

## §21.5

## 4 CFR Ch. I (1-1-01 Edition)

camera all information not released to the parties.

(c) After a protective order has been issued, counsel or consultants retained by counsel appearing on behalf of a party may apply for admission under the order by submitting an application to GAO, with copies furnished simultaneously to all parties. The application shall establish that the applicant is not involved in competitive decision-making for any firm that could gain a competitive advantage from access to the protected information and that there will be no significant risk of inadvertent disclosure of protected information. Objections to an applicant's admission shall be raised within 2 days after receipt of the application, although GAO may consider objections raised after that time.

(d) Any violation of the terms of a protective order may result in the imposition of such 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 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. The provision in paragraph (d) of §21.5 will apply not later than January 1, 1997.

(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 non-appropriated 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).

#### §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 to resolve the protest.

(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 re-

ceipt 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.

(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 5 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: