

Proposed Changes to GAO Bid Protest Rules: Greater Formality, Overall Familiarity

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On April 15, 2016, the Government Accountability Office (GAO) issued a proposed rule in the Federal Register that would amend its current bid protest regulations, codified at 4 C.F.R. Part 21.¹ The proposed rule adds a degree of formality to the protest process, including a modest filing fee and the use of an electronic filing system similar to the one used by most federal courts. Overall, however, the rule mainly codifies or clarifies existing protest practices, with certain limited exceptions. We summarize the key proposed amendments below.

1) Electronic Filing System

In order to comply with a statutory mandate, GAO will be implementing an electronic filing system called the Electronic Protest Docketing System (EPDS) that will be similar to that used by the federal courts. EPDS will be “the sole means for filing a bid protest at GAO,” except that classified material must not be filed through EPDS.

GAO currently requires litigants to transmit protest filings to an email address (protests@gao.gov) and copy all relevant parties. Barring technical hiccups, the introduction of an electronic filing system will simply add a small amount of time and effort to the filing process.

2) Filing Fee of \$350

GAO also plans to introduce a filing fee of \$350 for new protests, payable through EPDS. GAO estimates that this sum will be necessary to support EPDS over the next several years, but GAO will revisit the amount of the fee every two years.

The filing fee certainly represents an added cost to protesters. It is slightly lower than the filing fee of \$400 required at the Court of Federal Claims.

¹ The proposed rule is available at <https://www.gpo.gov/fdsys/pkg/FR-2016-04-15/pdf/2016-08622.pdf>.

3) Time for Filing a Protest

The proposed rule clarifies that, in a situation where “the basis for a protest becomes known when there is no solicitation closing date or when no further submissions in response to the solicitation are anticipated,” any protest must be filed within 10 days of when the basis of protest was known or should have been known. Further, the proposed rule provides that the foregoing requirement is not affected by a separate, extant regulation that gives protesters until 10 days following a required debriefing to file a protest.

One of the more substantive proposed amendments, this new provision is designed to “resolve[] a potential uncertainty” in GAO’s timeliness rules that GAO recently addressed in *Protect the Force Inc. —Recon.*, B–411897.3, Sept. 30, 2015, 2015 CPD ¶ 306. In that case, the agency amended the solicitation on July 27, 2015 but did not give offerors an opportunity to submit revised proposals. Two days later, on July 29, 2015, the agency announced that the protester had not been selected for award. The protester requested a debriefing, which was held on August 5, 2015, and the protester filed its protest on August 10, 2015. GAO dismissed the protester’s challenge to the modified solicitation terms as untimely under the principle articulated above.

This amendment will bring clarity in this area of protest procedure.

4) Communications among Parties

The proposed rule includes the requirement that: “All parties shall provide copies of all protest communications to the agency and to other participating parties either through EPDS or by email” and states that GAO will provide further guidance as to “when communications must be made through EPDS or email.” This amendment seems to defer the issue of whether and when protest communications must use EPDS. Some communications, such as formal filings, should be made through EPDS. Other communications, such as information discussions between the parties, should not—for example, communications between counsel for the intervenor and the agency as they both work to defend an award. This is an important issue that should be adequately addressed in the final rule.

5) Submission of the Agency Report

At least five days prior to issuing its Agency Report responding to a protest, an agency is required, under the current regulations, to file an index of the documents it intends to produce so that a protester has an opportunity to object to the agency’s planned production and GAO has an opportunity to resolve any production dispute. The proposed rule clarifies that “[i]f the fifth day prior to the filing of the report falls on a weekend or Federal holiday, the response [to a request for documents] shall be filed on the last business day that precedes the weekend or holiday.”

This amendment seems designed to prevent an agency from producing its document index immediately before filing its Agency Report. Such late production unfairly deprives a protester of its allotted time to request further documents and requires the protester to attend to document production issues in the midst of its “comment period”—the 10 days within which a protester must file its Comments on the Agency Report.

6) Protective Orders

With regard to protective orders, the proposed rule provides that a party that files a document containing protected material “shall provide to the other parties (unless they are not admitted to the protective order) an initial proposed redacted version of the document within 1 day after the protected version is filed.” The

rule provides further: “Within 5 days after the proposed redacted version of a document is provided, the party that authored the document shall file a final redacted version of the document, which has been agreed to by all of the parties. Only the final agreed-to version of a redacted document must be filed.”

Currently, GAO’s standard protective order does not include a specific timeline to submit redactions and, in practice, many parties opt not to prepare redacted versions of protected protest filings, other than the protest itself, in order to save time and cost. The proposed rule seems to impose a stricter mandate to prepare redactions of all protected filings, which may add cost to the protest. Moreover, it may be impractical to expect that a party responsible for filing a final redacted document necessarily can do so within five days, given that all parties must agree to the redactions.

7) Withholding of Award and Suspension of Contract Performance

GAO proposes to add the filing requirement to its regulations: “An agency shall file a notification in instances where it overrides a requirement to withhold award or suspend contract performance, and it shall file a copy of any issued determination and finding.”

In the unusual case in which an agency decides to override the automatic suspension of performance required by the Competition in Contracting Act during the pendency of a protest, this rule would ensure that such a decision is well publicized and that a protester is given appropriate notice to challenge it.

8) Recommendation for Reimbursement of Costs

GAO also proposes to expand on and modify its existing procedures for recommending the award of protest costs in the event the agency takes corrective action in response to a protest. The proposed rule provides that a protester must file a request that GAO recommend reimbursement of costs “not later than 15 days after the date on which the protester learned (or should have learned, if that is earlier) that GAO had closed the protest based on the agency’s decision to take corrective action.” The agency must file a response 15 days after that, and then the protester must file comments on the agency’s response within the following 10 days—or else GAO will *dismiss* the request for costs. The rule establishes similar filing deadlines where GAO has to resolve a dispute over the quantum of costs to be paid by an agency. GAO’s current regulations require only that a protester file its request for costs within the 15-day window described above. The agency’s response currently is discretionary.

9) Time for Decision by GAO

The proposed rule also states that: “GAO shall issue a decision on a protest within 100 days after it is filed. GAO will attempt to resolve a request for recommendation for reimbursement of protest costs under § 21.8(e), a request for recommendation on the amount of protest costs under § 21.8(f), or a request for reconsideration under § 21.14 within 100 days after the request is filed.”

The 100-day deadline for a protest decision is a current requirement, and GAO adheres to it strictly. The 100-day aspirational deadlines for requests for protest costs and reconsideration are new.

The net result of GAO’s proposed changes will be to add slightly more certainty and transparency to the process and timing of bid protests. Comments on the proposed rule are due May 16, 2016.

If you have any questions about the content of this Alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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