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GENERAL ACCOUNTING OFFICE

4 CFR Part 21

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

AGENCY: General Accounting Office.

ACTION: Final rule.

SUMMARY: The General Accounting Office (GAO) is amending its Bid Protest Regulations after receiving and considering the comments on the advance notice of proposed rulemaking published on February 21, 1996, and the proposed rule published on May 1, 1996. The final rule implements 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 final rule will facilitate GAO's meeting the new statutory deadline for issuing bid protest decisions and will enhance the efficiency and effectiveness of the bid protest process at GAO.

EFFECTIVE DATE: August 8, 1996.

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

SUPPLEMENTARY INFORMATION:

Effective Dates

Protests filed at GAO prior to the effective date of this final rule will be considered under the previous rule published at 60 FR 40737 on August 10, 1995. That previous rule will also apply to (1) protests filed on or after the effective date of this rule which supplement or amend a protest filed at GAO prior to the effective date of this rule and (2) claims and requests for reconsideration filed on or after the effective date of this rule which concern

a protest which was considered under the previous rule.

Background

On February 21, 1996, GAO published an advance notice of proposed rulemaking (61 FR 6579) soliciting comments on how its bid protest procedures could be revised to facilitate GAO's meeting, effective August 8, 1996, the new 100-calendar-day statutory deadline (which shortens the former 125-calendar-day deadline) for issuing bid protest decisions, as required by the National Defense Authorization Act for Fiscal Year 1996, Pub. L. 104-106, 110 Stat. 186, enacted on February 10, 1996. (Further reference to "days" means calendar days.) GAO invited comments addressing changing GAO's longstanding timeliness rules to link the timely filing of a protest with a statutorily required debriefing and on facilitating the expeditious resolution of protests through the use of early document production. In addition, GAO invited suggestions concerning the appropriate length of regulatorily imposed deadlines and the use of accelerated or alternative procedures to more expeditiously resolve bid protests.

In preparing the proposed rule, published on May 1, 1996 (61 FR 19205), GAO considered the written comments received in response to the advance notice. These comments generally recognized our previous efforts, as reflected in the final rule published on August 10, 1995 (60 FR 40737) and effective October 1, 1995, to streamline the bid protest process at GAO and to provide meaningful relief to vendors wrongfully harmed during the conduct of a procurement. The commenters also suggested ways in which the internal management of GAO's bid protest process could be enhanced.

Summary of Comments

Interested persons were invited to submit comments on GAO's proposed rule by July 1, 1996. We received written comments from 13 Federal agencies, 2 bar associations, 2 industry associations, and 1 law firm. In adopting this final rule, we have carefully considered all comments received. The commenters generally acknowledged GAO's efforts to shorten regulatorily imposed deadlines in order to streamline and expedite the bid protest process to meet the 100-day deadline for

issuing bid protest decisions and to help implement congressional intent to shorten the length of the procurement cycle.

GAO has also enhanced ongoing internal initiatives to facilitate the proactive management of cases and to accelerate the development and resolution of bid protests. For example, we have adopted procedures to simultaneously issue acknowledgment notices and protective orders in appropriate cases; to identify shortly after a protest is filed those cases in which a hearing appears likely to be appropriate; to encourage the use of accelerated schedules, in lieu of invoking the express option; to promote the expeditious resolution of summary dismissal requests; and to encourage the use of status and other conferences. We believe that regulatorily imposed improvements combined with proactive management of cases will enable GAO to routinely issue a fully developed decision resolving all issues raised in a protest within the 100-day deadline so that the protest does not unnecessarily delay the procurement cycle.

A discussion of the more significant comments concerning GAO's proposed rule, and our responses to these comments, are set forth below.

Section 21.0—Definitions

Several commenters supported our proposal to prescribe procedures for the uniform computation of "days" for all periods, including bid protest filing periods and stay periods. In the proposed rule, we added language to paragraph (e) of § 21.0 which provides that in computing any period of time described in Subchapter V, Chapter 35 of Title 31, United States Code, the day from which the period begins to run will not be counted, and that when the last day of the period falls on a Saturday, Sunday, or Federal holiday, the period will extend to the next day that is not a Saturday, Sunday, or Federal holiday. GAO adopts the language as proposed. We believe that periods of time in the bid protest system should be uniformly counted.

Section 21.1—Filing a Protest

To ensure that protesters focus their document and hearing requests, in the proposed rule we added language to § 21.1(d)(2) which makes clear that when a protester makes a document request, the protester must also explain

why the documents requested are relevant to the protest. The proposed language was supported by the commenters, and is adopted as proposed. We believe this requirement will assist GAO and the parties to identify those documents which are material to the disposition of the protest.

Similarly, we added language in the proposed rule to § 21.1(d)(3) which makes clear that when a protester requests a hearing, the protester must also provide an explanation of why it believes a hearing is necessary to resolve the protest. The proposed language was supported by the commenters, and is adopted as proposed. We think this requirement will assist GAO and the parties to identify early in the protest process those cases in which a hearing appears to be appropriate.

In response to a commenter's suggestion, we have added language to paragraph (g) of § 21.1 which makes clear the requirement that a protester file the redacted copy of its protest with GAO and the agency within 1 day after it files its unredacted protest with GAO. The requirement ensures that an agency can expeditiously provide the redacted copy of the protest to any intervenors.

Section 21.2—Time for Filing

We received numerous comments concerning the language in paragraph (a)(2) of § 21.2 in the proposed rule linking the timely filing of a protest with a statutorily required debriefing, that is, a debriefing which is "requested and, when requested, is required." In the proposed rule, we expressly linked our timeliness rule to the statutory debriefing and stay provision of the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. 103-355, 108 Stat. 3243, enacted on October 13, 1994. As explained, we believed such linkage would be consistent with congressional intent that a vendor receive a statutorily required debriefing before deciding whether or not to file a protest. The proposed linkage would have provided a uniform rule and practice—by filing a protest within 5 days of a statutorily required debriefing, a protest would be timely for bid protest purposes and the protester would be entitled to a stay.

The commenters were generally receptive to the linkage concept, but suggested various ways to clarify the proposed language. After considering all of these proposals, we have replaced the proposed language with the following language: "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."

This provision leaves intact GAO's longstanding timeliness rule that protests challenging an award made using sealed bidding procedures, protests raising supplemental/amended issues, and protests based on information which was independently obtained after a statutorily required debriefing must be filed within 10 days (formerly 14 days) after the basis of protest is known or should have been known, whichever is earlier. In the final rule, we have adopted 10 days (not 5 days as proposed) as the basis for calculating most protest (and other) filing periods consistent with the goal of making our bid protest process as simple and straightforward as possible.

In procurements conducted on the basis of competitive proposals in which a statutorily required debriefing is held, that is, where a debriefing is requested and, when requested, is required, a protester will always have up to 10 days after the debriefing to file its initial protest.

In adopting the 10-day timeliness rule, we recognize the concerns of those commenters who point out that shortening in any circumstances GAO's requirement for a timely filed protest from the former 14 days to the proposed 5 days would seriously diminish access to potential protesters who are accustomed to working with the 14-day requirement. At the same time, we recognize other commenters' legitimate concerns that the protest cycle be as short as feasible and, in the era of facsimile transmissions and express delivery services, 14 days is a disproportionately long period of time to allow vendors to file a protest. We think the 10-day timeliness rule adopted in this final rule strikes the appropriate balance between the comments that potential protesters should have time to prepare and file a well-considered protest, and other comments that the addition of a full 2-week period to the overall 100-day bid protest period is not consistent with the congressional goal of an expeditious bid protest system.

Moreover, to address concerns regarding strategic or defensive protests,

and to encourage early and meaningful debriefings, GAO provides in paragraph (a)(2) of § 21.2 that protesters shall not file an initial protest prior to the debriefing date offered to the protester, but must file the initial protest not later than 10 days after the date on which the debriefing is held. In order to administer this rule, our Office may close a file without prejudice on any protest which has been filed before a statutorily required debriefing, upon appropriate notice by an agency that the statutorily required debriefing date has been offered. We anticipate that this debriefing will normally occur on the first date offered by the agency. However, in the event 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. While we recognize that this places a potential burden on an agency's procurement cycle time, the agency has within its control the ability to minimize this period by offering early and meaningful debriefings consistent with congressional intent.

The adoption of a uniform 10-day timeliness rule provides for easy calculation of protest filing periods and substantially maintains the basic timeliness rule which has been in effect at GAO since 1975. This 10-day rule reflects a compromise which balances the legitimate competing interests and concerns of all parties. Under this rule and consistent with the statutory language in FASA, a protester may file a timely protest on any issue within 5 days of a statutorily required debriefing, as well as obtain a stay, thus eliminating the existing anomaly that a protester may be eligible for a stay based on a filing which does not constitute a timely protest. However, potential protesters should be aware that, even after this compromise (and as is currently also the case), a protester's initial filing may qualify as a timely protest, but may not entitle the protester to a stay. Nevertheless, a protester's opportunity to obtain meaningful review at GAO will be maintained.

In paragraph (a)(3) of § 21.2 in the proposed rule, we required that any subsequent protest to our Office following a protester's actual or constructive knowledge of initial adverse agency action on its agency-level protest be filed within 5 days. While this 5-day period was supported by several commenters, other commenters expressed concern that this proposed filing period was too short and would not provide protesters with sufficient time to consider an agency's decision regarding the agency-level

protest and to decide whether to file a subsequent protest, which may raise new issues, with GAO. We are adopting 10 days as the time period for filing a subsequent protest with GAO following a protester's knowledge of initial adverse agency action on its agency level protest to help ensure that the protester's decision regarding the filing of such a protest is well considered.

We have removed paragraph (a)(4) of § 21.2 in the proposed rule which required that supplemental or amended protests be filed within 5 days after the basis of protest is known or should have been known, whichever is earlier. By removing the proposed language, we will continue to require that supplemental or amended protests be filed in accordance with the basic "knew/should have known" timeliness rule which, as adopted in this final rule, is 10 days.

In addition, several commenters suggested that the time period for filing supplemental or amended protests be aligned with the 10-day time period for filing comments (the proposed language in paragraph (i) of § 21.3 is adopted) since we might consider arguments made in comments to be new protest issues which would need to independently satisfy GAO's timeliness rules. In light of this concern and consistent with the desire to calculate protest and other filing periods in a simple, straightforward manner, the time periods for filing supplemental or amended protests and comments will be concurrent, thereby achieving the "bright line" rule desired by the commenters.

Finally, a few commenters have expressed a concern that our timeliness rules conflict with the 10-working-day timeliness requirement contained in the North American Free Trade Agreement (NAFTA). Since the effective date of NAFTA implementation, we have not received a protest under the NAFTA rules. When NAFTA was implemented, we consulted the United States Trade Representative who advised that the minor inconsistency between NAFTA's and GAO's timeliness requirements would not pose any problems. We are cognizant of the inconsistency and believe that, because of the flexibility of our timeliness rules, we will be able to afford a NAFTA protester all treaty rights for purposes of the timely filing of a protest.

Section 21.3—Notice of Protest, Submission of Agency Report, and Time for Filing of Comments on Report

Consistent with the requirement in the National Defense Authorization Act for Fiscal Year 1996, GAO adopts the

language as proposed in paragraph (c) of § 21.3 concerning the new 30-day time period for filing the agency report (shortening the former 35-day requirement) after telephone notice of the protest from GAO.

In response to suggestions from commenters that GAO encourage the filing of relevant documents prior to the filing of the agency report, GAO adopts the language as proposed in paragraph (c) of § 21.3 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. As previously discussed in the final rule at 60 FR 40737, 40738, we believe that in appropriate cases, an agency's voluntary production of documents prior to the filing of its agency report will facilitate the prompt resolution of the protest and result in other system efficiencies.

In light of the shortened timeframe for resolving all protest issues, GAO believes it is critical to resolve document disputes prior to the filing of the agency report in order to avoid extending a protester's comment period or affording a protester an opportunity to file supplemental comments in response to the piecemeal release of additional documents. For this reason, GAO adopts the language proposed in paragraph (c) of § 21.3 requiring that at least 5 days prior to the filing of the agency report, in protests where specific documents material to the disposition of the protest have been requested, 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 of those documents which the agency intends to withhold from the protester and the reasons for the proposed withholding. GAO believes this list will facilitate the expeditious resolution of document disputes and ultimately the protest itself. We decline to adopt the suggestion of some commenters that a list be produced in all cases (including those cases where specific documents have not been requested) because we believe such a requirement would unduly burden the agencies without providing corresponding benefits to the bid protest process.

Several commenters suggested that the proposed 1-day period for filing objections with GAO and the other parties regarding the scope of the agency's proposed disclosure/nondisclosure of documents after receipt of the list should be at least 2 days. GAO adopts the suggestion of

these commenters by changing the language in paragraph (c) of § 21.3 making clear that any objection to the scope of the agency's proposed disclosure/nondisclosure of documents be filed within 2 days after receipt of the list.

GAO adopts the proposed language, "documents, or portions of documents," throughout § 21.3 which clarifies and reflects current longstanding practice that parties need not provide entire documents if only certain parts of the documents are relevant to the issues raised in the protest.

One commenter expressed concern that agency reports for overseas procurements often cannot be filed within the 30-day statutory period. This difficulty is already provided for in redesignated paragraph (f) of § 21.3. (The proposed rule divided former paragraph (c) of § 21.3 into 2 parts, creating a new paragraph (d) in this section and redesignating the subsequent paragraphs in this section.) In such cases, consistent with current practice, an agency may request an extension of time for filing the agency report. In response to another commenter's concern, GAO has added language to paragraph (f) of § 21.3 to permit an agency to also request an extension of time to file the list of documents proposed for disclosure/nondisclosure.

In redesignated paragraph (g) of § 21.3, GAO adopts the proposed language which requires agencies to respond to supplemental document requests within 2 days after the protester requests additional documents. This 2-day period is equivalent to the period given to the protester to request additional documents after their existence or relevance first becomes evident following receipt of the agency report and places the parties on a level playing field regarding the respective filing periods for supplemental documents.

Several commenters have expressed the view that it is inappropriate after the filing of comments on the agency report or hearing for agencies and other parties to file unsolicited responses to such comments. GAO adopts the language proposed in redesignated paragraph (j) of § 21.3 which provides that such additional responses shall not be submitted unless GAO specifically requests them or specifically grants permission for their submission. This requirement will ensure that the period of time for closing the protest record is not unnecessarily extended. The requirement is not, however, intended to foreclose the submission of additional information from an agency or other

parties when GAO believes that such input is appropriate.

Section 21.5—Protest Issues Not for Consideration

GAO adopts the language proposed in paragraph (d) of § 21.5 concerning protests alleging a violation of subsection (a), (b), (c), or (d) of sec. 27 of the Office of Federal Procurement Policy (OFPP) Act, 41 U.S.C. 423, as amended by sec. 4304 of the National Defense Authorization Act for Fiscal Year 1996. The statute requires that potential protesters notify the agency concerned of a possible procurement integrity violation within 14 days of discovering the alleged violation before protesting the matter to GAO. The statutory requirement reflected in paragraph (d) of § 21.5 will become effective on January 1, 1997, unless the requirement is implemented by OFPP by an earlier date. Pending OFPP's implementation of this requirement and consistent with current practice, GAO will continue to consider protests of alleged procurement integrity violations whether or not the protester has notified the agency prior to filing its protest.

Section 21.7—Hearings

Consistent with current practice, GAO adopts the language as proposed in paragraph (c) of § 21.7 which explicitly recognizes that hearings may be conducted by telephone. In paragraph (g) of § 21.7, GAO adopts the language as proposed which reduces the time for filing consolidated comments on the agency report and hearing from 7 days to 5 days after the hearing. In those circumstances where more time to file consolidated comments is necessary, GAO retains the flexibility to extend the comment period.

Section 21.8—Remedies

Several commenters have expressed concern that the 90-day timeframe for filing claims is too long. In paragraph (f)(1) of § 21.8, GAO has shortened the time for filing claims to 60 days. This change in the final rule will expedite the process for resolving claims and ultimately closing the contract file in a particular matter.

Section 21.9—Time for Decision by GAO

In accordance with the statutory requirement in the National Defense Authorization Act for Fiscal Year 1996, GAO adopts the language as proposed in paragraph (a) of § 21.9 that a decision on a protest be issued within 100 days after a protest is filed (shortening the former 125-day requirement).

Section 21.10—Express Options, Flexible Alternative Procedures, Accelerated Schedules, Summary Decisions, and Status and Other Conferences

Several commenters have recognized GAO's use of flexible alternative procedures to resolve bid protests, deeming such procedures particularly useful in light of the shortened statutory deadline for issuing decisions. GAO adopts the language as proposed in paragraph (e) of § 21.10 which specifically references as examples the use of accelerated schedules and/or the issuance of summary decisions as flexible alternative procedures which have been and will continue to be used by GAO to promptly and fairly resolve protests.

Further, GAO adopts the language proposed in the new paragraph (f) of § 21.10 which, reflecting current practice, expressly provides for conducting telephone or in person status and other conferences with all protest parties to promote the expeditious development and resolution of the protest. We added language to paragraph (f) of § 21.10 to recognize that other types of informal conferences may also be held. For example, GAO has used status and other conferences to resolve protective order admission objections, document disputes, and summary dismissal requests; to discuss issues related to hearings; and to obtain answers to questions which are relevant and material to the disposition of the protest. GAO has found that the use of status and other conferences benefits all parties to a protest. While some commenters suggested that we include in this final rule a specific time for conducting such conferences, we decline to add such language in order to retain the flexibility to conduct these conferences at any time during the process, thereby tailoring the conferences to the circumstances of a particular case.

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 amended 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 and other 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 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 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. 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 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 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, 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. The provision in paragraph (d) of § 21.5 will apply not later than January 1, 1997.

(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 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.

(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) Recomplete 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 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) 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 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 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 AGRICULTURE

Food and Consumer Service

7 CFR Part 295

RIN 0584-AC13

Availability of Information and Records to the Public

AGENCY: Food and Consumer Service, USDA.

ACTION: Final rule.

SUMMARY: This rule amends the Food and Consumer Service (FCS) Freedom of Information Act (FOIA) regulations contained in 7 CFR part 295 as required by the FOIA and 7 CFR part 1—Administrative Regulations, subpart A—Official Records, § 1.3 Agency Implementing Regulations. The revised information mainly reflects changes in office addresses and locations and expands the information for accessing records.

EFFECTIVE DATE: August 26, 1996.

FOR FURTHER INFORMATION CONTACT:

Joseph M. Scordato, Freedom of Information Act Officer, Information Technology Division, Food and Consumer Service, USDA, Alexandria, VA 22302 (703-305-2244).

SUPPLEMENTARY INFORMATION: The FOIA (5 U.S.C. 552(a)(1)) requires Federal agencies to publish in the Federal Register regulations describing how the public may obtain information from the agency. Part 295 of Title 7, Code of Federal Regulations, is issued in accordance with the regulations of the Secretary of Agriculture at 7 CFR part 1, subpart A, implementing FOIA.

This rule relates to internal agency management. Therefore, pursuant to 5 U.S.C. 553, notice of proposed rulemaking and opportunity for comment are not required, and this rule may be made effective less than 30 days after publication in the Federal Register. Further, since this rule relates to internal agency management, it is exempt from the provisions of Executive Order 12866. The Administrator of FCS has certified that this rule will not cause a significant economic impact or other substantial effect on small entities. Therefore, the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., do not apply. This rule contains no reporting or recordkeeping requirements subject to review under the Paperwork Reduction Act of 1995 (Pub. L. 104-13). This rule has been reviewed under Executive Order 12988, Civil Justice Reform, and has been determined to meet the applicable standards of the Executive Order. This

rule is intended to have preemptive effect with respect to any State or local laws, regulations, or policies that conflict with its provisions, or that would otherwise impede its full implementation. Prior to any judicial challenge to the application of this rule, a requester must exhaust all applicable administrative remedies provided in 7 CFR part 1, subpart A.

By this publication the Food and Consumer Service is notifying the Public of its office locations, the hours of operation, the kinds of information available, and the responsible officials where information may be obtained. In addition to the headquarters offices, the Food and Consumer Service has regional and field offices located throughout the Country.

List of Subjects in 7 CFR Part 295

Freedom of Information.

Accordingly, 7 CFR part 295 is revised to read as follows:

PART 295—AVAILABILITY OF INFORMATION AND RECORDS TO THE PUBLIC

Sec.

295.1 General statement.

295.2 Organizational description.

295.3 Informational and educational publications.

295.4 Program evaluation status reports.

295.5 Program statistical reports.

295.6 Public inspection and copying.

295.7 Indexes.

295.8 Requests.

295.9 Appeals.

Authority: 5 U.S.C. 301, 552; 7 CFR 1.1-1.23.

§ 295.1 General statement.

This part is issued in accordance with the regulations of the Secretary of Agriculture at 7 CFR 1.1-1.23, and appendix A, implementing the Freedom of Information Act (5 U.S.C. 552). The Secretary's regulations, as implemented by the regulations in this part, govern the availability of records of FCS to the public.

§ 295.2 Organizational description.

The description of the central and field organization of FCS is published as a notice in the Federal Register and may be revised from time to time in like manner. Such description contains a listing of FCS headquarters and field organizational units and their functions.

§ 295.3 Informational and educational publications.

FCS publishes a wide variety of informational and educational periodicals, pamphlets, brochures, leaflets, guides, and educational aids explaining the operation of FCS food