

## Acquisition & Property Division Policy Memorandum

Subject: <b>Processing GAO and Agency Protests Resulting from the Procurement Process</b>			Number: 33-01-A
Distribution: ARS PAO's FD APD	Date: 3/24/2006	This Replaces: APD Policy No. 33-01	

### Background

Agricultural Acquisition Circular (AAC) 96-04, April 4, 2005, changed the procedures for coordinating Government Accountability Office (GAO) procurement protests with the Senior Procurement Executive. Per cited AAC, Agriculture Acquisition Regulations Subpart 433.104 has been deleted. This memorandum provides updated information regarding the processing of GAO and Agency protests within Agricultural Research Service (ARS).

### Responsibilities

Responsibilities for processing GAO and Agency protests are as follows:

#### **GAO PROTEST**

#### **ARS GAO LIAISON (Chief, Policy Branch (PB), Acquisition and Property Division (APD))**

- Acts as the single point of contact for the GAO notification of protests within the Agency;
- Notifies the Contracting Officer (CO) of the protest and the due date for the Agency report;
- Provides a copy of the protest to the CO once it is received from the Department of Agriculture (USDA) Office of Procurement Policy Management;

- Ensures that the CO submits the proposed Agency Report to the ARS GAO Liaison within 7 working days prior to the required submission date at the GAO;
- Reviews the Report (including the Memorandum of Law) for completeness and ensures that the document, along with PB comments, is forwarded to the Director, APD, for review within 1 working day;
- Ensures that the Director's comments are forwarded to the CO within 3 working days of submission; and,
- Answers questions concerning interpretation of the Federal Acquisition Regulation (FAR) requirements and Agency protest procedures.

### **CO FOR THE GAO PROTESTED ACTION**

- Contacts the Office of General Counsel (OGC), General Law Division (Phone No.: 202-720-8972; Fax No.: 202-720-5837), to request the assignment of an Attorney; and notifies PB of the assignment.
- Provides the OGC Attorney copies of the following:
  - i. Solicitation and all amendments;
  - ii. Awardee's bid or proposal;
  - iii. Protestor's bid or proposal;
  - iv. Abstract of bids or offers; and,
  - v. Source selection recommendation.
- Complies with the GAO protest regulations set forth in 4 Code of Federal Regulations (CFR) Part 21 (GAO Bid Protest Regulations) and FAR Subpart 33.1.
- Provides a copy of the Agency Report to the ARS GAO Liaison within 7 working days prior to the required submission date to GAO. To avoid conflicts between the Memorandum of Law prepared by OGC and the Contracting Officer's Statement of Relevant Facts prepared by the CO, ensure that the OGC Attorney reviews the Statement of Relevant Facts prior to preparation of the final report.

### **OGC ATTORNEY ASSIGNED**

- Provides legal advice;
- Reviews and makes recommendations on the CO's Statement of Relevant Facts;
- Prepares the Memorandum of Law, which becomes part of the Agency Report;
- Provides legal counsel during any hearings; and,
- Delivers the final Agency Report to the GAO by the required submission date.

### **AGENCY PROTEST**

#### **ARS LIAISON (Chief, PB, APD)**

- Assists in the use of alternative dispute resolution techniques;
- Reviews the Agency Report prepared by the CO for adequacy and completeness, and ensures that it is forwarded to Director, APD, for review and concurrence, within 2 days;
- Assists in the independent review process of the Agency protest, if applicable;
- Reviews the request for award in the face of a protest, (i.e., urgent and compelling reasons); and,
- Answers questions concerning interpretation of the FAR requirements and Agency protest procedures.

**CO FOR THE AGENCY PROTESTED ACTION**

- Responsible for processing the Agency Report;
- Complies with the Agency protest regulations set forth in FAR Subpart 33.103.

**OGC ATTORNEY**

- Provides legal advice and counsel concerning the protest to the CO.

**Action Required by REE CO**      Ensure compliance with the regulations in 4 CFR Part 21, Subpart 33.1 and AGAR 433.1.

**APD Point of Contact**      Armenda Daye, Procurement Analyst, PB,  
301-504-1734

**Approved**                                      /s/  
Larry R. Cullumber, Director  
Acquisition and Property Division

**5 Enclosures**

## SUMMARY OF GAO BID PROTEST REQUIREMENTS

### Subject Area

### Requirement

1. Time for Filing a Protest to GAO

Protest must be filed not later than **10 calendar days** after the protester knew or should have known the basis of protest, or **5 days** after debriefing, whichever is earlier.

Note: If a significant legal issue is at stake, the GAO may accept an otherwise untimely protest (4 CFR Section 21.2 (c)).

**Exception:** Protests challenging competitive procurements when a contractor requests a statutorily required debriefing. Debriefings are required only if requested in writing within 3 days of (a) notice of elimination from competitive range, or (b) notice of contract award. The protest shall not be filed before the debriefing date offered to the protester but shall be filed not later than **5 calendar days** after the debriefing date.

If an Agency-level protest was timely filed, subsequent protest to the GAO must be within **10 calendar days** of actual or constructive knowledge of adverse Agency action.

2. Suspension of Performance

The CO must immediately suspend performance pending resolution of the protest within the Agency if a protest is received within **10 calendar days** after contract award **or** within **5 calendar days** after a debriefing date offered to the protester under a timely debriefing request, whichever is later. If continued performance is justified, a written justification or determination shall be approved by the Head of the Contracting Activity Designee.

Note: Because of the timeline, debriefings that are not mandatory, if given, should be given beyond the **10 days** after award period to eliminate mandatory suspension of performance.

3. Submission of Agency Report to the GAO

**30 calendar days** after telephonic notice of the protest to the GAO. A copy of the report must be simultaneously provided to the ARS GAO Liaison.

When specific documents material to the disposition of the protest have been requested, the Agency must provide a list of those documents at least **5 calendar days** prior to the filing of the Agency Report. The CO must provide all interested parties and the GAO a list of those documents and any portions thereof that they intend to withhold from the protester and the reasons for the proposed withholding.

Any objections by the protester to the scope of the Agency's proposed disclosure/nondisclosure of documents must be filed within **2 calendar days** after receipt of the list.

4. Protestor's Comments on the Agency Report to the GAO

Filed with the GAO within **10 calendar days** after receipt of the report. Copies are provided to the contracting agency and other participating parties. If a **hearing** is held, these comments are due within **5 days** of the hearing.

5. Hearings

May be held at the request of the Agency, a protester, or other interested party (e.g., awardee). Held at the GAO in Washington, D.C., and at the discretion of the GAO, at other locations, or by telephone.

6. Decisions by the GAO

Within **100 calendar days** after filing the protest.

7. Express Option

May be requested by either party, or the GAO may invoke on its own. Requests must be filed within **5 days** of protest filing.

Must be suitable for resolution within **65 calendar days** (decision by GAO must be within **65 calendar days** after filing a protest).

The Agency Report is due to GAO within **20 calendar days**.

Protester's comments on the Agency Report must be filed with the GAO and other parties within **5 calendar days** after receipt of the report.

OR

Consolidated comments on the Agency Report and hearing are due within **5 calendar days** after hearing or as specified by the GAO.

8. Sustained Protest

The protester shall file their claim for **cost** with the contracting Agency within **60 calendar days** after receipt of the GAO's recommendation.

Note: If ANY deadline falls on a weekend OR Government holiday, the deadline is extended to the next business day.

**GAO PROTEST REPORT EXHIBITS**

Supporting documents required to determine the validity of a protest are submitted in the Agency Protest Report. Documents are to be arranged in chronological order within each submission, earliest documents first; bound on the left margin (where practicable); numbered (whole numbers only); tabbed; and indexed. At a minimum, a copy of the following documents shall be included in the Agency Report to the GAO:

1. The protest;
2. The offer submitted by the protesting offeror;
3. The offer being considered for award or being protested;
4. All relevant evaluation documents;
5. The solicitation, including the specifications or portions relevant to the protest;
6. The abstract of offers or relevant portions;
7. Any other documents that are relevant to the protest, including documents specifically requested by the protester;
8. If applicable, the determination and findings to proceed with award and/or to continue contract performance;
9. The CO signed statement of relevant facts, including a best estimate of the contract value. The statement is to set forth findings, actions, recommendations, and any additional evidence or information not provided in the protest file that may be necessary to determine the merits of the protest;
10. Memorandum of Law (to be prepared by the Office of General Counsel (OGC) Attorney assigned to the protest); and,
11. A list of parties being provided the documentation.



**SUMMARY OF AGENCY BID PROTEST REQUIREMENTS**

<u>Subject Area</u>	<u>Requirement</u>
1. Time for Filing a Protest to the Agency	<p>Protest must be filed within <b>10 days</b> after contract award or within <b>5 days</b> after a debriefing date was offered to the protester.</p> <p>Protests of alleged improprieties in a solicitation shall be filed prior to bid opening or the closing date for receipt of proposals.</p> <p>All other protests filed no later than <b>10 days</b> after the basis of protest is known or should have been known, whichever is earlier.</p> <p>Subsequent protest to the GAO must be filed within <b>10 days</b> of knowledge of initial adverse agency action.</p> <p>Protesters who file protests with the HCAD shall furnish a complete copy to the CO.</p>
2. Suspension of Performance	<p>Upon receipt of a protest prior to award, a contract may not be awarded, pending Agency resolution of the protest, unless contract award is justified, in writing, for urgent and compelling reasons.</p>
3. Agency Decisions	<p>Resolution of Agency protests within <b>35 days</b> after the protest is filed.</p> <p>Agency decisions shall be written, well-reasoned and explain the Agency position. Decisions shall be provided to the protester using a method that provides evidence of receipt.</p>

The written final decision shall include a paragraph substantially as follows:

"This decision shall be final and conclusive unless a further written notice of protest is filed with the GAO in accordance with 4 CFR Part 21. Neither the filing of a protest with USDA nor the filing of a protest with the GAO affects your right to file an action in a district court of the United States or the United States Court of Federal Claims."

Enclosure 4

**GAO PROTEST - CHART OF RELEVANT TIME PERIODS**

REQUIREMENT	TIME PERIOD
Filing a Protest	Solicitation - before bid opening or the closing date for receipt of proposals. Other Matters - <b>10 calendar days</b> .
Suspension of Performance	Protest received within 10 calendar days after award. <b>5 calendar days</b> after debriefing date.
GAO Notification to Contracting Agency	No later than 1 day.
Agency Report to GAO	30 days.
Requested Documents List	<b>5 calendar days</b> before filing.
Objections to Disclosure/Nondisclosure of Documents	Within <b>2 calendar days</b> after receipt of the list.
Comments on the Agency Report	Within <b>10 calendar days</b> after receipt of report.
Hearing Held	Within <b>5 calendar days</b> of hearing.
GAO Decision	Within <b>100 calendar days</b> .
Express Option	Within <b>5 calendar days</b> of protest filing. GAO decision within <b>65 calendar days</b> . Agency Report to GAO within <b>20 calendar days</b> . Protester's comments on Agency Report within <b>5 calendar days</b> .
Sustained Protest	File claim for cost within <b>60 calendar days</b> of GAO's recommendation.

**AGENCY PROTEST - CHART OF RELEVANT TIME PERIODS**

Filing a Protest	Solicitation - before bid opening or the closing date for receipt of proposal. Other Matters - <b>10 calendar days</b> .
Suspension of Performance	Prior to award - no contract award, unless urgent and compelling reasons are justified.
Agency Decisions	Within <b>35 days</b> of filing.
Subsequent Protest to GAO	Within <b>10 calendar days</b> of adverse Agency action.