

Rules and Regulations

Federal Register

Vol. 60, No. 154

Thursday, August 10, 1995

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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 proposed rule published on January 31, 1995. The final rule implements the Federal Acquisition Streamlining Act of 1994 (FASA) and conforms GAO's current regulation to the practice that has evolved at GAO since April 1991, when GAO last revised part 21. The final rule will improve the overall efficiency and effectiveness of GAO's bid protest process 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. The final rule reflects the requirement in FASA that the implementing regulation be concise and easily understood by vendors and government officials. The final rule shortens the regulation, even though several provisions implementing FASA are added.

EFFECTIVE DATE: October 1, 1995.

FOR FURTHER INFORMATION CONTACT: Michael R. Golden (Acting Associate 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 56 FR 3759 on April 1, 1991. That previous rule will also be

used to consider (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 January 31, 1995, GAO published a proposed rule (60 FR 5871) in which it proposed to revise its Bid Protest Regulations. The supplementary information included with the proposed rule explained that the proposed revision to GAO's regulation implemented the 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 rule also was based on GAO's experience with the previous rule, including the use of protective orders and hearings, which was published at 56 FR 3759 on April 1, 1991. The proposed rule conformed GAO's regulation to the practice that had evolved at GAO since April 1991.

In revising its regulation, GAO has been guided by the statutory mandate in sec. 10002(e) of FASA that the implementing regulation 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, GAO's final rule 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. GAO's regulation is shortened overall, even though several new provisions implementing FASA are added. Redundancies are eliminated and language changes reflect an effort to make the regulation clearer and more readable.

Summary of Comments

Interested persons were invited to submit comments on GAO's proposed rule by April 3, 1995. We received written comments from 11 Federal agencies, 2 bar associations, 4 law firms, 1 industry association, and 2 members

of the public. In adopting this final rule, we have carefully considered all comments received. The commenters generally were supportive of our efforts to streamline the bid protest process and to provide expeditious and meaningful relief to vendors wrongfully excluded from procurements. In this regard, the commenters suggested further language changes consistent with these goals. We have adopted many of these suggestions in the final rule to improve the efficiency of the process.

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

One commenter recommended that we expand the definition of "intervenor" in § 21.0(b) to include entities which participated in a procurement which were not selected for award. It was suggested that these entities be considered "intervenor" in spite of their decision not to file a protest. Because these entities can file a protest in their own right, we do not believe that expansion of the definition of "intervenor" is warranted. Also, under § 21.3(i), GAO may permit, or even request, the submission of statements by entities which do not choose to, or cannot, participate as a matter of right in a protest. For example, it has been our practice to allow submissions from trade associations and other participants in a procurement.

Section 21.1—Filing a Protest

One commenter, in supporting our efforts to make the final rule more "user-friendly," suggested that we further revise the language in § 21.1(c), which lists the elements of a protest filing, to include certain additional elements. We basically adopted this suggestion by adding language to require a protester to establish in its protest its interested party status and the timeliness of its protest. Moreover, we have added a new paragraph (d) to this section (and accordingly, have redesignated subsequent paragraphs) which provides that in addition, protesters may request in their protests a protective order, specific documents relevant to the protest grounds, and a hearing. Further, we have revised the language in redesignated paragraph (i) of this section to provide that protests will not be dismissed if a protester fails

to request in its initial protest filing a protective order, specific documents relevant to the protest grounds, or a hearing. We believe these revisions will significantly simplify a protester's preparation of its protest.

In response to a commenter's concern that the agency does not always receive a complete copy of a protest and all attachments, we have added language to redesignated paragraph (e) of § 21.1 to make it clear that the protester is obligated to furnish the agency with a complete copy of its protest, including all attachments.

With respect to redesignated paragraph (g) of § 21.1, several commenters argued that the requirement for the simultaneous submission at GAO of a redacted version of a protest (omitting confidential information), along with the full, unredacted protest, would be unduly burdensome. Accordingly, we have revised the language in this section to require that a redacted version of the protest be filed with GAO within 1 day after the filing of the unredacted protest.

Section 21.2—Time for Filing

In the proposed rule, consistent with the requirements of FASA, we have converted our timeliness rules from "working days" to "calendar days." Accordingly, a protester may file a protest (which does not involve an alleged solicitation impropriety) not later than 14 calendar days (as opposed to 10 working days) after the basis of protest is known or should have been known, whichever is earlier.

Section 1402(b) of FASA requires an agency which receives notice of a protest from GAO within 10 days after 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 to immediately direct the contractor to suspend contract performance. According to one commenter, Congress intended to provide meaningful relief to an unsuccessful offeror which filed a protest within 5 calendar days after a required debriefing, thus obviating the unsuccessful offeror's need to file a "defensive" protest prior to receiving all information to which it is entitled pursuant to a statutorily required debriefing.

In light of the 14-calendar-day rule for filing timely protests, the commenter argued that if a protest is based on information discovered before a required debriefing, the protester cannot wait to file its protest until after it is debriefed since, at that point, the 14-calendar-day period for filing a timely

protest may have expired, although the protest may still be timely for the purpose of requiring the agency to suspend contract performance. For this reason, the commenter suggested that we change our timeliness rules to provide that a protest, other than one based on an alleged solicitation impropriety, be considered timely if it is filed within 14 calendar days after the protester knew (or should have known, if that is earlier) the basis of protest, or if it is filed within 5 calendar days after the required debriefing, whichever is later.

While we believe that this recommendation should be given further consideration, we decline to adopt this suggestion in the final rule because such a significant change to our longstanding timeliness rules should be published for comment prior to implementation. We plan to evaluate the protest practice which evolves in response to the implementation of the new debriefing requirements of FASA. If experience shows that a revision to our timeliness rules would be beneficial to the bid protest system, we will consider further rulemaking.

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

In response to a suggestion from a commenter, we have added language to § 21.3(a) to require that all protest communications be sent by means reasonably calculated to effect timely delivery. We believe this change will improve the efficiency of the bid protest process.

In response to suggestions from several commenters, we also have added language to clarify § 21.3(b) and to specifically acknowledge, consistent with our current practice, that an intervenor, as well as an agency, may file a request for dismissal of a protest prior to submission of the agency report.

Several commenters expressed concern regarding our implementation of the protest file requirement contained in sec. 1015 and 1065 of FASA. It was the consensus of these commenters that requiring an agency to file a protest file within 20 days of a request for such a file in every one of the large number of protests filed with our Office would represent an undue burden, in particular because of the need to redact the documents in the protest file. These commenters pointed out that many protests are dismissed (or withdrawn) within the first 20 days after filing, and that in those cases, the time and effort devoted to preparing a protest file would be wasted. In addition, some of these commenters stated that they

would be forced to litigate every protest, even where summary dismissal is appropriate, because they would be compelled to devote their limited resources to preparing a protest file rather than to drafting requests for summary dismissal.

In response to the concerns expressed, we have decided not to adopt the protest file requirement at this time. While we continue to believe that filing a protest file early in the bid protest process will permit a more expeditious resolution of protests and offer other system efficiencies, in view of the concern that the requirement for early preparation of protest material is unduly burdensome, we have elected at this time not to implement a mandatory protest file requirement as part of our bid protest procedures.

In any event, we note that the agencies have a statutory obligation to implement a protest file procedure. Rather than our Office implementing a protest file requirement at this time, we think it is appropriate that the protest file requirement be implemented, in the first instance, in the Federal Acquisition Regulation (FAR). However, it remains our intention, in appropriate cases, to encourage agencies to voluntarily provide a protest file early in the bid protest process to ensure prompt development and resolution of protests, and to avoid the need for GAO to invoke the express option in roll-over situations (*i.e.*, those cases where GAO closes an initial protest without deciding the merits of the protest grounds originally raised because a subsequently filed protest, with new or related protest grounds, potentially renders a decision on the initial protest grounds meaningless). In this regard, in response to suggestions from several commenters, we have clarified the language in § 21.10(a) by expressly stating that GAO may invoke the express option on its own initiative. We plan to closely evaluate the impact of such voluntary use of the protest file and, if the results prove to be of benefit to the process, we will consider formally incorporating the protest file requirement into our procedures.

In response to a commenter's concern that the language in § 21.3(c) permitting an agency to request relevant documents from a protester will allow for "wide-open" document requests, we have clarified the language in this section to limit these requests to "appropriate cases."

To conform our regulation to current practice, we have revised the language in § 21.3(e) to provide for granting an agency's requests for extensions of time for submission of agency reports "on a

case-by-case basis," rather than granting these requests "sparingly," the language which is used in our current regulation. (For consistency, we also have revised the language in § 21.3(h) to provide for granting a protester's requests for extensions of time for submission of comments "on a case-by-case basis," rather than granting these requests "sparingly," the language which is used in our current regulation.)

Section 21.5—Protest Issues Not for Consideration

Several commenters questioned our language change in § 21.5(b)(2) which provides that we will review the refusal by the Small Business Administration to issue a certificate of competency because of "a failure to consider vital information bearing on the firm's responsibility." We added this language to reflect our current case law. See *COSTAR*, B-240980, Dec. 20, 1990, 90-2 CPD ¶ 509; *American Industrial Contractors, Inc.*, B-236410.2, Dec. 15, 1989, 89-2 CPD ¶ 557.

Section 21.6—Withholding of Award and Suspension of Contract Performance

The information provided in § 21.6 is significantly modified. This section in the proposed rule repeated in substance the requirements for the withholding of award and the suspension of contract performance which are contained in 48 CFR part 33. These requirements are to be carried out by the agencies, not our Office, and therefore we refer readers to the relevant statutory and regulatory provisions addressing these requirements.

Section 21.7—Hearings

With regard to paragraphs (g) and (h) of § 21.7, several commenters requested clarification of the requirement for agencies to file consolidated post-hearing comments on the hearing and agency report, and clarification of the requirement to reference relevant hearing testimony and admissions. We have adopted the language recommended by the commenters.

Section 21.8—Remedies

Several commenters suggested that we address how we will implement the fee limitation provisions contained in sec. 1403 of FASA. We have added language to § 21.8(f)(2) referencing the statutory language of FASA. The agencies will adjudicate, in the first instance, claims for costs consistent with the statutory fee limitation provisions. If a protester and agency cannot reach agreement on a claim for costs within a reasonable time, we may, upon request of the

protester, recommend the amount of costs the agency should pay in accordance with the statutory fee limitation provisions.

Regarding the limitation on attorneys' fees, issues involving, for example, a request for higher fees based on the cost of living or a special factor are more appropriately resolved on a case-by-case basis. We expect to provide necessary guidance to parties through our decisions. Concerning the consultant and expert witness fee limitation, FASA limits the payment of these fees to "the highest rate of compensation * * * paid by the Federal Government." While there is some difference of opinion among the commenters on whether Congress intended to cap fees at the highest rate fixed by the Classification Act Schedules 15, see 5 U.S.C. 3109, we believe that the proposed FAR implementation, which limits consultant and expert witness fees to the highest rate fixed by 5 U.S.C. 3109, is appropriate and consistent with the statutory language. We are unaware of any legislative history which suggests that this implementation is contrary to congressional intent.

Section 21.10—Express Option, Accelerated Schedule, and Summary Decision

Section 21.10 has been clarified to confirm that GAO may resolve any protest using a flexible, accelerated schedule. In addition, for any protest, GAO may issue a summary decision. We anticipate that a request for a summary decision will be made as soon as practicable after the protest is filed, thus permitting GAO to expedite the decision-making process in order to minimize the disruption to the procurement process.

Section 21.12—Distribution of Decisions

As stated in § 21.12, we have established an electronic distribution system to facilitate expedited access to decisions. The telephone number for obtaining information regarding access to this electronic distribution system is 202-512-5282. In addition, the telephone number for GAO's case status line is 202-512-5436. We encourage parties requiring copies of decisions or case status information to use these telephone numbers. We are also changing the format of bid protest decisions. In order to provide a more uniform format and to facilitate distribution through electronic systems, the decisions themselves will not have an original signature, but the typed designation "Comptroller General of the United States."

Section 21.13—Nonstatutory Protests

One commenter expressed concern with the language of § 21.13 regarding an agency's agreement to have its protests decided by GAO. While we believe that a language change is not required, we point out that the language in this section is intended to permit agencies to agree, in advance, that our Office decide a class of cases or a particular case. Once a protest is filed, however, we do not anticipate that an agency will revoke an agreement to have the pending protest decided by our Office, and, in fact, in the past no agency has revoked such an agreement.

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 option, accelerated schedule, and summary decision.
 - 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 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 relevant to the protest grounds, and

(3) Request a hearing.

(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 no 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, within 1 day after the filing of its protest with GAO, a redacted copy of the protest which omits the information.

(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) 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, 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 timely 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 35 days after the telephone notice of the protest from GAO. The report shall include the contracting officer's statement of the relevant facts, a memorandum of law, and 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. In appropriate cases, the contracting agency may request that the protester produce relevant documents that are not in the agency's possession.

(d) 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 and shall identify in an index 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.

(e) The contracting agency may request an extension of time for the submission of the agency report. Extensions will be granted on a case-by-case basis.

(f) 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.

(g) 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.

(h) 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 on a case-by-case basis.

(i) 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 decisionmaking 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 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 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 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) and are implemented by 48 CFR part 33.

§ 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. Each party shall file with GAO, within 7 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 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 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 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 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 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, accelerated schedule, and summary decision.

(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 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 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 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) 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) At the request of a party or on its own initiative, GAO may resolve any protest using an accelerated schedule and/or may issue a summary decision for any 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(h)), 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 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.

[FR Doc. 95-19747 Filed 8-9-95; 8:45 am]
BILLING CODE 1610-01-P

**OFFICE OF PERSONNEL
MANAGEMENT****5 CFR Part 532**
RIN 3206-AG76**Prevailing Rate Systems; Abolishment
of Atlanta, Georgia, Special Wage
Schedules for Printing Positions**

AGENCY: Office of Personnel
Management.
ACTION: Final rule.

SUMMARY: The Office of Personnel Management is issuing a final rule to abolish the Federal Wage System special wage schedule for printing positions in the Atlanta, Georgia, wage area. Printing and lithographic employees in Atlanta, Georgia, will now be paid rates from the regular Atlanta, Georgia, wage schedule.

EFFECTIVE DATE: September 11, 1995.
FOR FURTHER INFORMATION CONTACT:
Paul Shields, (202) 606-2848.

SUPPLEMENTARY INFORMATION: On May 17, 1995, OPM published an interim rule to abolish the Federal Wage System special wage schedule for printing positions in the Atlanta, Georgia, wage area. The interim rule provided a 30-day period for public comment. OPM received no comments during the comment period. Therefore, the interim rule is being adopted as a final rule.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will affect only Federal agencies and employees.

List of Subjects in 5 CFR Part 532

Administrative practice and procedure, Freedom of information, Government employees, Reporting and recordkeeping requirements, Wages.

Accordingly, under the authority of 5 U.S.C. 5343, the interim rule amending 5 CFR part 532 published on May 17, 1995 (60 FR 26341), is adopted as final without any changes.

U.S. Office of Personnel Management.

Lorraine A. Green,
Deputy Director.

[FR Doc. 95-19749 Filed 8-9-95; 8:45 am]
BILLING CODE 6325-01-M

**MERIT SYSTEMS PROTECTION
BOARD****5 CFR Part 1201****Practice and Procedure; Realignment
of Regional Offices**

AGENCY: Merit Systems Protection
Board.
ACTION: Final rule.

SUMMARY: The Merit Systems Protection Board (the Board) announces the realignment of the geographical jurisdiction of certain regional and field offices and the approved hearing locations for all of its offices. The realignment affects the Atlanta, Philadelphia, San Francisco and Washington, DC. Regional Offices and the Denver, New York, and St. Louis Field Offices.

EFFECTIVE DATE: August 10, 1995.

FOR FURTHER INFORMATION CONTACT:
Darrell L. Netherton, Senior Executive
for Regional Administration, (202) 653-
7980.

SUPPLEMENTARY INFORMATION: The Board announces the realignment of the geographical jurisdiction of certain regional and field offices and the approved hearing locations for all of its offices. As a result, the Board will be more responsive to the needs of appellant and agency clients while maximizing the use of its financial and human resources.

Appeals and related matters will continue to be filed with the regional or field office having geographic jurisdiction. Accordingly, appellants, agencies and other interested parties should carefully review the regional and

field office jurisdictional boundary changes in Appendix II and the changes in the approved hearing locations in Appendix III.

The Board is publishing this rule as a final rule pursuant to 5 U.S.C. 1204(h).

List of Subjects in 5 CFR Part 1201

Administrative practice and procedure, Civil rights, Government employees.

PART 1201—[AMENDED]

Accordingly, the Board amends 5 CFR part 1201 as follows:

The authority citation for part 1201 continues to read as follows:

Authority: 5 U.S.C. 1204 and 7701 unless otherwise noted.

Appendices II and III to part 1201 are revised to read as follows:

**Appendix II to Part 1201—Appropriate
Regional or Field Office for Filing Appeals**

All submissions shall be addressed to the Regional Director, if submitted to a regional office, or the Chief Administrative Judge, if submitted to a field office, Merit Systems Protection Board, at the addresses listed below, according to geographic region of the employing agency or as required by § 1201.4(d) of this part. The facsimile numbers listed below are TDD-capable; however, calls will be answered by voice before being connected to the TDD. Address of Appropriate Regional or Field Office and Area Served:

1. Atlanta Regional Office
401 Peachtree Street NW., 10th floor
Atlanta, Georgia 30308-3519
Facsimile No.: (404) 730-2767
(Alabama, Florida, Georgia, Mississippi, South Carolina and Tennessee, east of the Tennessee River)
2. Chicago Regional Office
230 South Dearborn Street, 31st floor
Chicago, Illinois 60604-1669
Facsimile No.: (312) 886-4231
(Illinois—all locations north of Springfield, Indiana, Michigan, Minnesota, Ohio, and Wisconsin)
3. St. Louis Field Office
911 Washington Avenue, Suite 410
St. Louis, Missouri 63101-1203
Facsimile No.: (314) 425-4294
(Illinois—Springfield and all locations south of Springfield, Iowa, Kansas City, Kansas, Kentucky, Missouri, and Tennessee west of the Tennessee River)
4. Dallas Regional Office
1100 Commerce Street, Room 6F20
Dallas, Texas 75242-9979
Facsimile No.: (214) 767-0102
(Arkansas, Louisiana, Oklahoma, and Texas)
5. Denver Field Office
730 Simms Street, Suite 301
PO Box 25025
Denver, Colorado 80225-0025
Facsimile No.: (303) 231-5205
(Arizona, Colorado, Kansas—except Kansas City, Montana, Nebraska, New Mexico,