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GENERAL ACCOUNTING OFFICE

4 CFR Part 21

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

AGENCY: General Accounting Office.

ACTION: Final rule.

SUMMARY: The General Accounting Office (GAO) is amending its Bid Protest Regulations after receiving and considering comments on the proposed rule published on October 1, 2002. The final rule, promulgated in accordance with the Competition in Contracting Act of 1984, conforms the current regulations to current practice, and otherwise improves the overall efficiency and effectiveness of the bid protest process at GAO. GAO has not revised Part 21 since 1996, and the amendment will clarify several aspects of the bid protest process that have evolved since that time.

EFFECTIVE DATE: January 1, 2003.

FOR FURTHER INFORMATION CONTACT: John M. Melody (Assistant General Counsel) or David A. Ashen (Deputy Assistant General Counsel), 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 61 FR 39039 on July 26, 1996. That previous rule will also be applied in considering (1) protests filed on or after the effective date of this rule that 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 that concern a protest considered under the previous rule.

Background

On October 1, 2002, GAO published a proposed rule (67 FR 61542) in which it proposed to revise its Bid Protest Regulations. The supplementary information included with the proposed rule explained that the proposed revisions to GAO's regulations, promulgated in accordance with the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556, were prompted by GAO's recognition that there have been legal developments and changes in practice that have occurred since the last revision, in 1996. For example, the use of alternative dispute resolution (ADR) has grown in practice and electronic filing of protests has become technologically feasible. Of particular interest, the proposed revision reflected GAO's view that recent decisions by the Court of Appeals for the Federal Circuit and the Court of Federal Claims may warrant a change in our review of protests challenging affirmative responsibility determinations. GAO's final rule makes changes in these and other areas in order to improve the overall efficiency, effectiveness, and fairness of the bid protest process at GAO.

Summary of Comments

Interested persons were invited to submit comments on GAO's proposed rule by November 12, 2002. We received written comments from three Federal agencies, two law firms, and one bar association. In adopting this final rule, we have carefully considered all comments received. The commenters were generally supportive of our efforts to improve the bid protest process and clarify GAO's procedures, and suggested further language changes consistent with these goals. Several of these suggested changes have been adopted, either in the final rule itself, or in the form of additional information in GAO's publication, "Bid Protests at GAO: A Descriptive Guide" (Descriptive Guide), which will be updated to reflect the revised regulations.

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 suggested that GAO clarify which word processing applications/programs are acceptable for

use by parties in filing electronic protests and other protest documents, in order to ensure that applications used by protesters, agencies, and GAO are compatible. In response, GAO will set forth the details regarding electronic filing on both its Web site (www.gao.gov) and in the Descriptive Guide, including such essential information as the e-mail address to which protests must be sent and the word processing application used by GAO. While GAO cannot warrant compatibility between various word processing applications, disclosing the application used by GAO is information that may assist protesters in deciding upon an appropriate word processing application, and thereby should minimize any risk that a protest may be received in garbled form, or not be received at all, due to word processing application incompatibilities. However, as is made clear in the revised section 21.0(g), protesters bear the risk that the filing method chosen, including electronic filing, will not result in timely receipt of a legible protest at GAO; this includes any risk of incompatibility between word processing applications and other potential transmission problems. As for compatibility between protesters' and agencies' word processing programs, to the extent that electronic submissions are authorized in a particular case, the cognizant GAO attorney, together with the parties, will determine the appropriate means for transmitting submissions. We note that the extent to which electronic filings are permitted after receipt of an electronically transmitted protest will be determined by the GAO attorney, taking into consideration, in particular, whether protected information will be involved and the extent to which it can be transmitted securely, to GAO's and the parties' satisfaction.

Some commenters expressed the view that, in order for electronic filing of protests to be practicable, protesters must be able to confirm receipt of their protest transmission. GAO recognizes that the ability of protesters to confirm receipt of their protest is essential if electronic filing is to be a meaningful filing option. Toward this end, the system GAO has in place will provide an automatic return e-mail that can be used to confirm receipt of an electronic protest at GAO. Also, GAO will list its

case status telephone number on its website and in the Descriptive Guide to provide protesters with an additional means of confirming receipt.

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

One commenter expressed concern that the revised language under paragraph (i) of section 21.3 could lead to the dismissal of meritorious protest issues where the agency report inadequately responds to an issue and the protester does not comment further, having nothing new of substance to add. GAO notes that this hypothetical situation is only a theoretical possibility and does not reflect GAO's experience. The regulations to date have permitted protesters, in lieu of substantive comments, to merely ask that their protest be decided on the existing record, and it is GAO's experience that protesters choosing this option invariably have their protest denied. The purpose of the revision is to make protesters, particularly those proceeding on a *pro se* basis, aware of the need for them to respond substantively to the agency report on their protest in order to maximize the chance that their protest will be sustained; alternatively, it is intended to lead protesters to withdraw protests more promptly where they are unable to rebut the agency's substantive response. The revision is not intended to change the manner in which GAO handles comments on specific issues raised in a protest. Currently, where a protester fails to comment on an agency's substantive response to an issue that is consistent with the record and appears reasonable on its face, we typically will consider that aspect of the protest abandoned and dismiss it. On the other hand, where the agency report does not adequately address a protest issue, GAO does not automatically dismiss the issue; rather, GAO considers the record as a whole, and, if necessary, develops the record further, and decides whether the issue has merit. GAO will continue this practice under the revised regulations.

One commenter suggested that GAO include in the regulations or the Descriptive Guide a warning to protesters that their comments should address all issues raised in the original protest. However, GAO believes such a warning would be inconsistent with one of the underlying purposes of the change—to lead protesters to withdraw protests where the protester is unable to respond to the agency's position substantively—since the suggested warning could encourage protesters to address issues superficially solely to

avoid dismissal. However, GAO will highlight this change in the Descriptive Guide by making it clear that protests are seldom sustained where protesters do not submit substantive comments in response to an agency report.

Section 21.5—Protest Issues Not for Consideration

Two commenters expressed the view that the change under paragraph (b)(2) of section 21.5—providing that GAO will consider protests of Small Business Administration (SBA) Certificate of Competency (COC) reviews where it is alleged that SBA failed to follow its own published regulations—is unwarranted. GAO recognizes that SBA's judgments in connection with a COC determination are matters within SBA's discretion and are not subject to GAO review. It is GAO's view, however, that there are some circumstances under which it may be appropriate to consider protest arguments that SBA has violated its own regulations in making a particular COC determination, and thereby has deprived a bidder or offeror of a contract award to which it otherwise was entitled under applicable laws and regulations. As explained in the proposed rule's supplementary information, this change is intended to make GAO's review in this area consistent with that in the area of protests of procurements under section 8(a) of the Small Business Act (Sec. 21.5(b)(3)), and protests of affirmative determinations of responsibility (Sec. 21.5(c), as revised in this final rule). Further, as indicated in the revised language, GAO will interpret the exception narrowly and, as a result, anticipates that this review will occur infrequently.

One agency commenter expressed concern that the revised language could lead to the inequitable result that a protest could be sustained against a contracting agency based on SBA's misconduct. However, in the event that GAO sustained a protest based solely on SBA's actions, the decision would clearly indicate that the violation was SBA's, not the contracting agency's.

Several commenters questioned the change under section 21.5(c), providing for expanded GAO review of protests challenging affirmative determinations of responsibility. One agency commented that the change may lead to GAO's substituting its judgment for that of the contracting agency, while another commenter suggested that GAO provide some guidance as to what is meant by "serious concerns." The language providing for expanded GAO review in this area was prompted by the desire for consistency between our standard and

the Court of Appeals for the Federal Circuit's standard for reviewing affirmative responsibility determination protests. We believe the revised language serves this purpose. GAO believes it would not be practical or useful to provide detailed examples of protests that fall within or outside of the changed review standard, since small changes in the facts or evidence presented could result in a different conclusion. As a general matter, however, the language requiring the protester to "identify evidence raising serious concerns" is intended to encompass protests where, for example, the protest includes specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. At the other end of the spectrum, the revised language was intended to exclude from review general and "information and belief" allegations not supported by evidence, and those that identify what appear to be minor, rather than significant, discrepancies related to the awardee's responsibility.

Two commenters suggested that GAO review affirmative responsibility determination protests where it is alleged that the contracting officer unreasonably evaluated available information, in the same manner in which we review negative responsibility determinations. However, we believe this approach would accord too little weight to the contracting officer's discretion in the area of affirmative responsibility determinations and also place a substantial unwarranted additional burden on contracting agencies. In this regard, this change was prompted not by evidence of agency abuse in this area, but by our desire to preserve consistency between GAO and the courts. GAO's review therefore generally will involve a contracting officer's failure to consider "available relevant information," rather than the reasonableness of the contracting officer's judgments based on that information, or his or her failure to obtain information through an exhaustive investigation. Whereas GAO's review of negative responsibility determinations for reasonableness is intended to ensure that firms found entitled to a contract award under the announced evaluation scheme are not then unreasonably denied the award, no similar "nullification" of the evaluation scheme comes into play with an affirmative determination of responsibility.

One commenter suggested adding language to section 21.5 to make it

clear—as GAO recently held in *Champion Bus. Servs., Inc.*, B-290556, June 25, 2002, 2002 CPD ¶ 109—that protests challenging the inclusion of the protester’s own proposal in the competitive range fall outside GAO’s bid protest jurisdiction. GAO agrees that this change should be included in the regulations and, accordingly, has added appropriate language in new paragraph (j).

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

One commenter suggested that GAO clarify in paragraph (e) of section 21.10 that flexible alternative procedures may be invoked by GAO on its own initiative or at the request of the parties. GAO agrees that this point should be clarified and has amended the paragraph accordingly.

List of Subjects in 4 CFR Part 21

Administrative practice and procedure, Bid protest regulations, Government contracts, Government procurement.

For the reasons set out in the preamble, Title 4, Chapter I, Subchapter B, of the Code of Federal Regulations is amended to read as follows:

PART 21—BID PROTEST REGULATIONS

1. The authority citation for Part 21 continues to read as follows:

Authority: 31 U.S.C. 3551–3556.

2. Amend § 21.0 by revising paragraphs (f) and (g), and adding new paragraph (h) to read as follows:

§ 21.0 Definitions.

* * * * *

(f) *Adverse agency action* is any action or inaction by a contracting agency that 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 or proposal 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. Protests and other documents may be filed by hand delivery, mail, commercial carrier, facsimile transmission, or other electronic means (but see § 21.4(b) for restrictions on electronic filing where a protective order has been issued). Hand delivery and other means of delivery may not be practicable during certain periods due, for example, to security

concerns or equipment failures. The filing party bears the risk that the delivery method chosen will not result in timely receipt at GAO.

(h) *Alternative dispute resolution* encompasses various means of resolving cases expeditiously, without a written decision, including techniques such as outcome prediction and negotiation assistance.

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3. Amend § 21.1 by revising paragraph (c) introductory text and (c)(1) to read as follows:

§ 21.1 Filing a protest.

* * * * *

(c) A protest filed with GAO shall: (1) Include the name, street address, electronic mail address, and telephone and facsimile numbers of the protester,

* * * * *

4. Amend § 21.3 by revising paragraphs (a) and (i) to read as follows:

§ 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 substantial prospect of receiving an award. The contracting agency shall furnish copies of the protest submissions to those parties, except where disclosure of the information is prohibited by law, with instructions to communicate further directly with GAO. All parties shall furnish copies of all protest communications to the contracting agency and to other participating parties. All protest communications shall be sent by means reasonably calculated to effect expeditious delivery.

* * * * *

(i) Comments on the agency report shall be filed with GAO within 10 days after receipt of the report, with a copy provided to the contracting agency and other participating parties. The protest shall be dismissed unless the protester files comments within the 10-day period, except where GAO has granted an extension or has established a shorter period in accordance with § 21.10(e). Extensions will be granted on a case-by-case basis. 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.

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5. Amend § 21.4 by revising paragraph (b) to read as follows:

§ 21.4 Protective orders.

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(b) If no protective order has been issued, the agency may withhold from the parties those portions of its report that would ordinarily be subject to a protective order. GAO will review in camera all information not released to the parties. Where a protective order has been issued, documents may be filed by electronic means (other than facsimile transmission) only when specifically authorized by GAO.

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6. Amend § 21.5 by revising the introductory text and paragraphs (b)(2), (c) and (d), and adding new paragraphs (i) and (j), to read as follows:

§ 21.5 Protest issues not for consideration.

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 need be filed; where specific protest allegations are dismissed, an agency report shall be filed on the remaining allegations. Among the protest bases that shall be dismissed are the following:

* * * * *

(b) * * *

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(2) *Small Business Certificate of Competency Program.* Referrals made to the Small Business Administration (SBA) pursuant to sec. 8(b)(7) of the Small Business Act, or the issuance of, or refusal to issue, a certificate of competency under that section will generally not be reviewed by GAO. The exceptions, which GAO will interpret narrowly out of deference to the role of the SBA in this area, are protests that show possible bad faith on the part of government officials, or that present allegations that the SBA failed to follow its own published regulations or failed to consider vital information bearing on the firm’s responsibility due to the manner in which the information was presented to or withheld from the SBA by the procuring agency. 15 U.S.C. 637(b)(7).

* * * * *

(c) *Affirmative determination of responsibility by the contracting officer.*

Because the determination that a bidder or offeror is capable of performing a contract is largely committed to the contracting officer's discretion, GAO will generally not consider a protest challenging such a determination. The exceptions are protests that allege that definitive responsibility criteria in the solicitation were not met and those that identify evidence raising serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation.

(d) *Procurement integrity.* For any Federal procurement, GAO will not review an alleged violation of subsections (a), (b), (c), or (d) of sec. 27 of the Office of Federal Procurement Policy Act, 41 U.S.C. 423, as amended by sec. 4304 of the National Defense Authorization Act for Fiscal Year 1996, Public Law 104-106, 110 Stat. 186, February 10, 1996, where the protester failed to report the information it believed constituted evidence of the offense to the Federal agency responsible for the procurement within 14 days after the protester first discovered the possible violation.

(i) *Suspensions and debarments.* Challenges to the suspension or debarment of contractors will not be reviewed by GAO. Such matters are for review by the contracting agency in accordance with the applicable provisions of the Federal Acquisition Regulation.

(j) *Competitive range.* GAO will not consider protests asserting that the protester's proposal should not have been included or kept in the competitive range.

7. Amend § 21.7 by revising paragraphs (c) and (g) to read as follows:

§ 21.7 Hearings.

(c) Hearings generally will be conducted as soon as practicable after receipt by the parties of the agency report and relevant documents. Although hearings ordinarily will be conducted at GAO in Washington, DC, hearings may, at the discretion of GAO, be conducted at other locations, or by telephone or other electronic means.

(g) If a hearing is held, each party shall file comments with GAO within 5 days after the hearing was held or as specified by GAO. If the protester has not filed comments by the due date, GAO shall dismiss the protest.

8. Amend § 21.8 by revising paragraph (e) to read as follows:

§ 21.8 Remedies.

(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 reasonable costs of filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees. The protester shall file any request that GAO recommend that costs be paid within 15 days of the date on which the protester learned (or should have learned, if that is earlier) that GAO had closed the protest based on the agency's decision to take corrective action. The protester shall furnish a copy of its request to the contracting agency, which may file a response within 15 days after receipt of the request, with a copy furnished to the protester.

9. Amend § 21.10 by removing paragraph (d)(3), redesignating (d)(4) as (d)(3), and by revising paragraph (e) to read as follows:

§ 21.10 Express options, flexible alternative procedures, accelerated schedules, summary decisions, and status and other conferences.

(e) GAO, on its own initiative or upon request by the parties, may use flexible alternative procedures to promptly and fairly resolve a protest, including alternative dispute resolution, establishing an accelerated schedule, and/or issuing a summary decision.

10. Amend § 21.11 by revising paragraph (b) to read as follows:

§ 21.11 Effect of judicial proceedings.

(b) GAO will dismiss any case where the matter involved is the subject of litigation before, or has been decided on the merits by, a court of competent jurisdiction. GAO may, at the request of a court, issue an advisory opinion on a bid protest issue that is before the court. In these cases, unless a different schedule is established, the times provided in this part for filing the agency report (§ 21.3(c)), filing comments on the report (§ 21.3(i)), holding a hearing and filing comments (§ 21.7), and issuing a decision (§ 21.9) shall apply.

11. Amend § 21.12 by revising paragraph (b) to read as follows:

§ 21.12 Distribution of decisions.

(b) Decisions may be distributed to the parties, and are available from GAO, by electronic means.

Anthony H. Gamboa,
General Counsel.

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BILLING CODE 1610-02-P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 77

[Docket No. 02-021-3]

Tuberculosis in Cattle and Bison; State and Zone Designations; Texas: Delay of Compliance Date

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim Rule; delay of compliance date.

SUMMARY: In an interim rule amending the bovine tuberculosis regulations to classify the State of Texas as modified accredited advanced, we delayed the date for compliance with certain identification and certification requirements in those regulations until January 1, 2003. In this action, we are further delaying the date for compliance until September 30, 2003. This action will allow affected parties additional time to make necessary preparations to comply with certain requirements.

DATES: The date for complying with certain requirements of 9 CFR 77.10 for sexually intact heifers, steers, and spayed heifers moving interstate from the State of Texas (see "Tuberculosis in Cattle and Bison; State and Zone Designations; Texas," published in the **Federal Register** on June 6, 2002 [67 FR 38841-38844, Docket No. 02-021-1]) is September 30, 2003.

FOR FURTHER INFORMATION CONTACT: Dr. Joseph Van Tiem, Senior Staff Veterinarian, National Animal Health Programs, VS, APHIS, 4700 River Road Unit 43, Riverdale, MD 20737-1231; (301) 734-7716.

SUPPLEMENTARY INFORMATION:

Background

On June 6, 2002, we published an interim rule in the **Federal Register** (67 FR 38841-38844, Docket No. 02-021-1) amending the bovine tuberculosis regulations in 9 CFR part 77 regarding State and zone classifications by removing the split-State status of Texas and classifying the entire State as modified accredited advanced. Under