

Government Accountability Office

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(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.

[61 FR 39042, July 26, 1996, as amended at 67 FR 79835, Dec. 31, 2002; 73 FR 32430, June 9, 2008; 83 FR 13823, Apr. 2, 2018]

§ 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. If no closing time has been established, or if no further submissions are anticipated, any alleged solicitation improprieties must be protested within 10 days of when the alleged impropriety was known or should have been known.

(2) Protests other than those covered by paragraph (a)(1) of this section shall be filed not later than 10 days after the basis of protest is known or should have been known (whichever is earlier), with the exception of protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required. In such cases, with respect to any protest basis which is known or should have been known either before or as a result of the debriefing, and which does not involve an alleged solicitation impropriety covered by paragraph (a)(1) of this section, the initial protest shall not be filed before the debriefing date offered to the protester, but shall be filed not later than 10 days after the date on which the debriefing is held.

(3) If a timely agency-level protest was previously filed, any subsequent protest to GAO must be filed within 10 days of actual or constructive knowledge of initial adverse agency action, provided the agency-level protest was filed in accordance with paragraphs (a)(1) and (2) of this section, unless the 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 an agency, any subsequent protest to GAO will be considered timely if filed within the 10-day period provided by this paragraph, even if filed after bid opening or the closing time for receipt of proposals.

(b) Protests untimely on their face may be dismissed. A protester shall include in its protest all information establishing the timeliness of the protest; a protester will not be permitted to introduce for the first time in a request for reconsideration information necessary to establish that the protest was timely.

(c) GAO, for good cause shown, or where it determines that a protest raises issues significant to the procurement system, may consider an untimely protest.

[61 FR 39042, July 26, 1996, as amended at 83 FR 13823, Apr. 2, 2018]

§ 21.3 Notice of protest, communications among parties, submission of agency report, and time for filing of comments on report.

(a) GAO shall notify the agency within 1 day after the filing of a protest, and, unless the protest is dismissed under this part, shall promptly provide a written confirmation to the agency and an acknowledgment to the protester. The agency shall immediately give notice of the protest to the award-ee 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 agency shall provide 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 provide copies of all communications with GAO

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to the agency and to other participating parties either through EPDS or by email. GAO's website [<https://epds.gao.gov/login>] includes guidance regarding when to file through EPDS versus communicating by email or other means.

(b) A 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 agency shall file a report on the protest within 30 days after receiving notice of the protest from GAO. The report need not contain documents which the agency has previously provided or otherwise made available to the parties in response to the protest. At least 5 days prior to the filing of the report, in cases in which the protester has filed a request for specific documents, the agency shall file a response to the request for documents. If the fifth day prior to the filing of the report falls on a weekend or Federal holiday, the response shall be filed by the last business day that precedes the weekend or holiday. The agency's response shall, at a minimum, identify whether the requested documents exist, which of the requested documents or portions thereof the agency intends to produce, which of the requested documents or portions thereof the agency intends to withhold, and the basis for not producing any of the requested documents or portions thereof. Any objection to the scope of the agency's proposed disclosure or non-disclosure of documents must be filed within 2 days of receipt of this response.

(d) The report shall include the contracting officer's statement of the relevant facts (including a best estimate of the contract value), a memorandum of law, and a list and a copy of all relevant documents, or portions of documents, not previously produced, including, as appropriate: the bid or proposal submitted by the protester; the bid or proposal of the firm which is being considered for award, or whose bid or proposal is being protested; all evaluation documents; the solicitation, including the specifications; the abstract of bids or offers; and any other relevant documents.

In appropriate cases, a party may file a request that another party produce relevant documents, or portions of documents, that are not in the agency's possession.

(e) Where a protester or intervenor does not have counsel admitted to a protective order and documents are withheld from the protester or intervenor on that basis, the agency shall file redacted documents that adequately inform the protester and/or intervenor of the basis of the agency's arguments in response to the protest. GAO's website [<https://epds.gao.gov/login>] provides guidance regarding filing documents where no protective order is issued or where a protester or intervenor does not have counsel admitted to a protective order.

(f) The agency may file a request for an extension of time for the submission of the response to be filed by the agency pursuant to § 21.3(c) or for the submission of the agency report. Extensions will be granted on a case-by-case basis.

(g) The protester may file a request for additional documents after receipt of the agency report when their existence or relevance first becomes evident. Except when authorized by GAO, any request for additional documents must be filed not later than 2 days after their existence or relevance is known or should have been known, whichever is earlier. The agency shall file the requested documents, or portions of documents, within 2 days or explain why it is not required to produce the documents.

(h) Upon a request filed by a party, GAO will decide whether the agency must file any withheld documents, or portions of documents, and whether this should be done under a protective order. When withheld documents are provided, the protester's comments on the agency report shall be filed within the original comment filing period unless GAO determines that an extension is appropriate.

(i)(1) Comments on the agency report shall be filed within 10 days after the agency has filed the report, except where GAO has granted an extension of time, or where GAO has established a shorter period for filing of comments.

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Extensions will be granted on a case-by-case basis.

(2) The protest shall be dismissed unless the protester files comments within the period of time established in §21.3(i)(1).

(3) GAO will dismiss any protest allegation or argument where the agency's report responds to the allegation or argument, but the protester's comments fail to address that response.

(j) GAO may request or permit the submission of additional statements by the parties and by other parties participating in the protest as may be necessary for the fair resolution of the protest. The agency and other parties must receive GAO's approval before submitting any additional statements. GAO reserves the right to disregard material submitted without prior approval.

[61 FR 39042, July 26, 1996, as amended at 67 FR 79835, Dec. 31, 2002; 73 FR 32430, June 9, 2008; 83 FR 13823, Apr. 2, 2018]

§21.4 Protective orders.

(a) At the request of a party or on its own initiative, GAO may issue a protective order controlling the treatment of protected information. Such information may include proprietary, confidential, or source-selection-sensitive material, as well as other information the release of which could result in a competitive advantage to one or more firms. The protective order shall establish procedures for application for access to protected information, identification and safeguarding of that information, and submission of redacted copies of documents omitting protected information. Because a protective order serves to facilitate the pursuit of a protest by a protester through counsel, it is the responsibility of protester's counsel to request that a protective order be issued and to submit timely applications for admission to that order. GAO generally does not issue a protective order where an intervenor retains counsel, but the protester does not.

(b) Any agency or party filing a document that the agency or party believes to contain protected material shall, if requested by another party, provide to the other parties (unless they are not admitted to the protective order) an

initial proposed redacted version of the document within 2 days of the request. Where appropriate, the exhibits to the agency report or other documents may be proposed for redaction in their entirety. The party that authored the document shall file the final redacted version of the document that has been agreed to by all of the parties. Only the final agreed-to version of a redacted document must be filed. If the parties are unable to reach an agreement regarding redactions, the objecting party may submit the matter to GAO for resolution. Until GAO resolves the matter, the disputed information must be treated as protected.

(c) If no protective order has been issued, or a protester or intervenor does not have counsel admitted to a protective order, the agency may withhold from the parties those portions of its report that would ordinarily be subject to a protective order, provided that the requirements of §21.3(e) are met. GAO will review in camera all information not released to the parties.

(d) 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 filing an application. 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 filed within 2 days after the application is filed, although GAO may consider objections filed after that time.

(e) Any violation of the terms of a protective order may result in the imposition of such sanctions as GAO deems appropriate, including referral to appropriate bar associations or other disciplinary bodies, restricting the individual's practice before GAO, prohibition from participation in the remainder of the protest, or dismissal of the protest.

[61 FR 39042, July 26, 1996, as amended at 67 FR 79835, Dec. 31, 2002; 73 FR 32430, June 9, 2008; 83 FR 13824, Apr. 2, 2018]