) Such other recommendation(s) as GAO determines necessary to promote compliance.

(b) In determining the appropriate recommendation(s), GAO shall, except as specified in paragraph (c) of this section, consider all circumstances surrounding the procurement or proposed procurement including the seriousness of the procurement deficiency, the degree of prejudice to other parties or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement, and the impact of the recommendation(s) on the agency's mission.

(c) If the head of the procuring activity determines that performance of the contract notwithstanding a pending protest is in the government's best interest, GAO shall make its recommendation(s) under paragraph (a) of this section without regard to any cost or disruption from terminating, recompeting, or reawarding the contract.

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(d) If GAO determines that a solicitation, proposed award, or award does not comply with statute or regulation, it may recommend that the agency pay the protester the costs of:

(1) Filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees; and

(2) Bid and proposal preparation.

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

(f) *Recommendation on the amount of costs.*

(1) If GAO recommends that the agency pay the protester the costs of filing and pursuing the protest and/or of bid or proposal preparation, the protester and the agency shall attempt to reach agreement on the amount of costs. The protester shall file its claim for costs, detailing and certifying the time expended and costs incurred, with the agency within 60 days after receipt of 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.

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

(3) If the protester and the agency cannot reach agreement regarding the amount of costs within a reasonable time, the protester may file a request that GAO recommend the amount of costs to be paid, but such request shall be filed within

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10 days of when the agency advises the protester that the agency will not participate in further discussions regarding the amount of costs.

(4) Within 15 days after receipt of the request that GAO recommend the amount of costs to be paid, the agency shall file a response. The protester shall file comments on the agency response within 10 days of receipt of the response. GAO shall dismiss the request unless the protester files comments within the 10-day period, except where GAO has granted an extension or established a shorter period.

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

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

§ 21.9 Time for decision by GAO.

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

(b) In protests where GAO uses the express option procedures in § 21.10, GAO shall issue a decision on a protest within 65 days after it is filed.

(c) GAO, to the maximum extent practicable, shall resolve a timely supplemental protest adding one or more new grounds to an existing protest, or a timely amended protest, within the time limit established in paragraph (a) of this section for decision on the initial protest. If a supplemental or an amended protest cannot be resolved within that time limit, GAO may resolve the supplemental or amended protest using the express option procedures in § 21.10.

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

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

(b) The express option will be adopted at the discretion of GAO and only in those cases suitable for resolution within 65 days.

(c) Requests for the express option shall be filed not later than 5 days after the protest or supplemental/amended protest is filed. GAO will promptly notify the parties whether the case will be handled using the express option.

(d) When the express option is used, the following schedule applies instead of those deadlines in §§ 21.3 and 21.7:

(1) The agency shall file a complete report within 20 days after it receives notice from GAO that the express option will be used.

(2) Comments on the agency report shall be filed within 5 days after receipt of the report.

(3) Where circumstances demonstrate that a case is no longer suitable for resolution using the express option, GAO shall establish a new schedule for submissions by the parties.

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

(f) GAO may conduct status and other conferences by telephone or in person with all parties participating in a protest to promote the expeditious development and resolution of the protest.

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§ 21.11 Effect of judicial proceedings.

(a) A protester must immediately advise GAO of any court proceeding which involves the subject matter of a pending protest and must file copies of all relevant court documents.

(b) GAO will dismiss any case where the matter involved is the subject of litigation before, or has been decided on the merits by, a court of competent jurisdiction. GAO may, at the request of a court, issue an advisory opinion on a bid protest issue that is before the court. In these cases, unless a different schedule is established, the times provided in this part for filing the agency report (§ 21.3(c)), filing comments on the report (§ 21.3(i)), holding a hearing and filing comments (§ 21.7), and issuing a decision (§ 21.9) shall apply.

§ 21.12 Distribution of decisions.

(a) Unless it contains protected information, a copy of a decision shall be provided to the protester, any intervenors, and the agency involved; a copy also shall be made available to the public. A copy of a decision containing protected information shall be provided only to the agency and to individuals admitted to any protective order issued in the protest. A public version omitting the protected information shall be prepared wherever possible.

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

§ 21.13 Nonstatutory protests.

(a) GAO will consider protests concerning awards of subcontracts by or for a Federal agency, sales by a Federal agency, or procurements by agencies of the government other than Federal agencies as defined in § 21.0(c) if the agency involved has agreed in writing to have protests decided by GAO.

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

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

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(2) Section 21.6 pertaining to the withholding of award and the suspension of contract performance pursuant to 31 U.S.C. 3553(c) and (d).

§ 21.14 Request for reconsideration.

(a) The protester, any intervenor, and any Federal agency involved in the protest may request reconsideration of a bid protest decision. GAO will not consider a request for reconsideration that 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) A request for reconsideration of a bid protest decision shall be filed not later than 10 days after the basis for reconsideration is known or should have been known, whichever is earlier.

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

Appendix I
Sample Acknowledgment of Protest
and Confirmation of Report Requirement
(Protester Without Counsel)

[DATE]

File:

Protester:

Agency:

Solicitation No.:

Report Due:

GAO Attorney:

Decision Due:

Phone:

ACKNOWLEDGMENT OF PROTEST

We have received your protest concerning the referenced procurement. The contracting agency is required to file a report in response to the protest by the Report Due date indicated above. Under our Bid Protest Regulations, 4 C.F.R. § 21.3(i), you are required to file written comments in response to the report. Written comments must be filed via our Electronic Protest Docketing System (EPDS) within 10 calendar days of the filing of the agency's report--otherwise, we will dismiss your protest.

Also, the agency has been advised that if you have filed a request for specific documents, the agency should file, at least 5 days prior to the Report Due date, a list of those documents, or portions of documents, that the agency has released to the protester or intends to produce in the report, and of the documents that the agency intends to withhold and the reasons for the proposed withholding. You are requested to file any objection to the scope of the agency's proposed disclosure or nondisclosure with GAO and the other parties within 2 days of the filing of the list.

Bid protests, and subsequent associated filings, must be filed via EPDS. Note that timeliness will be measured by the date and time received in EPDS. A document is filed on a particular day when it is received in EPDS by 5:30 p.m. eastern time. Our Office hours are 8:30 a.m. until 5:30 p.m. eastern time, Monday through Friday.

GAO bid protest decisions not subject to protective orders are distributed via the GAO Worldwide Web Internet site (www.gao.gov), and in most cases are available within 1 business day of the decision date. The decision on this protest will be distributed to the parties through EPDS.

Appendix I
Sample Acknowledgment of Protest
and Confirmation of Report Requirement
(Protester Without Counsel)

Please refer to our file number in all future correspondence regarding the protest.

--For the Managing Associate General Counsel

Appendix I
Sample Acknowledgment of Protest
and Confirmation of Report Requirement
(Protester Without Counsel)

[DATE]

File:

Protester:

Agency:

Solicitation No.:

Report Due:

GAO Attorney:

Decision Due:

Phone:

CONFIRMATION OF REPORT REQUIREMENT

This confirms our electronic notification of the protest and report due date indicated above. Please advise us immediately via our Electronic Protest Docketing System (EPDS) of the individual(s) that will be representing the agency in the protest, including name, mailing address, e-mail address, and the telephone and fax numbers.

You should notify all intervenors that this protest has been filed and to communicate directly with us if they wish to intervene in the protest. The agency report must be made available to the protester and all intervenors in EPDS not later than the date indicated above. Please advise the protester of its obligation to file comments within 10 days of the filing of the agency report. Please also advise all parties of their right to file comments on the report to GAO within 10 days of its receipt. You should refer to our file number and the GAO attorney assigned in all future correspondence regarding the protest. Any request for dismissal should be filed as soon as practicable after receipt of this notice if the agency seeks resolution of the request by our Office prior to the stated report due date.

For your convenience, following is a list of the type of information to be included in your agency report:

- the contracting officer's statement of the relevant facts;
- a best estimate of the contract value;
- whether a statutory stay or suspension of performance is in place;
- a memorandum of law;

Appendix I
Sample Acknowledgment of Protest
and Confirmation of Report Requirement
(Protester Without Counsel)

- a copy of all relevant documents, or portions of documents, not previously produced, including, as appropriate, any agency-level protest and decision, the bid or proposal submitted by the protester, the bid or proposal of the firm being considered for award or whose bid or proposal is being protested, all evaluation documents, the solicitation (with specifications), and the abstract of bids or offers; and
- an index identifying the contents of the report and the location of each document or enclosure. Where portions of the report have been redacted for any party (or where the agency has omitted certain documents from a party's report), please indicate which redactions or omissions apply to each party. Agency reports must be organized through the use of pagination, tabs, and binders, as appropriate.

If the protester has filed a request for specific documents, please file, at least 5 days prior to the report due date, a list of those documents, or portions of documents, that you have released to the protester or intend to produce in your report, and of the documents you intend to withhold and the reasons for the withholding.

GAO bid protest decisions not subject to protective orders are distributed via the GAO Worldwide Web Internet site (www.gao.gov), and in most cases are available within 1 business day of the decision date. The decision on this protest will be distributed to the parties through EPDS.

--For the Managing Associate General Counsel

Appendix II
Sample Acknowledgment of Protest,
Confirmation of Report Requirement,
and Notice of Protective Order
(Protester With Counsel)

[DATE]

File:

Protester:

Agency:

Solicitation No.:

Report Due:

GAO Attorney:

Decision Due:

Phone:

ACKNOWLEDGMENT OF PROTEST and NOTICE OF PROTECTIVE ORDER

We have received your protest concerning the referenced procurement. Attached is a copy of the protective order issued in connection with this matter. Counsel seeking admission (and their law clerks, paralegals, or support staff if they are admitted to a state bar) must complete and file the attached application via our Electronic Protest Docketing System (EPDS) within 3 days of the filing of this protective order; applications for consultants are available upon request. A party objecting to any individual's application must file objections by the second day following the filing of the application. Applications containing the signature of the applicant must be filed in accordance with GAO's EPDS instructions. Failure to complete the application accurately may result in denial of admission and/or sanction.

Individuals covered under a protective order are required to take all precautions necessary to prevent disclosure of protected material. In addition to physically and electronically securing, safeguarding, and restricting access to the protected material in one's possession, these precautions include, but are not limited to, sending and receiving protected material using physical and electronic methods that are within the control of individuals authorized by this protective order. Examples of transmission methods that may require additional precautions include facsimile machines shared with individuals not admitted under this protective order, facsimile-to-electronic mail (e-mail) systems and services, and e-mail.

The contracting agency is required to file a report in response to the protest by the Report Due date indicated above. Under our Bid Protest Regulations, 4 C.F.R. § 21.3(i), you are required to file written comments in response to the report. Written comments must be filed within 10 calendar days of the filing of the agency's report-- otherwise, we will dismiss your protest.

Appendix II
Sample Acknowledgment of Protest,
Confirmation of Report Requirement,
and Notice of Protective Order
(Protester With Counsel)

Also, the agency has been advised that if you have filed a request for specific documents, the agency should file, at least 5 days prior to the Report Due date, a list of those documents, or portions of documents, that the agency has released to the protester or intends to produce in the report, and of the documents that the agency intends to withhold and the reasons for the proposed withholding. You are requested to file any objection to the scope of the agency's proposed disclosure or nondisclosure with GAO and the other parties within 2 days of the filing of the list.

Bid protests, and subsequent associated filings, must be filed via EPDS. Note that timeliness will be measured by the date and time received in EPDS. A document is filed on a particular day when it is received in EPDS by 5:30 p.m. eastern time. Our Office hours are 8:30 a.m. until 5:30 p.m. eastern time, Monday through Friday.

GAO bid protest decisions not subject to protective orders are distributed via the GAO Worldwide Web Internet site (www.gao.gov), and in most cases are available within 1 business day of the decision date. The decision on this protest will be distributed to the parties through EPDS.

Please refer to our file number in all future correspondence regarding the protest.

--For the Managing Associate General Counsel

Attachment

Please note that paragraphs 2, 4, and 7 of the Protective Order were revised in April 2018.

Appendix II
Sample Acknowledgment of Protest,
Confirmation of Report Requirement,
and Notice of Protective Order
(Protester With Counsel)

[DATE]

File:

Protester:

Agency:

Solicitation No.:

Report Due:

GAO Attorney:

Decision Due:

Phone:

**CONFIRMATION OF REPORT REQUIREMENT
AND NOTICE OF PROTECTIVE ORDER**

This confirms our electronic notification of the protest and report due date indicated above. Please advise us immediately via our Electronic Protest Docketing System (EPDS) of the individual(s) that will be representing the agency in the protest, including name, mailing address, e-mail address, and the telephone and fax numbers.

You should notify all intervenors that this protest has been filed and to communicate directly with us if they wish to intervene in the protest. The agency report must be made available to the protester and all intervenors in EPDS not later than the date indicated above. Please advise the protester of its obligation to file comments within 10 days of the filing of the agency report. Please also advise all parties of their right to file comments on the report to GAO within 10 days of its filing. You should refer to our file number and the GAO attorney assigned in all future correspondence regarding the protest. Any request for dismissal should be filed as soon as practicable after receipt of this notice if the agency seeks resolution of the request by our Office prior to the stated report due date.

Attached is a copy of the protective order issued in connection with this matter. Counsel seeking admission must complete and file the attached application within 3 days of the filing of this protective order. A party objecting to any individual's application must file its objections by the second day following the filing of the application.

For your convenience, following is a list of the type of information to be included in your agency report:

Appendix II
Sample Acknowledgment of Protest,
Confirmation of Report Requirement,
and Notice of Protective Order
(Protester With Counsel)

- the contracting officer's statement of the relevant facts;
- a best estimate of the contract value;
- whether a statutory stay or suspension of performance is in place;
- a memorandum of law;
- a copy of all relevant documents, or portions of documents, not previously produced, including, as appropriate, any agency-level protest and decision, the bid or proposal submitted by the protester, the bid or proposal of the firm being considered for award or whose bid or proposal is being protested, all evaluation documents, the solicitation (with specifications), and the abstract of bids or offers; and
- an index identifying the contents of the report and the location of each document or enclosure. Where portions of the report have been redacted for any party (or where the agency has omitted certain documents from a party's report), please indicate which redactions or omissions apply to each party. Agency reports must be organized through the use of pagination, tabs, and binders, as appropriate.

If the protester has filed a request for specific documents, please file, at least 5 days prior to the report due date, a list of those documents, or portions of documents, that you have released to the protester or intend to produce in your report, and of the documents you intend to withhold and the reasons for the withholding.

GAO bid protest decisions not subject to protective orders are distributed via the GAO Worldwide Web Internet site (www.gao.gov), and in most cases are available within 1 business day of the decision date. The decision on this protest will be distributed to the parties through EPDS.

--For the Managing Associate General Counsel

Attachment

Please note that paragraphs 2, 4, and 7 of the Protective Order were revised in April 2018.

Appendix III
Sample Notice of Protective Order

[DATE]

File:
Protester:
Agency:
Solicitation No.:

NOTIFICATION OF PROTECTIVE ORDER

Attached is a copy of the protective order issued in connection with this matter. Counsel seeking admission (and their law clerks, paralegals, or support staff if they are admitted to a state bar) must complete and submit the attached application via our Electronic Protest Docketing System (EPDS) within 3 days of the filing of this protective order; applications for consultants are available upon request. A party objecting to any individual's application must file objections by the second day following the filing of the application. Applications containing the signature of the applicant must be filed in accordance with GAO's EPDS instructions. Failure to complete the application accurately may result in denial of admission and/or sanction.

Individuals covered under a protective order are required to take all precautions necessary to prevent disclosure of protected material. In addition to physically and electronically securing, safeguarding, and restricting access to the protected material in one's possession, these precautions include, but are not limited to, sending and receiving protected material using physical and electronic methods that are within the control of individuals authorized by this protective order. Examples of transmission methods that may require additional precautions include facsimile machines shared with individuals not admitted under this protective order, facsimile-to-electronic mail (e-mail) systems and services, and e-mail.

--For the Managing Associate General Counsel

FOR FURTHER INFORMATION:

GAO Attorney:
Case Status Calls: 202-512-5436; Fax Number 202-512-9749
GAO's [Guide to GAO Protective Orders](#) is available at www.gao.gov.

Attachments

Please note that paragraphs 2, 4, and 7 of the Protective Order were revised in April 2018.

Appendix IV:
Sample Protective Order

**UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE
OFFICE OF THE GENERAL COUNSEL
PROCUREMENT LAW DIVISION
Washington, D.C. 20548**

Matter of:

File:

Agency:

PROTECTIVE ORDER

This protective order limits disclosure of certain material and information submitted in the above-captioned protest, so that no party obtaining access to protected material under this order will gain a competitive advantage as a result of the disclosure.

1. This protective order applies to all material that is identified by any party as protected, unless the Government Accountability Office (GAO) specifically provides otherwise. Protected material includes information whether on paper or in any electronic format. This protective order applies to all proceedings associated with the protest, e.g., supplemental/amended protests, requests for reconsideration, and claims for costs.
2. Protected material of any kind may be provided only to GAO and to individuals authorized by this protective order. The first page of each document containing protected material is to be clearly marked as follows:

**PROTECTED MATERIAL
TO BE DISCLOSED ONLY IN ACCORDANCE WITH
GOVERNMENT ACCOUNTABILITY OFFICE PROTECTIVE ORDER**

The party claiming protection must clearly identify the specific portion of the material for which it is claiming protection. Any agency or party filing a document that the agency or party believes to contain protected materials shall, if requested by another party, provide to the other parties admitted to the protective order an initial proposed redacted version of the document within 1 day of the request. The party that authored the document shall file a final redacted version of the document that has been agreed to by all of the parties. Only the final agreed-to version of a redacted document must be filed.

3. Only individuals who are admitted under this protective order by GAO, and support staff (paralegal, clerical, and administrative personnel) who are employed or supervised by individuals admitted under this order, and who are not involved in competitive

Appendix IV: Sample Protective Order

decision making for a party to the protest or for any firm that might gain a competitive advantage from access to the protected material disclosed under this order, shall have access to information covered by this order. Individuals admitted under this protective order shall advise such support staff, prior to providing them access to protected material, of their obligations under this order.

4. Each party included under this protective order shall receive up to 4 copies of the protected material (the original constitutes one copy), and shall not further duplicate that material, except as incidental to its incorporation into a submission to GAO or as otherwise agreed to by the parties with GAO's concurrence. For purpose of this provision, a "party" refers to the entity of record. Therefore, multiple attorneys or law firms representing a single party must determine among them how to allocate the maximum of 4 copies among the individuals admitted to the protective order. Each duplication of electronic media (e.g., CD ROM), whether in electronic or hard copy form, constitutes a single copy. Documents maintained in EPDS do not count against the maximum of 4 copies. E-mail transmissions to multiple recipients should be counted as generating one copy for the sender and one for each recipient.

5. When any party sends or receives documents in connection with this protest that are not designated as protected, including proposed redacted versions of protected documents, the party shall refrain from releasing the documents to anyone not admitted under this protective order, including clients, until the end of the second working day following receipt of the documents by all parties. This practice permits parties to identify documents that should have been marked protected before the documents are disclosed to individuals not admitted under this protective order.

6. Each individual covered under this protective order shall take all precautions necessary to prevent disclosure of protected material. In addition to physically and electronically securing, safeguarding, and restricting access to the protected material in one's possession, these precautions include, but are not limited to, sending and receiving protected material using physical and electronic methods that are within the control of individuals authorized by this protective order or that otherwise restrict access to protected material to individuals authorized by this protective order. The confidentiality of protected material shall be maintained in perpetuity.

7. Within 60 days after the conclusion of the protest (including any requests for reconsideration or entitlement, or claims for costs), each party admitted to this protective order must destroy all protected material received pursuant to this protest, including all electronically transmitted material and copies of such material, with the exception of a single copy of a protected decision or letter issued by our Office, and certify in writing to each other party that such destruction has occurred or must return the protected information to the parties from which the information was received. With the prior written agreement of the party that produced the protected material, protected material may be retained under the terms of this order for such period as may be agreed. Within the same 60 day period, protected pleadings (including copies in

Appendix IV:
Sample Protective Order

archival files and computer backup files) and written and electronic transcripts of protest conferences and hearings shall be destroyed, and the destruction certified to the other parties, unless the parties agree otherwise. In the absence of such agreement and for good cause shown, the period for retention of the protected material under this paragraph may be extended by order of GAO. Any individual retaining material received under this protective order (except for the single copy of a protected decision or letter issued by our Office) beyond the 60-day period without the authorization of GAO or the prior written agreement of the party that produced the material is in violation of this order. The terms of this protective order (except those terms regarding the return or destruction of protected material) shall apply indefinitely to the single copy of the protected decision or letter issued by our Office that is retained by a party admitted under this order.

8. Material to which parties gain access under this protective order is to be used only for the subject protest proceedings, absent express prior authorization from the GAO. Protected material obtained under this protective order may be used, however, in a bid protest filed with the United States Court of Federal Claims, without GAO's prior authorization, provided that the information is filed under seal with the Court, that the Court is informed of GAO's protective order, and that the Court is requested to issue its own protective order to cover the protected material. In addition, GAO must be notified when suit is filed with the Court. Use of material protected under the GAO protective order will be governed by the protective order issued by the Court.

9. Any violation of the terms of this protective order may result in the imposition of such sanctions as GAO deems appropriate, including but not limited to dismissal of the protest, referral of the violation to appropriate bar associations or other disciplinary bodies, and restricting the practice of counsel before GAO. A party whose protected information is improperly disclosed shall be entitled to all remedies under law or equity, including breach of contract.

[GAO ATTORNEY]

[DATE]

Appendix V: Sample Application for Access to
Material Under a Protective Order
for Outside Counsel

**UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE
OFFICE OF THE GENERAL COUNSEL
PROCUREMENT LAW DIVISION
Washington, D.C. 20548**

Matter of:

File:

Agency:

**APPLICATION FOR ACCESS TO MATERIAL
UNDER A PROTECTIVE ORDER
FOR OUTSIDE COUNSEL**

1. I, _____, hereby apply for access to protected material covered by the protective order issued in connection with this protest.
2. I am an attorney with the law firm of _____, which has been retained to represent _____, a party to this protest.
3. I am a member of the bar(s) of _____; my bar membership number(s) is/are _____.
4. My professional relationship with the party I represent in this protest and its personnel is strictly one of legal counsel. I am not involved in competitive decision making as discussed in U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984), for or on behalf of the party I represent, any entity that is an interested party to this protest, or any other firm that might gain a competitive advantage from access to the material disclosed under the protective order. I do not provide advice or participate in any decisions of such parties in matters involving similar or corresponding information about a competitor. This means that I do not, for example, provide advice concerning or participate in decisions about marketing or advertising strategies, product research and development, product design or competitive structuring and composition of bids, offers, or proposals with respect to which the use of protected material could provide a competitive advantage.
5. I identify here (by writing "none" or listing names and relevant circumstances) those attorneys in my firm who, to the best of my knowledge, cannot make the representations set forth in the preceding paragraph:

Appendix V: Sample Application for Access to
Material Under a Protective Order
for Outside Counsel

(Attach additional pages for this and the following questions, if needed.)

6. I identify here (by writing "none" or listing names, position, and responsibilities) any member of my immediate family who is an officer or holds a management position with an interested party in the protest or with any other firm that might gain a competitive advantage from access to the material disclosed under the protective order:

7. I identify here (by writing "none" or identifying the name of the forum, case number, date, and circumstances) instances within the last 2 years in which I have been denied admission to a protective order, or had admission revoked, or been found to have violated a protective order issued by GAO or by an administrative or judicial tribunal:

8. I identify here (by writing "none" or listing the protest name and file number) any pending application for admission to a protective order issued by GAO:

9. I have read the protective order issued by GAO in this protest, and I will comply in all respects with that order and will abide by its terms and conditions in handling any protected material filed or produced in connection with the protest.

10. I acknowledge that any violation of the terms of the protective order may result in the imposition of such sanctions as GAO deems appropriate, including but not limited to dismissal of protest, referral of the violation to appropriate bar associations or other disciplinary bodies, and restricting my practice before GAO. I further acknowledge that a party whose protected information is improperly disclosed shall be entitled to all remedies under law or equity, including breach of contract.

CERTIFICATION

By my signature, I certify that, to the best of my knowledge, the representations set forth above (including any attached statements) are true and correct. I recognize that knowingly making a false statement on this application could render me liable to a \$10,000 fine or 5 years imprisonment, or both, pursuant to 18 U.S.C. § 1001. I identify below the mailing address and facsimile number at which I may receive protected material in accordance with the terms of the protective order.

Signature

Date Executed

Appendix V: Sample Application for Access to
Material Under a Protective Order
for Outside Counsel

Typed Name and Title

Mailing Address

Direct Dial Telephone Number

Facsimile Number

E-mail Address

Appendix VI: Sample Application for Access to
Material Under a Protective Order
for In-House Counsel

**UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE
OFFICE OF THE GENERAL COUNSEL
PROCUREMENT LAW DIVISION
Washington, D.C. 20548**

Matter of:

File:

Agency:

**APPLICATION FOR ACCESS TO MATERIAL
UNDER A PROTECTIVE ORDER
FOR IN-HOUSE COUNSEL**

1. I, _____, hereby apply for access to protected material covered by the protective order issued in connection with this protest.
2. I am in-house counsel for _____, a party to this protest.
3. I am a member of the bar(s) of _____; my bar membership number(s) is/are _____.
4. My professional relationship with the party I represent in this protest and its personnel is strictly one of legal counsel. I am not involved in competitive decision making as discussed in U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984), for or on behalf of the party I represent, any entity that is an interested party to this protest, or any other firm that might gain a competitive advantage from access to the material disclosed under the protective order. I do not provide advice or participate in any decisions of such parties in matters involving similar or corresponding information about a competitor. This means that I do not, for example, provide advice concerning or participate in decisions about marketing or advertising strategies, product research and development, product design or competitive structuring and composition of bids, offers, or proposals with respect to which the use of protected material could provide a competitive advantage.
5. I have attached a detailed narrative providing the following information:
 - (a) my position and responsibilities as in-house counsel, including my role in providing advice in procurement-related matters;
 - (b) the person(s) to whom I report, and their position(s) and responsibilities;

Appendix VI: Sample Application for Access to
Material Under a Protective Order
for In-House Counsel

(c) the number of in-house counsel at the office in which I work, and their involvement, if any, in competitive decision making and in providing advice in procurement-related matters;

(d) my relationship to the nearest person involved in competitive decision making (both in terms of physical proximity and corporate structure); and

(e) measures taken to isolate me from competitive decision making and to protect against the inadvertent disclosure of protected material to persons not admitted under the protective order.

6. I identify here (by writing "none" or listing names, position, and responsibilities) any member of my immediate family who is an officer or holds a management position with an interested party in the protest or with any other firm that might gain a competitive advantage from access to the material disclosed under the protective order:

(Attach additional pages for this and the following questions, if needed.)

7. I identify here (by writing "none" or identifying the name of the forum, case number, date, and circumstances) instances within the last 2 years in which I have been denied admission to a protective order, or had admission revoked, or been found to have violated a protective order issued by GAO or by an administrative or judicial tribunal:

8. I identify here (by writing "none" or listing the protest name and file number) any pending application for admission to a protective order issued by GAO:

9. I have read the protective order issued by GAO in this protest, and I will comply in all respects with that order and will abide by its terms and conditions in handling any protected material filed or produced in connection with the protest.

10. I acknowledge that any violation of the terms of the protective order may result in the imposition of such sanctions as GAO deems appropriate, including but not limited to dismissal of protest, referral of the violation to appropriate bar associations or other disciplinary bodies, and restricting my practice before GAO. I further acknowledge that a party whose protected information is improperly disclosed shall be entitled to all remedies under law or equity, including breach of contract.

CERTIFICATION

By my signature, I certify that, to the best of my knowledge, the representations set forth above (including any attached statements) are true and correct. I recognize that knowingly making a false statement on this application could render me liable to a \$10,000 fine or 5 years imprisonment, or both, pursuant to 18 U.S.C. § 1001. I

Appendix VI: Sample Application for Access to
Material Under a Protective Order
for In-House Counsel

identify below the mailing address and facsimile number at which I may receive protected material in accordance with the terms of the protective order.

Signature

Date Executed

Typed Name and Title

Mailing Address

Direct Dial Telephone Number

Facsimile Number

E-Mail Address

Appendix VII: Sample Application for Access to
Material Under a Protective Order
for Consultant

**UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE
OFFICE OF THE GENERAL COUNSEL
PROCUREMENT LAW DIVISION
Washington, D.C. 20548**

Matter of:

File:

Agency:

**APPLICATION FOR ACCESS TO MATERIAL
UNDER A PROTECTIVE ORDER
FOR CONSULTANT**

1. I, _____, am a consultant employed by _____, and hereby apply for access to protected material covered by the protective order issued in connection with this protest.

2. I have been retained by _____ and will, under the direction and control of that attorney, assist in the representation of _____ in this protest.

3. I hereby certify that I am not involved in competitive decision making for or on behalf of any party to this protest or any other firm that might gain a competitive advantage from access to the material disclosed under the protective order. Neither I nor my employer provides advice or participates in any decisions of such parties in matters involving similar or corresponding information about a competitor. This means, for example, that neither I nor my employer provides advice concerning or participates in decisions about marketing or advertising strategies, product research and development, product design or competitive structuring and composition of bids, offers, or proposals with respect to which the use of protected material could provide a competitive advantage.

4. My professional relationship with the party for whom I am retained in this protest and its personnel is strictly as a consultant on issues relevant to the protest. Neither I, my spouse, nor any member of my immediate family holds office or a management position in any company that is a party in this protest, or in any competitor or potential competitor of a party.

Appendix VII: Sample Application for Access to
Material Under a Protective Order
for Consultant

5. I have attached the following information:

(a) a current resume describing my education and employment experience to date;

(b) a list of all clients for whom I have performed work within the 2 years prior to the date of this application, and a brief description of the work performed;

(c) a list of all clients for whom my employer has performed work within the 2 years prior to the date of this application and for whom the use of protected material could provide a competitive advantage, and a brief description of the work performed;

(d) a statement of the services I am expected to perform in connection with this protest;

(e) a description of the financial interests that I, my spouse, and/or my family has in any entity that is an interested party in this protest or whose protected material will be reviewed; if none, I have so stated;

(f) a list identifying by name of forum, case number, date, and circumstances all instances in which I have been granted admission or been denied admission to a protective order, or had a protective order admission revoked, or been found to have violated a protective order issued by GAO or by an administrative or judicial tribunal; if none, I have so stated; and

(g) a statement of the professional associations to which I belong, including membership numbers.

6. I have read a copy of the protective order issued by GAO in this protest, and I will comply in all respects with all terms and conditions of that order in handling any protected material filed or produced in connection with the protest. I will not disclose any protected material to any individual other than those individuals admitted under the protective order by GAO.

7. For a period of 2 years from the date this application is granted, I will not engage or assist in the preparation of a proposal to be submitted to any agency of the United States government for _____* where I know or have reason to know that any party to the protest, or any successor entity, will be a competitor, subcontractor, or teaming member. *Describe subject of procurement at issue in the protest

8. For a period of 2 years from the date this application is granted, I will not engage or assist in the preparation of a proposal for submission to _____* for _____** nor will I have any personal involvement in any such activity. *Name of contracting agency
**Describe procurement at issue in the protest

Appendix VII: Sample Application for Access to
Material Under a Protective Order
for Consultant

9. I acknowledge that any violation of the terms of the protective order may result in the imposition of such sanctions as GAO deems appropriate, including but not limited to dismissal of protest, referral of the violation to appropriate disciplinary bodies or professional associations, and restricting my practice before GAO. I further acknowledge that a party whose protected information is improperly disclosed shall be entitled to all remedies under law or equity, including breach of contract.

CERTIFICATION

By my signature, I certify that, to the best of my knowledge, the representations set forth above (including attached statements) are true and correct. I recognize that knowingly making a false statement on this application could render me liable to a \$10,000 fine or 5 years imprisonment, or both, pursuant to 18 U.S.C. § 1001. I identify below the mailing address and facsimile number at which I may receive protected material in accordance with the terms of the protective order.

Signature

Date Executed

Typed Name and Title

Mailing Address

Direct Dial Telephone Number

Facsimile Number

E-mail Address

Appendix VII: Sample Application for Access to
Material Under a Protective Order
for Consultant

ATTORNEY'S CERTIFICATION

The consultant named above has been retained by me to assist in the representation of in this protest and will perform his/her duties in connection with this protest under my direction and control.

Signature

Date Executed

Typed Name and Title

Name of Firm