

### 332.409

(10) Research surveys or demonstrations involving the training and placement of health personnel and health professionals, and dissemination of related information.

(11) Surveys or demonstrations in the field of social service.

#### 332.409 Contracting Officer action.

##### 332.409-1 Recommendation for approval.

The Contracting Officer shall transmit the information in *FAR 32.409-1* (or *FAR 32.409-2*) to the HCA by memorandum.

### Subpart 332.5—Progress Payments Based on Cost

#### 332.501 General.

##### 332.501-2 Unusual progress payments.

(a)(3) The HCA (non-delegable) shall approve an unusual progress payment.

### Subpart 332.7—Contract Funding

#### 332.703-70 Funding contracts during a continuing resolution.

(a) *Continuing resolutions.* A continuing resolution (CR) is a legislative measure enacted to keep existing Federal programs functioning, generally at minimal levels, after the expiration of prior fiscal year budget authority and until passage of regular appropriation acts by Congress.

(b) *Operating guidance.* Because the terms of CRs may vary, for each CR, specific operating guidance will be issued by the Office of the Assistant Secretary for Financial Resources (ASFR). This guidance will—

(1) Establish the availability of funds for existing and new projects or activities (consistent with the language of the CR);

(2) Identify any specific limits or constraints imposed; and

(3) Establish the authorized level and timing of obligations permitted.

(c) Contracting activities, in concert with program, budget and finance personnel, must carefully assess contract funding decisions to—

(1) Ensure compliance with HHS guidance regarding the specific terms of a CR;

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(2) Maintain essential operations and activities; and

(3) Guard against violations of the Anti-Deficiency Act—*see FAR 32.702.*

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21511, Apr. 26, 2010]

#### 332.704 Limitation of cost or funds.

*See* subpart *342.71*, “Administrative Actions for Cost Overruns,” for procedures for handling anticipated cost overruns.

## PART 333—PROTESTS, DISPUTES, AND APPEALS

### Subpart 333.1—Protests

Sec.

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AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

### Subpart 333.1—Protests

#### 333.102 General.

(g)(1) The OGC-GLD serves as the liaison for protests lodged with the Government Accountability Office (GAO); is designated as the office responsible for all protests within HHS; and serves as the notification point with GAO for all protests.

(2) Each contracting activity shall designate a protest control officer to serve as an advisor to the Contracting Officer and to monitor protests from the time of initial notification until the protest has been resolved. Contracting activities shall forward a copy of each appointment and termination of appointment of protest control officers through appropriate acquisition channels, including the HCA, to ASFR/OGAPA/DA and the Deputy Associate General Counsel, OGC-GLD.

**333.103 Protests to the agency.**

(f)(1) The Contracting Officer is authorized to make the determination, using the criteria in *FAR 33.104(b)*, to award a contract notwithstanding the protest after obtaining the concurrence of the contracting activity's protest control officer and the OGC-GLD. If a protest has been lodged with the Secretary, is addressed to the Secretary, or requests referral to the Secretary, the Contracting Officer shall also obtain approval from Associate DAS for Acquisition and OGC-GLD before making the award.

(2) The Contracting Officer shall require written confirmation of any oral protest. To be considered timely, the protester must file a written confirmation in accordance with the applicable provisions in *FAR 33.102(d)(2) and (e)*. In the following cases, the Contracting Officer shall forward written protests received before award through appropriate acquisition channels, including the HCA, to OGC-GLD for processing:

(i) The protester requests referral to the Secretary of HHS.

(ii) The protest is known to have been lodged with GAO or the Secretary or is addressed to either.

(iii) The Contracting Officer entertains some doubt as to the proper action regarding the protest or believes it to be in the best interest of the Government that the Secretary or GAO consider the protest. Otherwise, the Contracting Officer may answer protests addressed to the Contracting Officer with the concurrence of the contracting activity's protest control officer and OGC-GLD.

The Contracting Officer shall submit files concerning these protests in duplicate, or as otherwise specified by OGC-GLD, within 5 calendar days after protest receipt; mark the files "IMMEDIATE ACTION—PROTEST BEFORE AWARD;" and include any documents relevant to issues raised in the protest.

(3) The Contracting Officer shall treat protests received after award as indicated in *FAR 33.103(f)(3)*.

**333.104 Protests to GAO.**

(a) *General procedures.*

(3)(ii) OGC-GLD shall process protests filed with GAO, whether pre- or post-award. The Contracting Officer

shall prepare protest files as follows: assemble them in a secure binder, fastened at the left side with a fastener that will permit the full page to be read; include a numerical document index, with the first two positions reserved for the Contracting Officer's Statement of Facts and Circumstances and the second for OGC-GLD's Memorandum of Law, that is paginated and, as necessary for sizable files, divided into two or more volumes; and the cover of the report shall identify it as the protest file and include the solicitation number and the GAO Bid Protest file number—*i.e.*, "B- number." In addition, the Contracting Officer shall fold drawings and place them in an envelope in the binder and the solicitation/contract shall constitute a separate exhibit, if it is voluminous in size. The Contracting Officer shall distribute protest files as follows: four copies to OGC-GLD and one copy to the contracting activity's protest control officer. In addition to the items listed in *FAR 33.104(a)(3)(ii)(A) through (G)*, the protest file shall include the following documents:

(H) The current status of award. (*Note:* When award has been made, this shall include whether performance has commenced, shipment or delivery has been made, or a stop work order has been issued.)

(I) A copy of any mutual agreement to suspend work on a no-cost basis, when appropriate—*see FAR 33.104(c)(4)*.

(J) Copies of the notice of protest given offerors and other parties when the notice is appropriate—*see FAR 33.104(a)(2)*.

(K) A copy of the negotiation memorandum, when applicable.

(L) The name and telephone number of the person in the contracting office who may be contacted for information relevant to the protest.

(M) A copy of the competitive range determination.

(N) The acquisition plan, source selection plan, and the source selection decision document.

(O) The Contracting Officer's statement of facts and circumstances, including numbered findings of fact prepared with complete documentation,

and all the facts and rationale, both favorable and unfavorable, to the Contracting Officer's position.

(4) OGC–GLD shall make the necessary distributions referenced in *FAR 33.104(a)(4)*.

(5) Unless an alternative arrangement is reached with OGC–GLD, the Contracting Officer shall furnish one copy of the protest file containing the documentation specified in paragraph (a)(3)(ii) of this section (with the exception of the Contracting Officer statement of facts and circumstances) and *FAR 33.104(a)(3)(ii)(A) through (G)* to OGC–GLD within 5 calendar days from receipt of the protest. In addition, the Contracting Officer shall also accommodate any other OGC–GLD requests for documents which may be needed prior to the aforementioned 5-day time period. The Contracting Officer shall submit the Contracting Officer's statement of facts and circumstances and the additional copies of documentation within 14 calendar days from receipt of the protest. Since the statute allows only a short time period in which to respond to protests lodged with GAO, the Contracting Officer shall handle each protest on a priority basis. OGC–GLD shall submit copies of the protest file to GAO, the protestor, and any intervenors in accordance with *FAR 33.104(a)(4)(i)*.

(6) Since OGC–GLD will furnish the protest file to GAO, the protestor, and any intervenors, comments on the file from the protestor and any intervenors will be sent to OGC–GLD.

(7) OGC–GLD shall serve as the GAO point of contact for protests lodged with GAO.

(b) *Protests before award.*

(1) To make an award notwithstanding a protest, the Contracting Officer shall prepare a finding using the criteria in *FAR 33.104(b)(1)*, have it executed by the HCA (non-delegable), and forward it, along with a written request for approval to make the award (addressed to the Associate DAS for Acquisition through OGC–GLD). Should OGC–GLD concur, it shall forward the request to the Associate DAS for Acquisition for final approval. The written request for approval shall contain all relevant documentation as attachments to the request, so that the

information may be considered by Associate DAS for Acquisition.

(2) If the request to make an award notwithstanding the protest is approved by the Associate DAS for Acquisition, OGC–GLD shall notify GAO. Whether the request is approved or not, OGC–GLD shall telephonically notify the contracting activity's protest control officer of the Associate DAS for Acquisition decision, and the contracting activity's protest control officer shall immediately notify the Contracting Officer. Should the Associate DAS for Acquisition approve the request, ASFR/OGAPA/DA shall send a copy of that written approval to the contracting activity's protest control officer.

(c) *Protests after award.*

(2) If the Contracting Officer believes performance should be allowed to continue notwithstanding a protest, the Contracting Officer shall prepare a written finding using the criteria in *FAR 33.104(c)(2)*. The HCA (non-delegable) shall execute the written finding, which the contracting office shall forward pursuant to the procedures described in paragraph (b)(1) of this section. The notification procedures stated in paragraph (b)(2) of this section shall apply to protests after award.

(d) *Findings and notice.* The Contracting Officer shall prepare the written notice required by *FAR 33.104(d)* and provide a copy to OGC–GLD. OGC–GLD shall provide copies to GAO, the protestor, and any intervenors.

(g) *Notice to GAO.* *FAR 33.104(g)* requires the agency to notify GAO, if the agency has not followed any of GAO's recommendations (other than costs) within 60 days after its decision. By the end of the 60-day period, the Contracting Officer shall notify OGC–GLD of the status of implementing the recommendations and reasons for any non-compliance. OGC–GLD shall serve as the designated official to comply with the requirements of *FAR 33.104(g)*.

(i) *Express option.* When GAO invokes the express option, the Contracting Officer shall prepare the complete protest file as described in paragraph (a)(3) of this section, to include the item in paragraph (a)(3)(i), and deliver it (hand-carry, if necessary) to OGC–GLD in time to meet the submittal date

GAO established. OGC–GLD shall notify the Contracting Officer of the submittal date after GAO has finalized its requirements. If the Contracting Officer is not notified about a changed schedule, the timelines for a regular bid protest outlined in FAR 33.104(a)(3)(i) shall apply.

### Subpart 333.2—Disputes and Appeals

#### 333.203 Applicability.

(c) The Secretary has designated the Civilian Board of Contract Appeals (CBCA) as the authorized “Board” to hear and determine disputes for the Department.

#### 333.209 Suspected fraudulent claims.

The Contracting Officer shall submit any instance of a contractor’s suspected fraudulent claim to the OIG for investigation.

#### 333.211 Contracting Officer’s decision.

(a)(2) The Contracting Officer shall refer a proposed final decision to OGC–GLD, for advice as to the legal sufficiency and format before sending the final decision to the contractor. The Contracting Officer shall provide OGC–GLD with the pertinent documents with the submission of each proposed final decision.

(4)(v) When using the paragraph in FAR 33.211 (a)(4)(v), the Contracting Officer shall insert the words “Civilian” before each mention of the term “Board of Contract Appeals.”

(h) At any time within the period of appeal, the Contracting Officer may modify or withdraw the final decision. If a contractor has appealed the final decision to the CBCA, the Contracting Officer shall forward the recommended action to OGC–GLD with a supplement to the contract file that supports the recommended correction or amendment.

#### 333.212 Contracting Officer’s duties upon appeal.

(a) The rules set forth in the “Rules of the Civilian Board of Contract Appeals,” or the rules established by the U.S. Court of Federal Claims, as appropriate, shall govern appeals.

(b) The OGC–GLD is designated as the Government Trial Attorney to represent the Government in the defense of appeals before the CBCA. OGC–GLD shall provide the decision by CBCA to the appropriate Contracting Officer for compliance in accordance with the CBCA’s decision.

(c) If an appeal is filed with the CBCA, the Contracting Officer shall assemble a file, within 30 days of receipt of an appeal or notification that an appeal has been filed, that consists of all documents pertinent to the appeal, including the following:

(1) The decision and findings of fact from which the appeal is taken.

(2) The contract, including specifications and pertinent modifications, plans and drawings.

(3) All correspondence between the parties pertinent to the appeal, including the letter or letters of claim in response to which the decision was issued.

(4) Transcripts of any testimony taken during the course of proceedings, and affidavits or statements of any witness on the matter in dispute made prior to the filing of the notice of appeal with the CBCA.

(5) Any additional information considered pertinent. The Contracting Officer shall furnish the appeal file to the Government Trial Attorney for review and approval. After approval, the Contracting Officer shall prepare four copies of the file—*i.e.*, one for the CBCA, one for the appellant, one for the Government Trial Attorney, and one for the contracting office.

(d) At all times after the filing of an appeal, the Contracting Officer shall render whatever assistance is requested by the Government Trial Attorney. When an appeal is set for hearing, the Contracting Officer shall provide Government witnesses and specified physical and documentary evidence to the Trial Attorney. The Trial Attorney shall ensure the presence of all witnesses and documentary evidence at both the prehearing conference and hearing.

(e) If a contractor, which has filed an appeal with the CBCA, elects to accept fully the decision from which the appeal was taken, or any modification to

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it, and gives written notification of acceptance to the Government Trial Attorney or the concerned Contracting Officer, the Government Trial Attorney shall notify the CBCA of the disposition of the dispute in accordance with Rule 27 of the CBCA.

(f) If the contractor has elected to appeal to the U.S. Court of Federal Claims, the U.S. Department of Justice will represent HHS. However, the Contracting Officer shall coordinate all actions through OGC-GLD.

**333.212-70 Formats.**

(a) Contracting activities shall use the following format in transmitting appeal files to CBCA:

Your reference:

(Docket No.)

(insert name)

Clerk of the Board, Civilian Board of Contract Appeals

1800 F. Street, Washington, DC 20405  
(for regular mail delivery)

1800 M Street, 6th floor, Washington, DC 20036 [for overnight and physical (hand-carry) delivery]

Dear (insert name):

Transmitted herewith are documents relative to the appeal under Contract No. \_\_\_\_\_ with the \_\_\_\_\_ (insert name of contractor) in accordance with the procedures under Rule 4. The Government Trial Attorney for this case is \_\_\_\_\_ (insert General Law Division, Office of General Counsel, Department of Health and Human Services, 330 Independence Avenue, SW., Washington, DC 20201).

The request for payment of charges resulting from the processing of this appeal shall be addressed to:

\_\_\_\_\_ (insert name and address of cognizant finance office.)

Sincerely yours,

Contracting Officer

Enclosures

(b) Contracting activities shall use the following format in notifying the appellant that the appeal file was submitted to CBCA:

\_\_\_\_\_  
\_\_\_\_\_  
(insert contractor name and address)

Dear \_\_\_\_\_: (insert name)

An appeal file has been compiled relative to the appeal under Contract No. \_\_\_\_\_ (insert number), and has been submitted to the Civilian Board of Contract Appeals (CBCA). The enclosed duplicate of the appeal file is identical to that submitted to CBCA, except for contract documents which you already have been provided. You may furnish or suggest any additional information deemed pertinent to the appeal to CBCA according to their rules.

The CBCA will provide you with further information concerning this appeal.

Sincerely yours,  
Contracting Officer

Enclosure

**333.213 Obligation to continue performance.**

(a) The Contracting Officer shall use the Disputes clause at FAR 52.233-1 without the use of Alternate I. However, if the Contracting Officer determines that the Government's interest would be better served by use of paragraph (i) in Alternate I, the HCA or CCO shall approve its use.

**333.215-70 Contract clauses.**

(a) The Contracting Officer shall insert the clause in 352.233-70, Choice of Law (Overseas), in solicitations and contracts when performance will be outside the United States, its possessions, and Puerto Rico, except as otherwise provided in a government-to-government agreement.

(b) The Contracting Officer shall insert the clause in 352.233-71, Litigation and Claims, in solicitations and contracts when a cost-reimbursement, time-and-materials, or labor-hour contract is contemplated (other than a contract for a commercial item.)