

Bid Protests at GAO: A Descriptive Guide (Seventh Edition, 2003)

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 General Accounting Office, which for more than 75 years has provided an objective, independent, and impartial forum for the resolution of disputes concerning the awards of federal contracts.

Over the years, GAO has developed a substantial body of law and standard procedures for considering bid protests. This is the seventh 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 January 1, 2003, to conform the Regulations to current practice and otherwise to improve the overall efficiency and effectiveness of the bid protest process at GAO.

We have improved this edition of the booklet by providing additional and updated practice tips to assist parties participating in a bid protest at GAO. We also have updated the appendixes, which contain a revised sample protective order and revised sample applications for access to material under a protective order.

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THE BID PROTEST PROCESS

BACKGROUND

For more than 75 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, contracting 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 January 1, 2003, to conform the regulations to current practice and otherwise improve the efficiency and efficacy of the bid protest process at GAO. The revised regulations will 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.

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, which is published annually and reflects the revisions or additions to the regulations that were published in the Federal Register during the preceding year. 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 protests and impose certain requirements on contracting 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 contracting agency is required to file with GAO a report responding to the protest and to provide a copy of that report to the protester. 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 receive a copy of the report and will be allowed to file written comments on 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 it decides to hold a hearing, GAO 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 submit written comments on the hearing.

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 sent 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 work load.

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 either negotiation assistance, where the GAO attorney offers to assist the parties in reaching agreement on resolution of the matter, or outcome prediction, where the GAO attorney advises the parties of the attorney's view of the likely outcome based

on the record, so that the likely unsuccessful party may take appropriate action to resolve the protest.

FILING A PROTEST

WHO MAY 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). 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.

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 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).

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, and (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).

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. 4 C.F.R. § 21.1(b). Protests may be filed by hand delivery, mail, commercial carrier, facsimile transmission, or e-mail. 4 C.F.R. § 21.0(g). For protesters who decide to file by e-mail, we point out that GAO uses Microsoft Office (including Microsoft Word) as its office application software. Protests of different procurements must be separately filed. 4 C.F.R. § 21.1(f).

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

- (1) Include the name, street address, e-mail address, and telephone and facsimile (fax) numbers of the protester (or its representative, if any);
- (2) Be signed by the protester or its representative;
- (3) Identify the contracting 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 the filing of the protest with GAO, the protester must provide to GAO and the contracting agency a redacted version of the protest that omits such information. 4 C.F.R. § 21.1(g).

A party may request that GAO 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). GAO also may invoke alternative procedures, including ADR, on its own initiative.

Practice tip: Redacted Protests

A protester must file a redacted protest with GAO and the contracting agency within 1 day after the filing of the unredacted protest with GAO in order to facilitate the agency's notice of the protest to potential intervenors.

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.

Protests alleging improprieties in a solicitation must be filed before bid opening or the time set for receipt of initial proposals if the improprieties were apparent prior to that time. 4 C.F.R. § 21.2(a)(1). A solicitation defect that was not apparent before that time 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.*

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 that is 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 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).

The purpose of the exception to the timeliness rules for negotiated procurements where debriefings are required by law is to encourage vendors to seek, and contracting agencies to give, early and meaningful debriefings prior to the vendor's deciding 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.

Special timeliness rules govern protests initially filed with the contracting 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 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 proceeding 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.

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.

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.

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.

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.

WHERE TO SEND A PROTEST

Protests must be addressed to the General Counsel, General Accounting Office, 441 G St., N.W., Washington, DC 20548, Attention: Procurement Law Control Group. 4 C.F.R. § 21.1(b). GAO's office hours are from 8:30 a.m. to 5:30 p.m., eastern time, Monday through Friday.

Protests may be filed by hand delivery, mail, commercial carrier, fax, or e-mail. 4 C.F.R. § 21.0(g). Protests filed by hand delivery or commercial carrier must be delivered to the window located in the G Street lobby in GAO's main building at the above-referenced address.

Practice Tip: Filing Protests By Hand Delivery

Hand delivery to the window may not be possible during certain periods due to security or other concerns. When this is the case, protesters must avail themselves of one of the alternative filing methods.

Protesters filing their protests by fax should verify GAO's fax number prior to transmission. GAO's current official bid protest fax number is (202) 512-9749. Fax users should take into account the risk that GAO's receiving fax machine might be

busy, particularly near the end of a business day. GAO will time/date stamp a fax transmission as of the time the last page is received, which may affect the timeliness of the entire submission. Additional recorded information concerning the filing of protests at GAO may be obtained by calling GAO's Procurement Law Control Group at (202) 512-5282.

Practice Tip: Filing Protests By E-Mail

Protests filed by e-mail should be addressed to Protests@gao.gov. Upon our receipt of an e-mailed protest, the protester will be sent an automatic confirming e-mail reply. This reply also will advise that assignment and status information is available on our on-line Bid Protest Docket, accessible via the Legal Products link on GAO's Internet home page (www.gao.gov), or by calling our protest status line at 202-512-5436. Where protests filed by e-mail include attachments containing multiple documents, the attachments should include an index identifying the documents and their location in the attachment.

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).

Practice tip: Risk of Timely Receipt

Protesters should be aware that, whatever method of transmission they choose, they bear the risk that their 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 sends the protester a written 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 sent 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). Second, the notice contains the date on which the contracting 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 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 and the previously referenced official fax number also appear on the notice.

Practice Tip: GAO Web Site 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 Legal Products 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

Within 1 day of receipt of the protest, GAO will telephone the contracting agency to advise it that a protest has been filed. 4 C.F.R. § 21.3(a). That telephone call 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 call 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 telephone notice 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

If a protest is being filed shortly before the deadline for the triggering of an automatic stay of award or performance, the protester should bring this to GAO's attention at the time of filing; this will enable GAO to attempt to provide expedited notice of the protest to the contracting agency.

Although the telephone notice from GAO to the contracting agency may trigger a statutory stay, GAO does not review agency decisions in this regard, and will not consider a protest challenging an agency's decision not to delay a procurement, that is, to override a stay.

INTERVENORS

Immediately after receiving notice of the protest from GAO, the contracting agency must give notice of the protest to the contractor 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). If the award has been made, GAO permits only the awardee to intervene. If the award has not been made, firms wishing to intervene should so advise GAO and the other parties, and then contact GAO to learn whether they will be permitted to intervene. The notice of intervention can be a brief letter that includes the name, 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.

Practice tip: Notice of Appearance

It is helpful for the attorney who will represent the contracting agency in the protest to send a written notice to GAO and the protester (or its representative) advising of his or her name, address, telephone and fax numbers, and e-mail address. An intervenor (or its representative) should also provide the same information to GAO, the protester or its representative, and the agency attorney. 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 it without requiring the contracting 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 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 contracting 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 made as soon as practicable after the protest is filed. Id. The request should be in writing and sent to all parties. Unless it is clear that dismissal is appropriate, GAO will generally permit the protester to file a written response to the dismissal request. GAO will promptly address 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.

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 but, in appropriate cases, may be issued simultaneously with the acknowledgment notice. Where a protective order is in place for a protest, parties may file documents by e-mail only if authorized by, and only in accordance with procedures specifically established by, GAO with regard to that protest. 4 C.F.R. § 21.4(b).

Only individuals who apply to GAO, and whose 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 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(c). 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 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(d), or on individuals not admitted to the protective order who actively seek and obtain information that they know is covered by the protective order.

Because the information released under a protective order is not GAO's but, rather, the contracting 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 advise GAO and the other parties that there is an objection to the applicant's admission. 4 C.F.R. § 21.4(c). The GAO attorney will generally permit the objecting party to submit the specific objection, in writing, the next day. 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). Finally, in paragraph 7 of the application for both outside counsel and in-house counsel, GAO requires applicants to disclose those instances within the last 5 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.

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 site (www.gao.gov) by selecting the Bid Protests line under the Legal Products heading. 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 the Guide.

Any violation of the terms of a protective order may result in the imposition of such sanctions as GAO deems appropriate, including but not limited to referral of the violation to appropriate bar associations or other disciplinary bodies, and restricting the individual's practice before GAO. 4 C.F.R. § 21.4(d).

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, even if the record will include protected information, if the protester is proceeding without an attorney. 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. 4 C.F.R. § 21.4(a). 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 protester's counsel to file comments on the report.

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

GAO has admonished attorneys for violating the terms of a protective order when they have used protected material in court or in another administrative forum prior to receiving permission from GAO to do so. 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.

GAO has sanctioned attorneys permitted access to protected material under a protective order when they have unilaterally redacted documents containing protected information and released these redacted versions of the documents to individuals not admitted under the protective order prior to the expiration of the 2-day "cooling off" period; GAO denied these attorneys access to protected material under any protective order for 3 months. GAO has sanctioned an attorney permitted access to protected material under a protective order when she furnished the agency report to a representative of the protester, her client, who was not admitted under the protective order, an action characterized by GAO as a "gross violation of the clear terms of the order"; GAO denied this attorney access to protected material under any protective order for 2 years and referred the matter to the appropriate bar association.

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 Network Sec. Tech., Inc., B-290741.2, Nov. 13, 2002, 2002 CPD ¶ __.

AGENCY REPORT

Within 30 days after an agency receives telephonic notice of a protest from GAO, the agency is required to provide GAO, the protester, and any intervenors a complete written report responding to the protest, including all relevant documents, or portions of documents, and an explanation of the agency's position. 4 C.F.R. § 21.3(c). The report generally includes a statement of the relevant facts (and an estimate of the contract value) signed by the contracting officer, a memorandum of law explaining the agency's position in terms of procurement law, and a list and copies of all relevant documents, or portions of documents, not previously furnished. 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 provided to the parties. 4 C.F.R. § 21.3(c).

Practice Tip: Early Document Production

GAO has found that protests can be more promptly resolved where an agency releases relevant documents before the agency report is filed, since this ensures that any supplemental 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 protest arguments.

In addition, so that GAO may resolve any document disputes prior to the filing of the agency report, GAO requires that 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, the agency prepare 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 it intends to withhold and the reasons for the proposed withholding. Id. The list must be provided to all parties and to GAO. Objections to the scope of the agency's proposed disclosure or nondisclosure of documents must be filed with GAO and all other parties within 2 days of receiving the list. Id.

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.

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.

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). 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.

ADDITIONAL DOCUMENT REQUESTS

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 submit a written request for those documents to GAO and the other parties 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 respond to the request not later than 2 days after receiving the request by either producing the documents, or portions of documents, or explaining why the documents are not being produced. Id.

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 receipt of the report.

4 C.F.R. § 21.3(i). Unless otherwise advised by the protester, GAO will assume that the protester received the report not later than the due date specified in the acknowledgment notice furnished by GAO. Id. A copy of the comments should be furnished to each of the other parties not later than the day after the comments are received at GAO.

Even if the contracting 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).

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 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.

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 appropriate 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.

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 written or oral, 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. A copy of all written submissions to GAO, redacted where necessary, should be provided to all parties to the protest.

HEARINGS

At the request of a party, or on its own initiative, GAO may conduct a hearing in person or by telephone where it concludes that the protest cannot be resolved on the written record alone. 4 C.F.R. § 21.7(a), (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 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 contracting 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 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 1 day 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 have access to a written transcript. 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 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). Parties may check the status of a protest on GAO's Bid Protest Docket, found on GAO's Internet web home page (www.gao.gov).

EXPRESS OPTIONS

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 to that effect not later than 5 days after the protest is filed. 4 C.F.R. § 21.10(c).

Under the express option schedule, the agency report is due within 20 days after the contracting agency receives notice from GAO that the express option will be used. 4 C.F.R. § 21.10(d)(1). Comments on the report generally are due within 5 days after

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. 4 C.F.R. § 21.10(d)(3). Under the express option schedule, GAO's decision will be issued not later than 65 days after the protest was 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.

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 these 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 appropriate. This may take the form of negotiation assistance either before or after a protest is filed, or outcome prediction, where GAO 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 to resolve the protest without a written decision.

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 take 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 TYPES OF 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 either dismiss, deny, or sustain a protest. GAO generally sustains protests where it determines that the contracting 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 take into consideration 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).

If the protest is sustained, GAO generally will recommend that the protester be reimbursed the costs of filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees. 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. 4 C.F.R. § 21.8(d).

Practice Tip: Agency Corrective Action--Costs

Where the contracting 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.

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 contracting 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)(2).

Protesters should keep in mind that, except in very limited circumstances, the costs for attorneys' fees may not exceed \$150 per hour. GAO never recommends that agencies pay lost profits or other common-law damages.

When GAO recommends corrective action, 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 60 days. The Comptroller General, in turn, reports to the Congress each instance where recommendations were not fully implemented.

Practice tip: Distributing GAO's Decision

Protesters may check on the status of a protest by reviewing the Bid Protest Docket on GAO's web site (www.gao.gov), under the Legal Products heading, or by calling GAO's bid protest status line at (202) 512-5436. Once signed, a copy of a decision is generally available on GAO's web site within 24 hours of the case being closed. Decisions also will be provided to the parties by mail, facsimile or e-mail. 4 C.F.R. § 21.12(b).

Practice Tip: Public Versions of Decisions

Where a decision contains protected information, it will not be accessible from GAO's web site or otherwise made available to the public. Instead, a redacted version of the decision, omitting the protected information, will be prepared as soon as possible for release to the public, and the redacted version will be accessible from GAO's web site. 4 C.F.R. § 21.12. GAO typically will issue a redacted public version of the decision 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 from the public version of the decision. Parties should provide their views in this regard expeditiously.

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. For example, evaluation scores and unfavorable past performance information generally will not be redacted.

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.

REQUESTS FOR RECONSIDERATION

Any party who participated in the protest, including the protester, any intervenor, and the contracting 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. 4 C.F.R. § 21.14(c).

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.

BID PROTEST REGULATIONS

The regulations governing the bid protest process appear in Part 21 of Title 4 of the Code of Federal Regulations. Those regulations, as revised January 1, 2003, are applicable to protests filed after that date. They are reprinted below.

§ 21.0 Definitions.

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

(b) *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.

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

(d) *Contracting agency* means a Federal agency which has awarded or proposes to award a contract under a protested procurement.

(e) *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 General Accounting 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.

(f) *Adverse agency action* is any action or inaction by a contracting agency which 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.

(g) A document is *filed* on a particular day when it is received by GAO by 5:30 p.m., eastern time, on that day. Protests and other documents may be filed by hand delivery, mail, commercial carrier, facsimile transmission, or other electronic means (but see § 21.4(b) for restrictions on electronic filing where a protective order has been issued). Hand delivery and other means of delivery may not be practicable during certain periods due, for example, to security concerns or equipment failures. The filing party bears the risk that the delivery method chosen will not result in timely receipt at GAO.

(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 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 in writing and addressed as follows: General Counsel, General Accounting Office, 441 G Street, NW., Washington, DC 20548, Attention: Procurement Law Control Group.

(c) A protest filed with GAO shall:

- (1) Include the name, street address, electronic mail address, and telephone and facsimile numbers of the protester,
- (2) Be signed by the protester or its representative,
- (3) Identify the contracting 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 contracting 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 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. 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 the protester must file a redacted copy of the protest which omits the information with GAO and the agency within 1 day after the filing of its protest with GAO.

(h) 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 which are subsequently incorporated into the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation.

(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, 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 filed within 10 days of actual or

constructive knowledge of initial adverse agency action will be considered, provided the agency-level protest was filed in accordance with paragraphs (a)(1) and (a)(2) of this section, unless the contracting agency imposes a more stringent time for filing, in which case the agency's time for filing will control. In cases where an alleged impropriety in a solicitation is timely protested to a contracting agency, any subsequent protest to 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.

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

(a) GAO shall notify the contracting agency by telephone within 1 day after the filing of a protest, and, unless the protest is dismissed under this part, shall promptly send a written confirmation to the contracting agency and an acknowledgment to the protester. The contracting agency shall immediately give notice of the protest to the contractor if award has been made or, if no award has been made, to all bidders or offerors who appear to have a substantial prospect of receiving an award. The contracting agency shall furnish 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 furnish copies of all protest communications to the contracting agency and to other participating parties. All protest communications shall be sent by means reasonably calculated to effect expeditious delivery.

(b) A contracting 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 contracting agency shall file a report on the protest with GAO within 30 days after the telephone notice of the protest from GAO. The report provided to the parties need not contain documents which the agency has previously furnished 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 provide to all parties and GAO a list of those documents, or portions of documents, which the agency has released to the protester or intends to produce in its report, and of the documents which the agency intends to withhold from the protester and the reasons for the proposed withholding. Any objection to the scope of the agency's proposed disclosure or nondisclosure of documents must be filed with GAO and the other parties within 2 days of receipt of this list.

(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 protest; the bid or proposal submitted by the protester; the bid or proposal of the firm which is being considered for award, or whose bid or proposal is being protested; all evaluation documents; the solicitation, including the specifications; the abstract of bids or offers; and any other relevant documents. In appropriate cases, the contracting agency may request that the protester produce relevant documents, or portions of documents, that are not in the agency's possession.

(e) Subject to any protective order issued in the protest pursuant to § 21.4, the contracting agency shall simultaneously furnish a copy of the report to the protester and any intervenors. The copy of the report filed with GAO shall list the parties who have been furnished copies of the report. Where a protester does not have counsel admitted to a protective order and documents are withheld from the protester in accordance with this part, the agency shall provide documents adequate to inform the protester of the basis of the agency's position.

(f) The contracting agency may request an extension of time for the submission of the list of documents to be provided 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 request 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 with GAO and the contracting agency not later than 2 days after their existence or relevance is known or should have been known, whichever is earlier. The contracting agency shall provide the requested documents, or portions of documents, and a list to GAO and the other parties within 2 days or explain why it is not required to produce the documents.

(h) Upon the request of a party, GAO will decide whether the contracting agency must provide any withheld documents, or portions of 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) Comments on the agency report shall be filed with GAO within 10 days after receipt of the report, with a copy provided to the contracting agency and other participating parties. The protest shall be dismissed unless the protester files comments within the 10-day period, except where GAO has granted an extension or has established a shorter period in accordance with § 21.10(e). Extensions will be granted on a case-by-case basis. Unless otherwise advised by the protester, GAO will assume the protester received the agency report by the due date specified in the acknowledgment of protest furnished by GAO.

(j) GAO may request or permit the submission of additional statements by the parties and by other parties not participating in the protest as may be necessary for the fair resolution of the protest. The agency and other parties shall not submit any additional statements unless the statements are specifically requested by GAO or submitted after permission has been granted by GAO.

§ 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 under that order.

(b) If no protective order has been issued, the agency may withhold from the parties those portions of its report that would ordinarily be subject to a protective order. GAO will review in camera all information not released to the parties. Where a protective order has been issued, documents may be filed by electronic means (other than facsimile transmission) only when specifically authorized by GAO.

(c) 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 submitting an application to GAO, with copies furnished simultaneously to all parties. 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 raised within 2 days after receipt of the application, although GAO may consider objections raised after that time.

(d) 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 and restricting the individual's practice before GAO.

§ 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 contracting agency. Disputes between a contractor and the agency are resolved pursuant to the disputes clause of the contract and the Contract Disputes Act of 1978. 41 U.S.C. 601-613.

(b) *Small Business Administration issues.* (1) Small business size standards and standard industrial classification. Challenges of established size standards or the size status of particular firms, and challenges of the selected standard industrial classification may be reviewed solely by the Small Business Administration. 15 U.S.C. 637(b)(6).

(2) *Small Business Certificate of Competency Program.* Referrals made to the Small Business Administration (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 Small Business Administration at the contracting officer's discretion and on such terms as are agreed upon by the procuring agency and the Small Business Administration, the decision to place or not to place a procurement under the 8(a) program is not subject to review absent a showing of possible 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. 423, 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 in GAO or the contracting agency within the time limits set forth in § 21.2.

(f) Protests which lack a detailed statement of the legal and factual grounds of protest as required by § 21.1(c)(4), or which 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. 472.* 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 agency awarding the prime contract has requested in writing 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 contracting 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.

§ 21.6 Withholding of award and suspension of contract performance.

Where a protest is filed with GAO, the contracting 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).

§ 21.7 Hearings.

(a) At the request of 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) Hearings shall normally be recorded and/or transcribed. If a recording and/or transcript is made, any party may obtain copies at its own 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.

(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 contracting agency implement any combination of the following remedies:

- (1) Refrain from exercising options under the contract;
- (2) Terminate the contract;
- (3) Reopen the contract;
- (4) Issue a new solicitation;
- (5) Award a contract consistent with statute and regulation; or
- (6) Such other 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 contracting 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.

(d) If GAO determines that a solicitation, proposed award, or award does not comply with statute or regulation, it may recommend that the contracting 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) If the contracting 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 within 15 days of 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 protester shall furnish a copy of its request to the contracting agency, which may file a response within 15 days after receipt of the request, with a copy furnished to the protester.

(f)(1) If GAO recommends that the contracting 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 contracting 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 contracting agency shall issue a decision on the claim for costs as soon as practicable after the claim is filed. If the protester and the contracting agency cannot reach agreement within a reasonable time, GAO may, upon request of the

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

(3) The contracting agency shall notify GAO within 60 days after GAO recommends the amount of costs the agency should pay the protester of the action taken by the agency 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.

(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.

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

(a) At the request of 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 in writing and received in GAO 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 contracting agency shall file a complete report with GAO and the parties 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 with GAO and the other parties 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 request 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.

§ 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 with GAO 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, the head of the contracting activity responsible for the protested procurement, and the senior procurement executive of each Federal agency involved; a copy shall also be made available to the public. A copy of a decision containing protected information shall be provided only to the contracting 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 may be distributed to the parties, and are available from GAO, by electronic means.

§ 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 the provision of § 21.8(d) pertaining to recommendations for the payment of costs. The provision for the withholding of award and the suspension of contract performance, 31 U.S.C. 3553(c) and (d), also does not apply to nonstatutory protests.

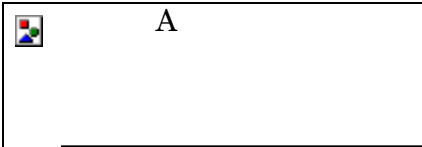
§ 21.14 Request for reconsideration.

(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, with copies to the parties who participated in the

protest, not later than 10 days after the basis for reconsideration is known or should have been known, whichever is earlier.

(c) GAO will summarily dismiss any request for reconsideration that fails to state a valid basis for reconsideration or is untimely. The filing of a request for reconsideration does not require the withholding of award and the suspension of contract performance under 31 U.S.C. 3553(c) and (d).
filing of a request for reconsideration does not require the withholding of award and the suspension of contract performance under 31 U.S.C. 3553(c) and (d).



Sample Protective Order

United States General Accounting Office
Washington, DC 20548

Office of the General Counsel

File: B-
Protester:
Agency:

NOTIFICATION OF PROTECTIVE ORDER

Attached is a copy of the protective order issued in connection with this matter. Counsel seeking admission must complete and submit the attached application to our Office within 3 days of receipt of this protective order, with a copy provided simultaneously to all parties; applications for consultants are available upon request. A party objecting to any individual's application must so advise our Office by the second day following receipt of the application. While applications may be filed by facsimile transmission, a hard copy with original signature must also be submitted. 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 or that otherwise restrict access to protected material to 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 and facsimile-to-electronic mail systems or services. Protected material shall not be sent using electronic mail without the express consent of this Office.

--For the Associate General Counsel

FOR FURTHER INFORMATION:

GAO Attorney: ; 202-512-
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

Appendix I
Sample Protective Order

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

Matter of:

File: B-

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. 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 General Accounting Office (GAO). Such authorization must be requested in writing, with notice to all parties.

1. This protective order applies to all material that is identified by any party as protected, unless 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
GENERAL ACCOUNTING OFFICE PROTECTIVE ORDER**

The party claiming protection must clearly identify the specific portion of the material for which it is claiming protection. Wherever such protection is claimed for a protest pleading, the party filing the pleading shall submit a proposed redacted version for public release when the protected version is 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

Appendix I
Sample Protective Order

competitive decisionmaking 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 a single copy of the protected material and shall not 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. However, each party that receives protected material in an electronic format may print a single copy of that protected material.

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. Protected material shall not be sent using electronic mail without the express consent of GAO. The confidentiality of protected material shall be maintained in perpetuity.

7. Within 60 days after the disposition of the protest(s) (or if a request for reconsideration or a claim for costs is filed, 60 days after the disposition of those matters), all protected material furnished to individuals admitted under this protective order, including all copies of such material, with the exception of a single copy of a protected decision or letter issued by our Office, shall be: (1) returned to the party that produced them; or (2) with the prior written agreement of the party that produced the protected material, destroyed and certified as destroyed to the party that produced them; or (3) with the prior written agreement of the party that produced the protected material, 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 archival files and computer backup files) and written and electronic transcripts of protest conferences and hearings shall be destroyed, and the destruction certified to GAO and 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

Appendix I
Sample Protective Order

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. 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 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

Sample Applications for Access to Material Under a
Protective Order

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

Matter of:

File: B-

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 _____ and have 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 decisionmaking 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.

Sample Applications for Access to Material Under a
Protective Order

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:

(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 5 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:

Sample Applications for Access to Material Under a
Protective Order

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 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

Typed Name and Title

Mailing Address

Facsimile Number

Sample Applications for Access to Material Under a
Protective Order

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

Matter of:

File: B-

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 decisionmaking 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.
5. I have attached the following information:
 - (a) a current resume describing my education and employment experience to date;

Sample Applications for Access to Material Under a Protective Order

(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

Sample Applications for Access to Material Under a
Protective Order

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 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

Facsimile Number

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

Sample Applications for Access to Material Under a
Protective Order

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

Matter of:
File: B-
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 decisionmaking 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.

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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;
- (c) the number of in-house counsel at the office in which I work, and their involvement, if any, in competitive decisionmaking and in providing advice in procurement-related matters;
- (d) my relationship to the nearest person involved in competitive decisionmaking (both in terms of physical proximity and corporate structure); and
- (e) measures taken to isolate me from competitive decisionmaking 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 5 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:

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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 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

Typed Name and Title

Mailing Address

Facsimile Number