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GOVERNMENT ACCOUNTABILITY OFFICE

4 CFR Part 21

Government Accountability Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts

AGENCY: Government Accountability Office.

ACTION: Final rule.

SUMMARY: This document amends Government Accountability Office (GAO) Bid Protest Regulations, which have been promulgated in accordance with the Competition in Contracting Act of 1984. These amendments are being made to implement changes to the definition of an "interested party" for the GAO Bid Protest forum set forth in sec. 326 of the National Defense Authorization Act for Fiscal Year 2008, and to make certain administrative changes.

DATES: *Effective Date:* June 9, 2008.

FOR FURTHER INFORMATION CONTACT: Michael R. Golden (Managing Associate General Counsel), Ralph O. White (Assistant General Counsel), or Jonathan L. Kang (Senior Attorney), 202-512-3315.

SUPPLEMENTARY INFORMATION:

Effective Dates

GAO's statutory jurisdiction to hear bid protests filed by interested parties was recently amended by section 568 of the Department of Homeland Security Appropriations Act, 2008 (enacted as Division E of the Consolidated Appropriations Act, 2008, Pub. L. 110-161, 121 Stat. 1844, on December 26, 2007), and by sections 326 and 843 of the National Defense Authorization Act for Fiscal Year 2008, Public Law 110-181, 122 Stat. 3, 62, 236.

Section 568 of the Department of Homeland Security Appropriations Act,

2008, made the Transportation Security Administration (TSA) subject to the Federal Acquisition Regulation. Therefore, as of the June 23, 2008, effective date, GAO will begin to hear protests of TSA procurements covered by TSA solicitations issued on or after the effective date.

Section 326 of the National Defense Authorization Act for Fiscal Year 2008 expanded the protest rights of Federal employees in a competition conducted under Office of Management and Budget (OMB) Circular A-76 or noncompetitive decision to convert a function performed by Federal employees to private sector performance. Section 326 specifies that GAO has jurisdiction to hear protests concerning studies initiated after January 1, 2004, for actions taken after the date of enactment, which was January 28, 2008.

Section 843 of the National Defense Authorization Act for Fiscal Year 2008 amended GAO's statutory jurisdiction under 10 U.S.C. 2304c(e) and 41 U.S.C. 253j(e) to authorize GAO to hear protests of the issuance or proposed issuance of certain task and delivery orders under certain indefinite-delivery/indefinite-quantity contracts. Section 843 specifies that GAO has jurisdiction to hear protests concerning the issuance or proposed issuance of task and delivery orders 120 days after enactment, which is May 27, 2008.

Background

On March 21, 2008, GAO published a proposed rule (73 FR 15098) to amend its Bid Protest Regulations. The supplementary information included with the proposed rule explained that the proposed revisions to GAO's Bid Protest Regulations were promulgated in accordance with the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. 3551-3556, in response to statutory changes in GAO's bid protest jurisdiction contained in section 568 of the Department of Homeland Security Appropriations Act, 2008, and sections 326 and 843 of the National Defense Authorization Act for Fiscal Year 2008.

The proposed rule also explained that after careful consideration, GAO had concluded that no changes in GAO's Bid Protest Regulations were necessary in order to effectuate the provisions of section 568 of the Department of Homeland Security Appropriations Act, 2008, or section 843 of the National Defense Authorization Act for Fiscal

Year 2008. The proposed rule therefore set forth the proposed revisions to GAO's Bid Protest Regulations to implement section 326 of the National Defense Authorization Act for Fiscal Year 2008 and to make certain administrative changes.

GAO invited interested persons to participate in this rulemaking by submitting written comments regarding the proposed revisions. These comments were required to be submitted on or before April 21, 2008.

Summary of Comments

GAO received written comments from two Federal agencies, two Federal employee labor unions, the American Bar Association, and two individuals. In adopting this final rule, GAO has carefully considered all comments received.

With respect to the changes in GAO's rules to implement the recently enacted statutes, one of the agencies, the American Bar Association, and both Federal employee labor unions explicitly agreed that the proposed regulations correctly implemented the statutory language. On the other hand, both of the employee unions suggested additional changes to GAO's rules to fully implement what they contend is the intent of the statutory changes. With respect to the changes in GAO's rules made for administrative purposes, the American Bar Association endorsed the proposed changes. A summary of the more significant specific comments concerning GAO's proposed rule, and GAO's responses to these comments, are set forth below.

Interested Party

The recent changes to the statutory definition of an "interested party" anticipate that Federal employees may be represented by either of two entities: (1) The official who submitted the agency tender in a public-private competition; or (2) any one person or individual who, for the purpose of representing the employees of a Federal agency in a protest, has been designated their agent by a majority of the employees who are engaged in performing such activity.

One individual commentator noted that the proposed revision to the definition of an "interested party" uses the term "individual" rather than the term "person" to describe the representative other than the agency

tender official (ATO) who can file a protest on behalf of affected employees, and raised concerns about the term "individual." Congress initially changed the statutory definition of "interested party" in section 739(c) of the Financial Services and General Government Appropriations Act, 2008 (enacted as Division D of the Consolidated Appropriation Act, 2008), using the term "person" to describe the representative of the majority of affected Federal employees. One month later, in the National Defense Authorization Act for Fiscal Year 2008, Congress again amended the same provision, this time using the term "individual." GAO has used the language of the later-enacted statute for its rules. For GAO, the use of the term "individual" as opposed to "person" is not intended to signal any substantive difference between the terms.

One of the agency commentators expressed concern that the interested party definition could allow affected employees to protest the selection of a "most efficient organization" (MEO) under a public-private competition conducted pursuant to OMB Circular A-76. GAO's proposed interested party definition, which closely tracks the statutory enactment, does not address (just as the statute does not address) whether affected employees are authorized to protest the selection of an MEO. In the event GAO is presented with this issue, GAO will consider it at that time.

While the two Federal employee unions expressly recognize that GAO's proposed rules were faithfully implementing the statutory amendments to the definition of an interested party, both expressed concern regarding several areas where they contend more guidance should be provided. These concerns, in the aggregate, were that the definition of an interested party should be supplemented to: (1) Provide guidance regarding the designation of an employee representative (this concern was also raised by one of the individual commentators), (2) address whether a government employee must lose or be at risk of losing his or her job in order to have standing to protest, and (3) authorize a protest without regard to the number of employees involved. Additionally, one Federal employee union argued that affected employees should be eligible to receive access to information covered by a protective order.

With respect to the designation of an employee representative, GAO plans to resolve these issues on a case-by-case basis. However, GAO's practice is to generally accept a party's representation

that it is an interested party, unless facts are brought to GAO's attention that challenge the representation.

With respect to whether a government employee must lose his or her job in order to have standing to protest, GAO has addressed this issue in a recent decision in which GAO concluded that Federal employees' jobs "must be at stake in order for their designated agent to qualify as an interested party to challenge an agency's conversion of a function to performance by the private sector." *Mark Whetstone—Designated Employee Agent*, B-311284, May 9, 2008, 2008 CPD ¶ 5-6. Because GAO has addressed this issue in a published decision, GAO does not believe that a change to the proposed rule is needed.

With respect to whether a protest is authorized without regard to the number of affected employees, GAO has addressed this issue in a recent decision as well. As GAO explained in *Lisa Hartman—Designated Employee Agent*, B-311247, May 6, 2008, 2008 CPD ¶ 5-6, there is no requirement under OMB Circular A-76 for an agency to use the procurement process to conduct a "streamlined competition," when a commercial activity is performed by 65 or fewer full-time equivalent (FTE) employees. Moreover, there is no statutory requirement to conduct a public-private competition, using the procurement process, if fewer than 10 FTEs are involved. *Id.*; see also National Defense Authorization Act for Fiscal Year 2008, Public Law 110-181, Sec. 327, 122 Stat. 3, 63. Because GAO has addressed this issue in a decision, GAO does not believe that a change to the proposed rule is needed.

Finally, with respect to whether affected employees should be eligible to receive access to information covered by a protective order, GAO notes that this issue was raised by several commentators in connection with the revision of GAO's rules in 2005. 70 FR 19679, 19680, Apr. 14, 2005. As explained then, GAO thought it was premature to provide definitive guidance regarding providing access to protected information by the ATO, the employee representative, and/or their attorneys. Since that time, GAO has not had an opportunity to address this matter further in protest decisions.

Nonetheless, GAO thinks that several points of guidance offered then are still applicable. GAO believes that where counsel for the ATO or for the employee representative is not a government employee, that attorney will be required to apply for admission under existing standards established for admission to a protective order. As for the ATO and the

employee representative, those individuals would presumably not be provided access to protected information under the protective order, just as non-attorneys in other protests cannot obtain such access. In cases where counsel for the ATO, or for the employee representative, is a government employee, GAO will proceed on a case-by-case basis, with appropriate weight given to the agency's views and, in particular, to the access that the agency has given the attorney to proprietary or source selection sensitive documents before the protest was filed. As the practice develops, and experience is gained by all sides, GAO intends to develop uniform procedures that can be incorporated into the bid protest process and, if warranted, into GAO's Bid Protest Regulations.

Contracting Agency

In the proposed rules, GAO explained it was deleting the definition of "contracting agency" at paragraph (d) of 4 CFR 21.0, and replacing the term "contracting agency" with "agency" throughout 4 CFR 21. One of the individual commentators brought to GAO's attention that the proposed rule failed to implement this change at paragraph (c) of 4 CFR 21.3. GAO is correcting this omission in the final rule.

Additional Statements

In the proposed rules, GAO explains that, consistent with current practice, GAO proposed to revise paragraph (j) of 4 CFR 21.3 to clarify that parties must seek GAO's prior approval before submitting additional statements, and that GAO reserves the right to disregard statements that are submitted without prior approval. One of the individual commentators suggested that GAO amend the proposed rule to state that GAO will automatically reject additional filings that are submitted without prior approval. Although the amendment of the rule reflects the need for parties to seek prior approval before submission of additional statements, GAO does not believe that it would be appropriate, in every case, to automatically reject additional statements submitted without prior approval. As a result, GAO is not changing the proposed rule in this respect.

The same commentator also requested that GAO amend the proposed rule to state that when a party is allowed to submit an additional statement, the other parties shall have a minimum of 24 hours to respond, where practicable. As a general rule, consistent with GAO's statutory obligation to issue decisions

within 100 calendar days, GAO allows parties to respond to additional statements. GAO is not prepared, however, to amend the rules to reduce its flexibility in this area.

One of the Federal employee union commentators requested that GAO amend this proposed rule to allow parties who request permission to submit additional statements to submit the statement along with the request. GAO does not believe that this proposed change is warranted, as it would effectively defeat the stated purpose of the rule of requiring parties to first obtain permission to submit additional statements.

Reimbursement of Costs

One of the individual commentators requested that GAO amend its rule at 4 CFR 21.8 to state that GAO will recommend reimbursement of costs and attorneys' fees only in "appropriate circumstances," so as to provide GAO with the discretion to avoid recommending that an agency reimburse the costs and fees of agency employees or counsel. The commentator recognizes that this concern would not exist in situations where affected employees retain outside representation. GAO does not think that changes to this rule are needed to conclude that awarding costs to government employee protesters may not be appropriate, because the rule already states that GAO "may" recommend reimbursement of protest costs, including attorneys' fees.

The same commentator also suggested that GAO clarify paragraph (e) of 4 CFR 21.8 to expressly state that GAO will not recommend reimbursement of protest costs where an agency takes prompt corrective action, i.e., the agency takes corrective action before the agency report is produced. GAO thinks this issue has been adequately addressed in prior decisions. E.g., *Alaska Structures, Inc.-Costs*, B-298156.2, July 17, 2006, 2006 CPD ¶ 109 at 4. GAO recognizes that the commentator is accurately stating the general rule applicable to recommendations for the reimbursement of protest costs. On the other hand, GAO does not rule out the possibility that unique and rarely encountered circumstances could warrant the recommendation of the reimbursement of costs when an agency takes corrective action prior to the due date for the agency report and would like to retain its discretion in this regard. See *Louisiana Clearwater, Inc.—Reconsideration & Costs*, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209 at 6.

Statutory Stays

In the notice of proposed rulemaking, GAO stated that it would revise 4 CFR 21.6 and 21.14 to clarify that GAO has no role in administering the statutory requirements to withhold contract award or suspend contract performance. One of the Federal employee unions expressed concern with GAO's proposed clarification because of what the commentator perceived as GAO's ability to direct agencies to suspend contract performance. The commentator argued that this ability could provide a valuable mechanism to enforce the rights of affected employees.

GAO proposed this change to more accurately reflect its role in questions involving the statutory stay provisions of CICA. GAO views this clarification as appropriate for all of the protests over which GAO has jurisdiction: this clarification has no greater or lesser application to protests involving public-private competitions. As a result, GAO plans to implement the proposed changes to 4 CFR 21.6 and 4 CFR 21.14 as explained in the notice of proposed rulemaking.

TSA Jurisdiction

In the notice of proposed rulemaking, GAO noted that as of June 23, 2008, procurements conducted by the TSA will be subject to the Federal Acquisition Regulation (FAR), such that GAO will gain jurisdiction over TSA procurements. The Department of Homeland Security (DHS) has issued a final rule stating that TSA "acquisitions initiated after June 22, 2008" will be subject to the FAR. 73 FR 30317, May 27, 2008. In addition, TSA has requested that GAO clarify that its jurisdiction will apply to procurements covered by solicitations issued on or after June 23. In light of the revised DHS regulations pertaining to the applicability of the FAR to TSA procurements, and in the interest of an orderly transition by TSA to FAR-based procurements, GAO will hear protests of TSA procurements covered by TSA solicitations issued on or after June 23.

List of Subjects in 4 CFR Part 21

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

■ For the reasons set out in the preamble, Title 4, Chapter I, Subchapter B, Part 21 of the Code of Federal Regulations is amended 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. Remove the words "a contracting agency" and "the contracting agency" wherever they appear and add in their place the words "an agency" or "the agency," respectively.

■ 3. Amend § 21.0, by revising paragraphs (a)(2), (b)(2), and (c); removing paragraph (d); and redesignating paragraph (e) as paragraph (d), redesignating paragraph (f) as paragraph (e), redesignating paragraph (g) as paragraph (f) and revising it, and redesignating paragraph (h) as paragraph (g).

The revisions read as follows:

§ 21.0 Definitions.

(a) (1) * * *

(2) In a public-private competition conducted under Office of Management and Budget Circular A-76 regarding performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under OMB Circular A-76, *interested party* also means

(A) The official responsible for submitting the Federal agency tender, and

(B) Any one individual, designated as an agent by a majority of the employees performing that activity or function, who represents the affected employees.

(b)(1) * * *

(2) If an interested party files a protest in connection with a public-private competition conducted under OMB Circular A-76 regarding an activity or function of a Federal agency, the official responsible for submitting the Federal agency tender, or the agent representing the Federal employees as described in paragraph (a)(2)(B) of this section, or both, may also be *intervenors*.

(c) *Federal agency* or *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.

* * * * *

(f) 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 (202-512-9749), or e-mail (protests@gao.gov). Please check GAO's Web site (<http://www.gao.gov/legal/bidprotest.html>) for current filing information. 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.

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■ 4. Amend § 21.1 by revising paragraph (g) to read as follows:

§ 21.1 Filing a protest.

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(g) Unless precluded by law, GAO will not withhold material submitted by a protester from any party outside the government after issuing a decision on the protest, in accordance with GAO's rules at 4 CFR part 81. 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 a redacted copy of the protest which omits the information with GAO and the agency within 1 day after the filing of its protest with GAO.

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■ 5. Amend § 21.3 by revising paragraphs (c), (d), and (j) to read as follows:

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

* * * * *

(c) The agency shall file a report on the protest with GAO within 30 days after the telephone notice of the protest from GAO. The report provided to the parties need not contain documents which the agency has previously furnished 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 respond to the request for documents in writing. 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 nondisclosure of documents must be filed with GAO and the other parties within 2 days of receipt of this list.

(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 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; the abstract of bids or offers; and any other relevant documents. In appropriate cases, a party may request that another party produce relevant documents, or portions of documents, that are not in the agency's possession.

* * * * *

(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.

■ 6. Amend § 21.4 by revising paragraphs (b) and (d) 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.

* * * * *

(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, restricting the individual's practice before GAO, prohibition from participation in the remainder of the protest, or dismissal of the protest.

■ 7. Amend § 21.5 by revising paragraph (b)(1) to read as follows:

§ 21.5 Protest issues not for consideration.

* * * * *

(b) *Small Business Administration issues.* (1) Small business size standards and North American Industry Classification System (NAICS) standards. Challenges of established size standards or the size status of particular firms, and challenges of the selected NAICS code may be reviewed solely by

the Small Business Administration. 15 U.S.C. 637(b)(6).

* * * * *

■ 8. Revise § 21.6 to read as follows:

§ 21.6 Withholding of award and suspension of contract performance.

Where a protest is filed with GAO, the 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); GAO does not administer the requirements to stay award or suspend contract performance under CICA at 31 U.S.C. 3553(c) and (d).

■ 9. Amend § 21.12 by revising paragraph (a) to read as follows:

§ 21.12 Distribution of decisions.

(a) Unless it contains protected information, a copy of a decision shall be provided to the protester, any intervenors, and the agency involved; a copy also shall be made available to the public. A copy of a decision containing protected information shall be provided only to the 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.

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■ 10. Amend § 21.14 by revising paragraph (c) to read as follows:

§ 21.14 Request for reconsideration.

* * * * *

(c) GAO will summarily dismiss any request for reconsideration that fails to state a valid basis for reconsideration or is untimely. To obtain reconsideration, the requesting party must show that our prior decision contains errors of either fact or law, or must present information not previously considered that warrants reversal or modification of our decision; GAO will not consider a request for reconsideration based on repetition of arguments previously raised.

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Accountability Office.

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