

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

GENERAL ACCOUNTING OFFICE

4 CFR Part 21

General Accounting Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts

AGENCY: General Accounting Office.

ACTION: Proposed rule.

SUMMARY: The General Accounting Office (GAO) is proposing to revise its Bid Protest Regulations to implement the requirement in the National Defense Authorization Act for Fiscal Year 1996 that GAO, for new protests filed on or after August 8, 1996, issue bid protest decisions within 100 calendar days from the time a protest is filed at GAO. The proposed revision will facilitate GAO's meeting the new statutory deadline for issuing bid protest decisions and will improve the overall effectiveness of the bid protest process at GAO.

DATES: Comments must be submitted on or before July 1, 1996.

ADDRESSES: Comments should be addressed to: Michael R. Golden, Assistant General Counsel, General Accounting Office, 441 G Street, NW., Washington, DC 20548.

FOR FURTHER INFORMATION CONTACT: Michael R. Golden (Assistant General Counsel) or Linda S. Lebowitz (Senior Attorney), 202-512-9732.

SUPPLEMENTARY INFORMATION: On February 21, 1996, the General Accounting Office (GAO) published an advance notice of proposed rulemaking (61 FR 6579) soliciting comments on how its bid protest procedures could be revised in order to facilitate GAO's meeting a new statutory deadline for issuing bid protest decisions, while also improving the overall effectiveness of the bid protest process at GAO. In this regard, the National Defense Authorization Act for Fiscal Year 1996, Pub. L. 104-106, 110 Stat. 186, which was enacted on February 10, 1996, requires GAO, effective August 8, 1996, to issue bid protest decisions within 100

calendar days from the time a protest is filed at GAO, shortening the current 125-calendar-day requirement. (Any further reference to "days" means "calendar days.") In the advance notice, GAO specifically invited comments on changing its longstanding timeliness rule to permit the filing of a protest 5 days after a statutorily required debriefing, and on the feasibility of promoting early document production in appropriate cases to facilitate the expeditious resolution of bid protests. GAO also invited the submission of ideas regarding the appropriate length of regulatorily imposed deadlines, as well as suggestions concerning the use of accelerated or alternative procedures to more expeditiously resolve bid protests.

Interested persons were invited to submit comments on GAO's advance notice by March 22, 1996. We received written comments from 10 Federal agencies, 2 bar associations, 2 law firms, 1 industry association, and 2 vendors. In preparing this proposed rule, we have carefully considered all comments received. The commenters generally recognized the effectiveness of our previous efforts to streamline the bid protest process at GAO and to provide meaningful relief to vendors wrongfully excluded from procurements, as reflected in the final rule published on August 10, 1995 (60 FR 40737) and effective October 1, 1995. The commenters made suggestions on how GAO could improve the internal management of the bid protest process. While we are adopting many of the suggested management practices and we expect to implement others in the near future, we believe that regulatory implementation of such improvements is unnecessary. For example, we are focusing on promptly resolving early requests for partial or complete dismissals of protests. We are also establishing procedures to routinely issue protective orders, where warranted, shortly after a protest is filed.

Significant proposed revisions to GAO's Bid Protest Regulations are set forth below.

Statutorily Imposed Deadlines

In accordance with sec. 5501 of the National Defense Authorization Act for Fiscal Year 1996, GAO proposes to revise paragraph (c) of § 21.3 to require a contracting agency to file its report in

response to a protest with GAO within 30 days, as opposed to 35 days, after receiving telephone notice of the protest from GAO. GAO also proposes to revise paragraph (a) of § 21.9 to require our Office to issue a decision on a bid protest within 100 days after the protest is filed with our Office.

Timeliness Rules

Consistent with the suggestion of several commenters, GAO's proposed regulation at § 21.2(a)(2) requires that protests, except those alleging a solicitation impropriety, filed under a procurement in which a debriefing is required by law be filed not later than 5 days after the debriefing; in all other cases, the protest is required to be filed within 10 days after the basis of protest is known or should have been known, whichever is earlier. (Wherever possible throughout this proposed rule in the interests of simplification and user-friendliness, GAO proposes to establish filing times using multiples of "five" days. For example, GAO has reduced the "knew/should have known" timeliness rule from 14 days to 10 days.) GAO believes that this proposed change to the timeliness rule will help to ensure the prompt and fair resolution of bid protests.

Consistent with the suggestion of several commenters, GAO proposed to add a new paragraph (a)(4) to § 21.2 which reduces the time for filing supplemental or amended protests from 14 days (pursuant to the current "knew/should have known" timeliness rule) to 5 days after the basis of protest is known or should have been known, whichever is earlier. GAO believes that this shortening of time will permit GAO to issue a consolidated decision resolving the supplemental or amended protests, usually based on information provided with the agency report, within the original 100-day period, thus avoiding rollover situations or the issuance of separate decisions.

In paragraph (a)(3) of § 21.2, GAO proposes to shorten the time for filing a protest based on initial adverse agency action on an agency-level protest from 14 days to 5 days. GAO agrees with those commenters who suggested this proposed revision, recognizing that in cases where there has been an agency-level protest, the protest issues are usually already developed.

Early Document Production

In paragraph (d)(2) of § 21.1, GAO proposes to add language requiring a protester to explain the relevancy of specifically requested documents to its protest grounds.

GAO received numerous comments concerning early document production as a means of facilitating the prompt resolution of bid protests. As previously addressed in the final rule at 60 FR 40737, 40738, while GAO believes that early document production will promote the expeditious resolution of appropriate bid protests and will result in other system efficiencies, GAO also believes that early document production should be accomplished on a voluntary basis, with an agency assessing the value of such a procedure in a particular case. In this regard, in paragraph (c) of § 21.3, GAO proposes to explicitly recognize that documents may be provided prior to the filing of the agency report or may otherwise be made available to the parties, such as by allowing parties to review documents on site at the agency prior to the filing of the report.

GAO also proposes to add to paragraph (c) of § 21.3 a requirement that 5 days prior to the filing of the agency report, in cases in which the protester has filed a request for specific documents, that the agency 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 those documents which the agency intends to withhold from the protester and the reasons for the proposed withholding. GAO further proposes to require that any objection to the scope of an agency's proposed disclosure or nondisclosure of documents be filed with GAO and the other parties within 1 day of receipt of this list.

Throughout § 21.3, GAO proposes to clarify the language to reflect the current longstanding practice that parties need not provide entire documents if only certain portions of these documents are relevant to the protest.

Several commenters expressed concern that in light of the shortened timeframe for resolving bid protests, unsolicited submissions after the filing of comments on the agency report or hearing are particularly inappropriate. GAO proposes to address this concern by adding a sentence to the proposed § 21.3(j), currently at § 21.3(i), which states that the agency and other participating parties shall not submit any additional statements unless the statements are specifically requested by

GAO or submitted after permission has been granted by GAO.

Other Regulatorily Imposed Deadlines

To facilitate meeting the shortened statutory deadline for issuing bid protest decisions, GAO also proposes to reduce the following filing periods: in the proposed § 21.3(g), currently at § 21.3(f), the agency must respond to supplemental document requests within 2 days, as opposed to 5 days; in the proposed § 21.3(h), currently at § 21.3(g), when withheld documents are furnished, the protester's comments on the agency report are due within the original comment filing period, not 10 days after its receipt of the additional documents, unless GAO specifically grants an extension; and in the proposed § 21.3(i), currently at § 21.3(h), comments on the agency report are due within 10 days, as opposed to 14 days, after receipt of the report unless GAO specifically grants an extension. In paragraph (b) of § 21.14, GAO proposes to shorten the time for filing requests for reconsideration (the resolution of such requests are not subject to statutory deadlines) from 14 days to 10 days.

Accelerated or Alternative Procedures

Many commenters suggested that GAO promote the use of flexible alternative procedures to expedite the resolution of bid protests. Paragraph (e) of § 21.10 already contains language allowing for the establishment of accelerated schedules and the issuance of summary decisions. In paragraph (e) of § 21.10, GAO proposes to add language specifically acknowledging that flexible alternative procedures may be used to promptly and fairly resolve bid protests. In response to numerous comments, GAO also proposes to add a new paragraph (f) to § 21.10, providing that GAO may conduct status conferences, by telephone or in person, with all parties participating in the protest to promote the expeditious development and resolution of the protest.

Miscellaneous Matters

GAO proposes to revise paragraph (e) of § 21.0 in accordance with the statutory requirement under 31 U.S.C. 3555(b) that GAO prescribe procedures for the computation of days for all periods described in Subchapter V, Chapter 35 of Title 31, United States Code.

In paragraph (a) of § 21.3, and in response to one commenter's suggestion, GAO proposes that all protest communications be sent by means reasonably calculated to effect "expeditious" delivery, clarifying what

was intended by our previous use of "timely" delivery.

For annual reporting purposes, GAO proposes to add language to the proposed § 21.3(d), currently at § 21.3(c), requiring agencies to include a "best estimate" of the value of goods and services being procured.

GAO proposes to remove the substantive content of paragraph (d) of § 21.5 addressing procurements protested to the General Services Administration Board of Contract Appeals, see sec. 5101 of the National Defense Authorization Act for Fiscal Year 1996, and proposes to replace the substantive content with a new dismissal ground regarding the violation of sec. 27 of the Office of Federal Procurement Policy (OFPP) Act, 41 U.S.C. 423. Specifically, as proposed, § 21.5(d) provides that for any Federal procurement, GAO will not review an alleged violation of subsections (a), (b), (c), and (d) of sec. 27 of the OFPP Act, as amended by sec. 4304 of the National Defense Authorization Act for Fiscal Year 1996, if the protester failed to report to the Federal agency responsible for the procurement the information the protester believes constitutes evidence of the offense within 14 days after the protester first discovered the possible violation.

Comments

Comments concerning the proposed rule should reference file number B-259187.2. Comments may be filed by hand delivery or mail at the address in the address line, or by facsimile transmission at 202-512-9749.

List of Subjects in 4 CFR Part 21

Administrative practice and procedure, Bid protest regulations, Government contracts.

For the reasons set out in the preamble, Title 4, Chapter I, Subchapter B, of the Code of Federal Regulations is proposed to be amended to read as follows:

1. Part 21 is revised to read as follows:

PART 21—BID PROTEST REGULATIONS

Sec.

- 21.0 Definitions.
- 21.1 Filing a protest.
- 21.2 Time for filing.
- 21.3 Notice of protest, submission of agency report, and time for filing of comments on report.
- 21.4 Protective orders.
- 21.5 Protest issues not for consideration.
- 21.6 Withholding of award and suspension of contract performance.
- 21.7 Hearings.
- 21.8 Remedies.

- 21.9 Time for decision by GAO.
- 21.10 Express options, flexible alternative procedures, accelerated schedules, summary decisions, and status conferences.
- 21.11 Effect of judicial proceedings.
- 21.12 Distribution of decisions.
- 21.13 Nonstatutory protests.
- 21.14 Request for reconsideration.

Authority: 31 U.S.C. 3551–3556.

§ 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 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. A document may be filed by hand delivery, mail, or commercial carrier;

parties wishing to file a document by facsimile transmission or other electronic means must ensure that the necessary equipment is operational at GAO's Procurement Law Control Group.

§ 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, 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 reason 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 no 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, within 1 day after the filing of its protest with GAO, a redacted copy of the protest which omits the information.

(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) Except for protests covered by paragraph (a)(1) of this section, protests filed by a party that has received a debriefing required by law shall be filed not later than 5 days after the debriefing, and in all other cases, not later than 10 days after the basis of protest is known or should have been known, whichever is earlier.

(3) If a timely agency-level protest was previously filed, any subsequent protest to GAO filed within 5 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 5-day period provided by this paragraph, even if filed after bid opening or the closing time for receipt of proposals.

(4) Protests which supplement or amend a previously filed protest shall be filed not later than 5 days after the basis of protest is known or should have been known, whichever is earlier.

(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 reasonable 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. Five 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 the documents which the agency intends to withhold from the protester and the reason 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 1 day 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 acquisition's 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 agency report. Extensions will be granted on a case-by-case basis.

(g) The protester may request additional documents 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 or a written statement requesting that the case be decided on the existing record, or requests an extension of time within the 10-day period. 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. Upon a showing that the specific circumstances of a protest require a period longer than 10 days for the submission of comments, GAO will set a new date for the submission of comments. Extensions will be granted on a case-by-case basis.

(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 participating 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 which would ordinarily be subject to a protective order. GAO will review in camera all information not released to the parties.

(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.

GAO shall summarily dismiss a protest or specific protest allegations that do not state a valid basis for protest, are untimely (unless considered pursuant to § 21.2(c)), or are not properly before GAO. 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 shall be filed; where specific protest allegations are dismissed, an agency report shall be filed on the remaining allegations. Among the protest bases

which 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.* Any referral made to the Small Business Administration pursuant to sec. 8(b)(7) of the Small Business Act, or any issuance of, or refusal to issue, a certificate of competency under that section will not be reviewed by GAO absent a showing of possible bad faith on the part of government officials or a failure to consider vital information bearing on the firm's responsibility. 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 based in large measure on subjective judgments which generally are not readily susceptible of reasoned review, an affirmative determination of responsibility will not be reviewed absent a showing of possible bad faith on the part of government officials or that definitive responsibility criteria in the solicitation were not met.

(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, Pub. L. 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.

§ 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.

(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.

(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, no separate comments on the agency report should be submitted unless specifically requested by GAO. Each party shall file with GAO, within 5 days after the hearing was held or as specified by GAO, a single document expressing any comments on both the hearing and agency report, with copies furnished to the other parties. By the due date, if the protester has not filed comments or a written statement requesting that the case be decided on the existing record, 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 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 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 after being advised that the contracting agency has decided 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 90 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 an 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 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 no later than 5 days after the protest or supplemental 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) If a hearing is held, no separate comments on the agency report under paragraph (d)(2) of this section should be submitted unless specifically requested by GAO. Consolidated comments on the agency report and hearing shall be filed within 5 days after the hearing was held or as specified by GAO.

(4) 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 may use flexible alternative procedures to promptly and fairly resolve a protest, including establishing an accelerated schedule and/or issuing a summary decision.

(f) GAO may conduct status 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 protest where the matter involved is the subject of litigation before a court of competent jurisdiction, or where the matter involved 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 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).

Robert P. Murphy,
General Counsel.

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 161, 250 and 284

[Docket No. RM96-1-000]

Standards For Business Practices Of Interstate Natural Gas Pipelines

April 24, 1996.

AGENCY: Federal Energy Regulatory Commission, Energy.

ACTION: Notice of Proposed Rulemaking and Request for Office of Management and Budget Emergency Processing of Submission of Collection of Information.

SUMMARY: The Federal Energy Regulatory Commission is issuing a notice of proposed rulemaking to revise the Commission's regulations to require interstate natural gas pipelines to follow standardized procedures for critical

business practices—nominations; allocations, balancing, and measurement; invoicing; and capacity release—and standardized mechanisms for electronic communication between the pipelines and those with whom they do business. The proposed regulations incorporate by reference the proposed standards submitted by the Gas Industry Standards Board (GISB) in response to the Commission's October 25, 1995 Advanced Notice of Proposed Rulemaking (ANOPR). 60 FR 55504 (Nov. 1, 1995).

GISB and others in the natural gas industry have requested expedited processing of this proposed rule. Accordingly, pursuant to 5 CFR 1320.13, the Commission is providing notice of its request to the Office of Management and Budget (OMB) for emergency processing of this proposed collection of information by May 24, 1996.

DATES: Comments on the proposed rule are due May 24, 1996. Comments should be filed with the Office of the Secretary and should refer to Docket No. RM96-1-000.

Because the Commission has requested OMB to process the proposed collection of information on an emergency basis, comments on the proposed collection of information should be filed with OMB, attention Desk Officer FERC, as soon as possible.

ADDRESSES:

Federal Energy Regulatory Commission,
888 First Street, NE., Washington DC,
20426

Office of Management and Budget,
Room 3019 NEOB, Washington, D.C.
20503, or via the Internet at
hillier_t@a1.eop.gov.

FOR FURTHER INFORMATION CONTACT:

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1283

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in Room 2A, 888 First Street, N.E., Washington D.C. 20426.

The Commission Issuance Posting System (CIPS), an electronic bulletin