

whole or in part on improprieties concerning the award of the contract.

3. Section 33.102 is amended by revising paragraph (a); redesignating paragraphs (b) and (c) as (c) and (e), respectively, and adding new paragraphs (b) and (d); and revising newly designated paragraphs (e)(2) and (e)(3) to read as follows:

### 33.102 General.

(a) Contracting officers shall consider all protests and seek legal advice, whether protests are submitted before or after award and whether filed directly with the agency, the General Accounting Office (GAO), or for automatic data processing acquisitions under 40 U.S.C. 759 (ADP contracts), the General Services Board of Contract Appeals (GSBCA or the Board). (See 19.302 for protests of small business status and 22.608-3 for protests involving eligibility under the Walsh-Healey Public Contracts Act.)

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

- (1) Take any action that may have been taken by the Comptroller General in the event of a GAO protest; and
- (2) Pay appropriate costs as stated in section 33.104(h).

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

- (1) A protest is likely to be filed; and
- (2) Delay of performance is, under the circumstances, in the best interests of the United States.

(2) May protest to the GAO in accordance with GAO regulations (4 CFR Part 21). An interested party who has filed a protest regarding an ADP procurement with the GAO may not file a protest with the GSBCA with respect to that procurement.

(3) May protest to the GSBCA regarding an award of an ADP contract in accordance with GSBCA Rules of Procedure (48 CFR Chapter 61). An interested party who has filed a protest regarding an ADP procurement with GSBCA (40 U.S.C. 759(f)) may not file a protest with the GAO with respect to that procurement.

4. Section 33.103 is amended in paragraph (b)(1) by removing "or" and inserting "and"; by revising the second and third sentences of (b)(2); by revising the second sentence in paragraph (b)(4);

and by adding paragraph (b)(5) to read as follows:

### 33.103 Protests to the agency.

(b) \* \* \* In all other cases, protests shall be filed not later than 14 days after the basis of protest is known or should have been known, whichever is earlier. The agency for good cause shown, or where it determines that a protest raises issues significant to the agency's acquisition system, may consider the merits of any protest which is not filed timely.

(4) \* \* \* Failure to substantially comply with any of the above requirements may be grounds for dismissal of the protest.

(5) The agency should furnish a copy of the written protest ruling to the protester by certified mail return receipt requested, or by any other method that provides evidence of receipt.

5. Section 33.104 is amended—
- a. By revising the introductory text;
  - b. By adding a sentence to the end of paragraph (a)(2)(ii);
  - c. By revising the introductory text of paragraph (a)(3)(i);
  - d. In paragraph (a)(3)(ii)(H) by adding a "s" to "allegation";
  - e. By redesignating paragraphs (a)(5) through (a)(7) as (a)(6) through (a)(8), respectively and adding a new paragraph (a)(5);
  - f. By revising the introductory text of newly designated paragraph (a)(6);
  - g. In the third sentence of paragraph (a)(6)(iii) by adding a "s" to "request"; and
  - h. By revising paragraphs (c)(1), and (c)(5); and
  - i. By revising paragraphs (f), (g), and (h).

The revised text reads as follows:

### 33.104 Protests to GAO.

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

(2) (ii) \* \* \* However, if the protestor has identified sensitive information and requests a protective order, then the contracting officer should obtain a redacted version from the protestor to furnish to other interested parties.

(3)(i) Upon notice that a protest has been filed with the GAO, the contracting officer shall immediately begin compiling the information necessary for a report to the GAO. The agency normally submits a complete report to the GAO within 35 days after the GAO

notifies the agency by telephone that a protest has been filed, or within 20 days after receipt from the GAO of a determination to use the express option, unless the GAO—

(5) When a protest is filed with the GAO, and an actual or prospective offeror so requests, the procuring agency shall establish a protest file and, in accordance with any applicable protective orders, provide actual or prospective offerors reasonable access to the file. However, if the GAO dismisses the protest before the administrative report is submitted then no protest file need be established.

(i) The protest file shall consist of the agency administrative report.

(ii) Information exempt from disclosure under section 552 of title 5, United States Code, or under an applicable protective order, may be redacted from the protest file.

(iii) The protest file shall be made available within a reasonable time after submittal of the agency administrative report.

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

(c) *Protests after award.* (1) When the agency receives notice of a protest from the GAO within 10 days after contract award or within 5 days after a debriefing date offered to the protestor for any debriefing that is required by 15.1003, whichever is later, the contracting officer shall immediately suspend performance or terminate the awarded contract, except as provided in paragraphs (c)(2) and (3) of this section.

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