

# 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 Federal Acquisition Streamlining Act of 1994 (FASA) and to conform GAO's current regulation to the practice that has evolved at GAO since April 1991, when GAO last revised part 21. The proposed revision will improve the overall efficiency and effectiveness of the bid protest process at GAO by streamlining the process, by reducing the costs of pursuing protests at GAO for all parties, and by permitting GAO to resolve protests as expeditiously as possible. FASA requires that the implementing regulation be concise and easily understood by vendors and government officials, and the proposed revision reflects this requirement. The proposed revision shortens the regulation, even though several provisions implementing FASA are added.

**DATES:** Comments must be submitted on or before April 3, 1995.

**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:** The proposed revision to the General Accounting Office's (GAO) Bid Protest Regulations implements statutory changes contained in the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. 103-355, 108 Stat.

3243, dated October 13, 1994. The proposed revision is based on GAO's experience with the prior revision to its regulation, including the use of protective orders and hearings, which became effective on April 1, 1991 (56 FR 3759). The proposed revision conforms GAO's current regulation to the practice that has evolved at GAO since April 1991, and will improve the bid protest process at GAO. In revising its regulation, GAO was guided by the statutory mandate in sec. 10002(e) of FASA that regulations implementing FASA be concise and easily understood by vendors and government officials, and by the principle that GAO's bid protest process remain as uncomplicated and informal as possible, consistent with the goal of providing expeditious and meaningful relief to vendors wrongfully excluded from procurements. More specifically, the proposed revision will streamline the process, reduce the costs of pursuing protests at GAO for all parties, and permit GAO to resolve protests as expeditiously as possible. The regulation is shortened overall, even though several new provisions are added in order to implement FASA. Redundancies are eliminated and language changes reflect an effort to make the regulation clearer and more readable.

Explanations of significant revisions to GAO's Bid Protest Regulations are set forth below.

GAO's proposed regulation at 4 CFR 21.1(f), currently at § 21.3(b), requires that if a protester believes that the protest includes confidential information which should be withheld, the protester must advise GAO of this fact on the front page of the protest submission and must file, simultaneously with the filing of its protest with GAO, a redacted copy of the protest which omits the information. GAO does not anticipate that this requirement will impose a significant burden since a protester is currently obligated to identify, "wherever it appears," information in its protest that it believes should be withheld as permitted by law.

Paragraphs (c) and (d) of § 21.3 implement the statutory requirement set forth in sec. 1015 and 1065 of FASA that if any party to a protest filed with GAO so requests, the agency shall produce a protest file. The statutory

language of those sections calls for the implementing regulation to be consistent with the regulation regarding the preparation and submission of the so-called "rule 4 file" in protests before the General Services Administration Board of Contract Appeals (GSBCA). In light of that direction, and taking into account the somewhat longer period for deciding protests filed with GAO, the proposed regulation provides that when requested, the agency is to prepare and submit a protest file to GAO, the protester, and any intervenors within 20 calendar days after the agency's receipt of the request. (In revising its current regulation, GAO has converted from "working days" to "calendar days" consistent with the requirements of FASA.)

GAO believes that requiring an agency to produce a protest file, when one is requested, early in the bid protest process will make it easier to carry out the mandate in sec. 1403 of FASA that supplemental protests not delay the issuance of a decision by GAO. Currently, supplemental protests are generally based on information included in the documents contained in the agency report, and must generally be filed within 10 working days of the protester's receipt of the documents. GAO believes that if an agency provides the relevant documents early in the process, supplemental protests will be filed earlier. Consequently, the meaningful protest issues which need to be addressed by GAO will be identified by the parties earlier in the process, thus benefiting all parties in terms of time and costs. Further, GAO believes that early production of the protest file will allow bid protests to be resolved as expeditiously as possible, which will shorten procurement suspensions.

As with the "rule 4 file," the protest file under the proposed regulation will contain only pre-existing documents, rather than documents prepared in response to the protest. As detailed in paragraph (e) of § 21.3, the contracting officer's statement of the relevant facts and a memorandum of law are to be filed within 35 calendar days after the agency receives telephone notice of the protest from GAO.

Section 21.5(h), currently § 21.3(m)(10), removes GAO's consideration of subcontract protests where the subcontract is "by or for the government"; rather, GAO will consider

protests concerning awards of subcontracts by or for a Federal agency as nonstatutory protests in accordance with § 21.13 where the agency awarding the prime contract has requested in writing that subcontract protests be decided by GAO. In *US West Communications Services, Inc. v. United States*, 940 F.2d 622 (Fed. Cir. 1991), the court called into question the GSBCA's review of a prime contractor's award of a subcontract based on the language in the Competition in Contracting Act of 1984, 40 U.S.C. 759(f)(9)(A) (1988), which authorizes the GSBCA to review protests of a solicitation by a Federal agency for bids or proposals for a proposed contract or contract. GAO's statutory language in this regard is basically identical to that of the GSBCA. In the absence of any language in FASA which addresses this matter, GAO believes that it is appropriate to treat protests against awards of subcontracts by or for a Federal agency as nonstatutory protests.

Comments concerning the proposed rule should reference file number B-259187. Comments may be filed by hand delivery or mail at the address in the address line, or comments may be filed 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, part 21 of the Code of Federal Regulations is proposed to be revised 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 option.
  - 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 a period of time for the purpose of this part, the day from which the period begins to run is not counted. 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 filing 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 or mail; 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 and that the entire document is received by 5:30 p.m. on the due date.

#### § 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 number 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) Specifically request a ruling by the Comptroller General of the United States,

(6) State the form of relief requested, and

(7) Request specific documents relevant to the protest grounds.

(d) The protester shall furnish a copy of the protest 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 copy of the protest no later than 1 day after the protest is filed with GAO. The protest document must indicate that a copy is being furnished within 1 day to the appropriate individual or location.

(e) 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.

(f) GAO will not withhold material submitted by a protester from any party outside the government unless it is permitted to do so by law. 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, simultaneously with the filing of its protest with GAO, a redacted copy of the protest which omits the information.

(g) 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.

(h) A protest may be dismissed for failure to comply with any of the requirements of this section. However, a protest shall not be dismissed for failure to comply with paragraph (d) 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) In cases other than those covered in paragraph (a)(1) of this section, protests shall be filed not later than 14 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 14 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 14-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 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 any communications to the contracting agency and to other participating parties.

(b) A contracting agency 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) If any party to the protest so requests, the contracting agency shall prepare a protest file and provide a copy to GAO within 20 days after the agency's receipt of the request. The contracting agency shall simultaneously furnish a copy of the protest file to the protester and any intervenors. The protest file shall include an index and a copy of all relevant documents 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 or portions relevant to the protest; the abstract of bids or offers or relevant portions; and any other relevant documents. The contracting agency shall provide any additional documents requested in the protest or explain why it is not required to produce the documents. The contracting agency may request that the protester produce relevant documents that are not in the agency's possession.

(d) Information exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552, may be omitted in the copy of the protest file provided to the parties, unless counsel for a party has been admitted to a protective order issued in the protest, in which case the file shall be provided to counsel in accordance with the protective order.

(e) The contracting agency shall file a report on the protest with GAO within 35 days after the telephone notice of the protest from GAO. The report shall include all relevant documents as set forth in paragraph (c) of this section, except to the extent already produced in the protest file, as well as the contracting officer's statement of the relevant facts and a memorandum of law.

(f) Subject to any protective order issued in the protest, 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 and shall identify any documents, or portions of documents, withheld from any party and the reason for the withholding. 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.

(g) The contracting agency may request an extension of time for the submission of the protest file or agency report. Extensions will be granted sparingly.

(h) 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 and an index to GAO and the other parties within 5 days or explain why it is not required to produce the documents.

(i) Upon the request of a party, GAO will decide whether the contracting agency must provide any withheld 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 10 days after its receipt of the documents, unless otherwise specified by GAO.

(j) Comments on the agency report shall be filed with GAO within 14 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 14-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 14 days for the submission of comments, GAO will set a new date for the submission of comments. Extensions will be granted sparingly.

(k) GAO may permit or request 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.

#### § 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, in the first instance, 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 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 anytime 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 protested to the General Services Administration Board of Contract Appeals.* Interested parties may protest a procurement or proposed procurement of automated data processing equipment and services to the General Services Administration Board of Contract Appeals. After a protest to the Board, the same procurement generally may not be the subject of a protest to GAO. 40 U.S.C. 759(f).

(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 or 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(e).

(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.

(a) The following requirements regarding the withholding of award and the suspension of contract performance when a protest is filed with GAO are set forth in 31 U.S.C. 3553 (c) and (d). There is an additional requirement contained in 48 CFR 33.104(d) that the contracting officer give written notice to the protester and other parties of any

decision to proceed with award or to continue contract performance. The requirements are included here for informational purposes.

(b) When the contracting agency receives notice of a protest from GAO prior to award of a contract, it may not award a contract under the protested procurement while the protest is pending unless the head of the procuring activity responsible for award of the contract determines in writing and reports to GAO that urgent and compelling circumstances significantly affecting interests of the United States will not permit waiting for GAO's decision. This finding may be made only if the award is otherwise likely to occur within 30 days.

(c) When the contracting agency has awarded the contract, but receives notice of a protest from GAO within 10 days of the date of contract award, or within 5 days after the debriefing date offered to an unsuccessful offeror for any debriefing that is requested and, when requested, is required, the agency shall immediately direct the contractor to cease contract performance and to suspend related activities that may result in additional obligations being incurred by the government under that contract while the protest is pending. The contracting officer responsible for award of the contract may authorize contract performance notwithstanding the pending protest if he or she determines in writing and reports to GAO that:

- (1) Performance of the contract is in the government's best interest, or
- (2) Urgent and compelling circumstances significantly affecting interests of the United States will not permit waiting for GAO's decision.

#### **§ 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.

(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. All parties may file consolidated comments on the hearing and the agency report with GAO, with copies furnished to the other parties, within 7 days after the hearing was held or as specified by GAO. 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 may dismiss the protest.

(h) In post-hearing comments, the parties should cite to specific testimony during the hearing relevant to the disposition of the protest.

#### **§ 21.8 Remedies.**

(a) If GAO determines that a solicitation, cancellation of a solicitation, termination 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) Recompete 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 makes the finding referred to in § 21.6(c)(1) 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 14 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 14 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 shall result in forfeiture of the protester's right to recover its costs. GAO may consider an untimely claim for good cause shown.

(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 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 125 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, within the time limit established in paragraph (a) of this section for decision on the initial protest. If an amended protest cannot be resolved within that time limit, GAO may resolve the amended protest using the express option procedures in § 21.10.

#### § 21.10 Express option.

(a) Any party may request that GAO decide a protest on an "express option" expedited schedule.

(b) The expedited schedule will be adopted at the discretion of GAO and only in those cases suitable for resolution within 65 days.

(c) Requests for an expedited schedule shall be in writing and received in GAO no later than 3 days after the protest or supplemental protest is filed. GAO will promptly notify the parties whether the case will be handled on an expedited schedule.

(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 7 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 7 days after the hearing was held or as specified by GAO.

(4) If all parties agree, GAO will resolve protests decided on an expedited schedule by a summary decision.

(5) Where circumstances demonstrate that a case is no longer suitable for

resolution on an expedited schedule, GAO shall establish a new schedule for submissions by the parties.

#### § 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 file 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 part 21 for filing the agency report (§ 21.3(e)), filing comments on the report (§ 21.3(j)), 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's electronic bulletin board.

#### § 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 its protests decided by GAO.

(b) The provisions of this part shall apply to nonstatutory protests except for the provisions of § 21.3(c) pertaining to the contracting agency protest file and § 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 14 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

### Animal and Plant Health Inspection Service

#### 9 CFR Part 85

[Docket No. 94-064-1]

#### Official Pseudorabies Tests

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** We are proposing to amend the pseudorabies regulations by adding the glycoprotein I enzyme-linked immunosorbent assay approved differential test to the list of official pseudorabies tests, which would allow certain pseudorabies vaccinated swine to be moved interstate to destinations other than those currently allowed. Under the current pseudorabies regulations, pseudorabies vaccinated swine that are not from a qualified negative gene-altered vaccinated herd may be moved interstate only for slaughter or to a quarantined herd or quarantined feedlot. This proposed change would allow, under certain conditions, the glycoprotein I enzyme-linked immunosorbent assay approved differential test to be used as an official pseudorabies test to qualify certain