

(f) *GAO decision time.* GAO issues its recommendation on a protest within 125 days from the date of filing of the protest with the GAO, or within 65 days under the express option, unless GAO establishes a longer period of time. The GAO attempts to issue its recommendation on an amended protest that adds a new ground of protest within the time limit of the initial protest. If an amended protest cannot be resolved within the initial time limit, the GAO may resolve the amended protest through an express option.

(g) *Notice to GAO.* If the agency has not fully implemented the GAO recommendations with respect to a solicitation for a contract or an award or a proposed award of a contract within 60 days of receiving the GAO recommendations, the head of the contracting activity responsible for that contract shall report such failure to the GAO not later than 5 days after the expiration of the 60 day period. The report shall explain the reasons why the GAO's recommendation exclusive of costs, has not been followed by the agency.

(h) *Award of costs.* (1) If the GAO determines that a solicitation for a contract or a proposed award or an award of a contract does not comply with a statute or regulation, the GAO may recommend that the agency conducting the procurement pay to an appropriate interested party the direct cost, exclusive of profit, of filing and pursuing the protest, including reasonable attorney's fees and consultant and expert witness fees, and bid and proposal preparation costs.

(2) If the GAO recommends the award of costs to an interested party, the agency, in accordance with agency procedures, shall attempt to reach an agreement on the amount of the cost to be paid. If the agency and the interested party are unable to agree on the amount to be paid, GAO may, upon request of the interested party, recommend to the agency the amount of cost that the agency should pay.

(3) No agency shall pay a party, other than a small business concern within the meaning of section 3(a) of the Small Business Act (see 19.001, "Small business concern"), costs under paragraph (h)(2) of this section—

(i) For consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Government; or

(ii) For attorneys' fees that exceed \$150 per hour unless the agency determines, based on the recommendation of the Comptroller General on a case by case basis, that an increase in the cost of living or a special

factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. The cap placed on attorneys' fees for businesses, other than small businesses, constitutes a benchmark as to what constitutes a "reasonable" level for attorneys' fees for small businesses.

(4) A recommended award of costs may be paid by the agency out of funds available to or for the use of the agency for the acquisition of supplies or services. Before paying a recommended award of costs, agency personnel should consult legal counsel. Section 33.104(h) applies to all recommended awards of costs which have not yet been paid.

(5) If the GAO recommends the agency pay costs (as defined under paragraph (h)(1) of this section) and the agency does not promptly pay the costs, the agency shall promptly report to GAO the reasons for the failure to follow the GAO recommendation.

(6) Any costs the contractor receives under this section shall be excluded from all proposals, billings, or claims against the Government and such exclusions should be reflected in the cost agreement.

6. Section 33.105 is amended—

(a) By adding an introductory paragraph;

(b) By revising paragraph (a)(1);

(c) In paragraph (a)(2)(ii) by removing "five" and inserting "three";

(d) By revising the introductory text of paragraph (d)(1);

(e) In paragraph (d)(1)(i) by removing "calendar";

(f) By adding paragraph (d)(4);

(g) In paragraph (e) by removing "45 work" and inserting "65";

(h) By redesignating paragraphs (f) and (g) as (g) and (h) and adding a new paragraph (f);

(i) By revising the new by designated paragraphs (g)(1)(i), and (g)(2);

(j) By adding paragraphs (g)(3) and (g)(4); and

(k) By revising paragraph (h).

The revised text reads as follows:

33.105 Protests to GSBICA.

Procedures for protests at the GSBICA, are found at 48 CFR chapter 61 (GSBICA Rules). In the event this subpart conflicts with 48 CFR Chapter 61, 48 CFR Chapter 61 governs.

(a)(1) Upon request of an interested party in connection with any procurement that is subject to this section (including any such procurement that is subject to delegation of procurement authority), the GSBICA shall review any decision by the contracting officer that is alleged to violate a statute, a regulation, or the conditions of a delegation of

procurement authority. ADP acquisition protests not covered under the Federal Property and Administrative Services Act (40 U.S.C. 759) may not be heard by the GSBICA, but may be heard by the agency, the courts, or GAO. A protester shall furnish a copy of its complete protest to the official and location designated in the solicitation, or in the absence of such a designation to the contracting officer, on the same day the protest is filed with the GSBICA. Any request for a hearing on either a suspension of procurement authority or on the merits shall be in the protest.

(d)(1) If a protest contains a timely request for a suspension of procurement authority, the Board will hold a hearing. A timely request for suspension of procurement authority is one that is filed before award, within 10 days of award, or within five days of the offered debriefing, when the debriefing is required by 15.1003, whichever is later. The Board suspends the procurement authority unless the agency establishes that—

(4) A suspension shall not preclude the agency concerned from continuing the procurement process up to but not including the award of the contract unless the Board determines such action is not in the best interests of the United States.

(f) Any agreement that provides for the dismissal of a protest and involves a direct or indirect expenditure of appropriated funds shall be made part of the public record (subject to any protective order considered appropriate by the Board) before dismissal of the protest. If an agency is party to a settlement agreement, the submission of the agreement to the Board shall include a memorandum, signed by the contracting officer concerned, that describes in detail the procurement, the grounds for protest, the Government's position regarding the grounds for protest, the terms of the settlement, and the agency's position regarding the propriety of the award or proposed award of the contract at issue in the protest.

(g) * * *

(1) * * *

(i) Filing and pursuing the protest, including reasonable attorney consultant, and expert witness fees, studies, analyses, tests; and

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(2) Costs awarded under paragraph (g)(1) of this section or payments of amounts due under settlement agreements shall be paid out in