

**SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS
PART 833—PROTESTS, DISPUTES, AND APPEALS**

Subpart 833.1 – Protests

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AUTHORITY: 40 U.S.C. 121(c) and 48 CFR 1.301-1.304.

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SUBPART 833.1 – PROTESTS**833.102 General.**

Solicitations must instruct interested parties (see FAR provision 52.233-2) to send a copy of any protest filed with the Government Accountability Office (GAO) to the contracting officer and the appropriate VA Central Office activity as follows:

(a) For contracts to be awarded by the Office of Construction and Facilities Management: Director, Office of Construction and Facilities Management, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420.

(b) For all other contracts: Deputy Assistant Secretary for Acquisition and Materiel Management, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420.

833.103 Protests to VA.

(a) Filing of protests. (1) An interested party may protest to the contracting officer or, as an alternative, may request an independent review by filing a protest with the Deputy Assistant Secretary for Acquisition and Materiel Management (DAS for A&MM), or for solicitations issued by the Director, Office of Construction and Facilities Management. A protest filed with the DAS for A&MM or the Director, Office of Construction and Facilities Management, will not be considered if the interested party has a protest on the same or similar issues pending with the contracting officer.

(2) Protests to the contracting officer must be in writing and addressed where the offer/bid is to be submitted.

(3) Protests requesting an independent review must be in writing and addressed to the Deputy Assistant Secretary for Acquisition and Materiel Management, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420; or, for solicitations issued by the Office of Construction and Facilities Management, to the Director, Office of Construction and Facilities Management, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420.

(4) The following types of protests may be dismissed by VA without consideration of the merits or forwarded to another agency for appropriate action:

(i) Contract administration. Disputes between a contractor and VA are resolved under the disputes clause of the contract and the Contract Disputes Act of 1978. (41 U.S.C. 601-613).

(ii) 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 are for review solely by the Small Business Administration (SBA). (15 U.S.C. 637(b)(6); 13 CFR 121.1002).

(iii) Small business certificate of competency program. A protest made under section 8(b)(7) of the Small Business Act, or in regard to any issuance of a certificate of competency or refusal to issue a certificate under that section, is not reviewed in accordance with bid protest procedures unless there is a showing of possible fraud or bad faith on the part of Government officials.

(iv) Protests under section 8(a) of the Small Business Act. The decision to place or not to place a procurement under the 8(a) program is not subject to review unless there is a showing of possible fraud or bad faith on the part of Government officials or that regulations may have been violated. (15 U.S.C. 637(a)).

(v) Affirmative determination of responsibility by the Contracting Officer. An affirmative determination of responsibility will not be reviewed unless there is a showing that such determination was made fraudulently or in bad faith or that definitive responsibility criteria in the solicitation were not met.

(vi) Walsh-Healey Public Contract Act. Challenges of the legal status of a firm as a regular dealer or manufacturer within the meaning of the Walsh-Healey Act is determined solely by the procuring agency, the SBA (if a small business is involved), and the Secretary of Labor. (41 U.S.C. 35-45).

(vii) Subcontractor protests. The contracting agency will not consider subcontractor protests except where the subcontract is by or for the Government.

(viii) Judicial proceedings. The contracting agency will not consider protests where the matter involved is the subject of litigation before a court of competent jurisdiction.

(b) Alternative dispute resolution. Bidders/offerors and VA contracting officers are encouraged to use alternative dispute resolution (ADR) procedures to

resolve protests at any stage in the protest process. If ADR is used, VA will not furnish any documentation in an ADR proceeding beyond what is allowed by the FAR.

(c) Action upon receipt of protest. For protests filed with the contracting officer, the HCA will be the approving official for the determinations identified in FAR 33.103(f)(1) and (f)(3). If the HCA is also the contracting officer, the approving official will be the DAS for A&MM. For protests filed with the DAS for A&MM or the Director, Office of Construction and Facilities Management, those individuals will be the approving officials for the determinations identified in FAR 33.103(f)(1) and (f)(3).

(d) Requests for GAO advance decisions. When a written protest has been filed with the contracting officer and the contracting officer considers it desirable to do so, the contracting officer may request an advance decision from the Comptroller General. The contracting officer must send the submission to the Comptroller General through the DAS for A&MM or the Director, Office of Construction and Facilities Management, as appropriate, and must include the material listed in FAR 33.104(a). The contracting officer must promptly notify the protesting individual or firm in writing of the decision of the Comptroller General.

(e) Protest after award. When a written protest is filed with the contracting officer after contract award, the following requirements apply:

(1) If FAR 33.103(f)(3) requires suspension of contract performance, the contracting officer must seek to obtain a mutual agreement with the contractor to suspend performance on a no-cost basis. If unsuccessful, the contracting officer must issue a stop-work order in accordance with contract clause FAR 52.233-3, Protest after Award.

(2) If suspension of contract performance is not required by FAR 33.103(f)(3) and if the contracting officer determines that the award was proper, the contracting officer must furnish the protester a written explanation of the basis for the award that is responsive to the allegations of the protest. The contracting officer will advise the protester that the protester may appeal the determination to one of the following:

(i) The DAS for A&MM.

(ii) The Director, Office of Construction and Facilities Management, in the case of a contract awarded by the Office of Construction and Facilities Management.

(iii) The Comptroller General.

(3) If suspension of contract performance is not required by FAR 33.103(f)(3) but the contracting officer determines that the award is questionable, the contracting officer, after consulting with OGC, will advise the contractor of the protest and invite the contractor to submit comments and relevant information. The contracting officer must submit the case promptly to the DAS for A&MM for advice. The DAS for A&MM may consult with OGC and will either advise the contracting officer of the appropriate action to take, or submit the case to the Comptroller General, through the Assistant Secretary for Management, for a decision. The contracting officer will provide interested parties with a copy of the final decision.

(f) Agency appellate review of the contracting officer's protest decision. An interested party may request an independent review of a contracting officer's protest decision by filing an appeal with the DAS for A&MM or, for solicitations issued by the Office of Construction and Facilities Management, with the Director, Office of Construction and Facilities Management. To be considered timely, the appeal must be received by the appropriate official named in this paragraph within 10 calendar days of the date the interested party knew, or should have known, whichever is earlier, of the basis for the appeal. Appeals must be addressed as provided in paragraph (a)(3) of this section. Appeals do not extend GAO's timeliness requirements for appeals to GAO. By filing an appeal as provided in this paragraph, an interested party may waive its rights to further appeal to the Comptroller General at a later date. Agency responses to appeals submitted to the agency shall be reviewed and concurred in by OGC (025).

833.104 Protests to GAO.

(a) General procedures. (1) Procedures for protests to GAO are at 4 CFR Part 21 (GAO Bid Protest Regulations). If guidance concerning GAO procedure in this section differs from 4 CFR Part 21, 4 CFR Part 21 applies.

(2) When a protest before or after award has been filed with GAO, the contracting officer must submit a report to the DAS for A&MM, or the Director, Office Construction and Facilities Management, as appropriate, within 5 workdays after receipt of verbal or written notice of the protest, whichever occurs first. The report must include a copy of the documentation indicated in FAR 33.104(a)(3).

(3) Contracting officers are responsible for the notification procedures outlined in FAR 33.104(a)(4).

(b) Protests before award. When VA receives notice from GAO of a pre-award protest filed directly with GAO, award will normally not be made until the matter is resolved. However, award may be made despite the protest if the DAS

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for A&MM, or the Director, Office of Construction and Facilities Management, as appropriate, approves the findings of the HCA required by FAR 33.104(b)(1) and GAO has been notified as provided by FAR 33.104(b)(2). The Director, Acquisition Resources Service, or the Director, Office of Construction and Facilities Management, as appropriate, is responsible for notifying GAO.

(c) Protests after award. When, after award of a contract, VA receives notice from GAO of a protest filed directly with GAO, the contracting officer must, if required to do so by FAR 33.104(c)(1), immediately suspend performance. However, contract performance need not be suspended, despite the protest, if the SPE approves the HCA's findings required by FAR 33.104(c)(2) and GAO has been notified under FAR 33.104(c)(3). Authority to approve the HCA's findings is further delegated to the DSPE and, for solicitations issued by the Officer of Construction and Facilities Management, the Director, Office of Construction and Facilities Management. The Director, Acquisition Resources Service, or the Director, Office of Construction and Facilities Management, as appropriate, is responsible for notifying GAO.

833.106 Solicitation provisions.

(a) The contracting officer shall insert the provision at 852.233-70, Protest content/alternative dispute resolution, in each solicitation expected to exceed the simplified acquisition threshold.

(b) The contracting officer shall insert the provision at 852.233-71, Alternative protest procedure, in solicitations expected to exceed the simplified acquisition threshold.

SUBPART 833.2 – DISPUTES AND APPEALS**833.209 Suspected fraudulent claims.**

The contracting officer must refer matters relating to suspected fraudulent claims to the Office of Inspector General for investigation and referral to the Department of Justice. The contracting officer may not initiate any collection, recovery, or other settlement action while the matter is in the hands of the Department of Justice without first obtaining the concurrence of the U.S. Attorney concerned, through the Office of the Inspector General.

833.211 Contracting officer's decision.

(a) When a dispute cannot be settled by agreement and a final decision under the Disputes clause of the contract is necessary, the contracting officer must furnish the contractor the contracting officer's final decision in the matter.

(b) The contracting officer must identify the decision, in writing, as a final decision and include a statement of facts in sufficient detail to enable the contractor to fully understand the decision and the basis on which it was made. The decision must set forth those facts relevant to the dispute with which the contractor and the contracting officer are in agreement, and as clearly as possible, the area of disagreement.

(c) For VA contracts, the Board of Contract Appeals noted in FAR 33.211 is the Civilian Board of Contract Appeals (CBCA), 1800 F Street, NW., Washington, DC 20405.

833.212 Contracting officer's duties upon appeal.

(a) When a contracting officer receives notice of appeal in any form, the contracting officer must do the following:

(1) Annotate the appeal with the date of mailing (or date of receipt, if otherwise conveyed).

(2) Within 10 days, forward the original notice of appeal and a copy of the contracting officer's final decision letter to the OGC.

(3) Concurrently transmit copies of the notice of appeal and the final decision letter to the DAS for A&MM. (In cases of construction contracts administered by the Office of Construction and Facilities Management, copies of the appeal and the final decision letter need not be transmitted to the DAS for A&MM but instead should be sent to the Director, Office of Construction and Facilities Management.)

(b) Within 20 days of receipt of an appeal, or advice that an appeal has been filed, the contracting officer must assemble and transmit to the OGC, an appeal file consisting of all documents pertinent to the appeal, including all of the following:

(1) The decision and findings of fact that are being appealed.

(2) The contract, including specifications and pertinent amendments, 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 witnesses on the matter in dispute made prior to the filing of the notice of appeal.

(5) Any additional information considered pertinent.

833.213 Obligation to continue performance.

(a) As provided in FAR 33.213, contracting officers shall use FAR clause 52.233-1, Disputes, with its Alternate I. Clause 52.233-1 requires the contractor to continue performance in accordance with the contracting officer's decision in the event of a claim arising under a contract. Alternate I expands this authority, adding a requirement for the contractor to continue performance in the event of a claim relating to the contract.

(b) In the event of a dispute not arising under, but relating to, the contract, if the contracting officer directs continued performance, the contracting officer may consider providing financing for the continued performance, provided, that the Government's interests are properly secured. The contracting officer will contact the DAS for A&MM and OGC for advice prior to authorizing such financing.

833.214 Alternative dispute resolution (ADR).

Contracting officers and contractors are encouraged to use alternative dispute resolution (ADR) procedures. CBCA guidance on ADR may be obtained at <http://www.cbca.gsa.gov>.

833.215 Contract clause.

The contracting officer must use the clause at 52.233-1, Disputes, with its Alternate I (see 833.213).

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