





MEMORANDUM

December 19, 2007

To: Heads of Contracting Activity

From: Martin J. Brown 
Deputy Assistant Secretary for Acquisition Management and Policy

Daniel Barry 
Associate General Counsel, Office of General Counsel -- General Law
Division

Subject: Interim Departmental Protest Control Officer (DPCO) Acquisition Guidance

The roles and responsibilities of the Health and Human Services (HHS) Departmental Protest Control Officer shall transition from the Office of Acquisition Management and Policy (ASAM-OAMP) to the Office of the General Counsel, General Law Division (OGC-GLD). The attached acquisition guidance governs this transition and is effective immediately.

Placing the Departmental Protest Control Officer function within OGC-GLD aligns HHS, organizationally, with other Federal agencies. This function is deemed to be legal in nature and is performed by legal counsel in other Federal agencies; the proposed transfer of this function from ASAM-OAMP to OGC-GLD makes good business sense.

HHS OGC-GLD assumes the Departmental Protest Control Officer function, serves as the notification point with the Government Accountability Office (GAO) for all protests, serves as the focal point on all protest-related communications for OPDIV protest control officers, and provides all necessary legal support in defense of protests.

The attached acquisition guidance outlines protest policies that the acquisition community will adhere to pending formal promulgation in the HHS Acquisition Regulation (HHSAR). If there are any questions, please contact Ms Doris Gibson at 202- 690-7590.

Attachment: Interim Departmental Protest Control Officer (DPCO) Acquisition Guidance

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**Interim Departmental Protest Control Officer (DPCO)
Acquisition Guidance**

Regulation Proposal: HHSAR Interim Change -- Departmental Protest Control Officer (DPCO)

1. Regulation Subparts: HHSAR 314, Mistakes in bids and HHSAR 333, Protest, Disputes, and Appeals.

2. Background: The Department of Health and Human Services (HHS), Office of the Secretary (OS), Office of the Assistant Secretary for Administration and Management (ASAM), Office Acquisition Management and Policy (OAMP), Division of Acquisition Policy (DAP) is currently designated as the headquarters office to serve as the liaison for protests lodged with the U.S. Government Accountability Office (GAO). The purpose of this interim change to the Health and Human Services Acquisition Regulation (HHSAR) is to move this function to the Office of General Counsel-General Law Division (OGC-GLD). OGC-GLD provides legal advice and litigation support for matters such as appropriations, copyright law, Federal Tort Claims Act (including medical malpractice), the Freedom of Information Act and Privacy Act, Federal contract law, personnel law, equal employment opportunity, and labor relations. As a result of this proposed amendment to HHSAR, HHS OGC-GLD would assume the Departmental Protest Control function, serve as the notification point with the GAO for all protests, serve as the focal point on all protest-related communications for OPDIV protest control officers, and provide all necessary legal support in defense of protests.

3. Analysis and Discussion: GAO recently released its bid protest statistics for fiscal year 2007. Of the 335 decisions based on the merits, the GAO sustained 91 protests. This represents a sustain rate of 27 percent, down 2 percent from the 29 percent sustain rate in fiscal year 2006, but up 10 percent from the 17 percent sustain rate in fiscal year 2003. The number of protests filed increased slightly to 1,411 cases, up from the 1,327 cases in fiscal year 2006. The GAO also reported that there was no instance in which a federal agency did not fully implement a recommendation made by the GAO in connection with a bid protest decided during fiscal year 2007.

Placing the Departmental Protest Control Officer function within OGC-GLD aligns HHS, organizationally, with other Federal agencies. This function is deemed to be legal in nature and is performed by legal counsel in other Federal agencies; the proposed transfer of this function from ASAM-OAMP to OGC-GLD makes good business sense.

4. Impact on HHSAR: The proposed regulatory language affects two parts of the HHSAR:

- HHSAR Subpart 314.407 - Mistakes in bids.

- HHSAR Subpart 333 - Protest, Disputes, and Appeals. This subpart will be amended to indicate that the Departmental Protest Control Officer function will transition to the Office of the General Counsel, General Law Division (OGC-GLD).

5. Existing and Amended language for the Departmental Protest Control Officer (DPCO):

a) Amendment to HHSAR Part 314

Part 314-SEALED BIDDING.

Subpart 314.4 - Opening of Bids and Award of Contract

314.407 Mistakes in bid. 314.407-3

Other mistakes disclosed before award.

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

(e) The authority to make determinations under paragraphs (a), (b), (c), and (d) of FAR 14.407-3 is delegated to the Chief of the Contracting Office, without power of redelegation.

(f) Each proposed determination shall have the concurrence of the Associate General Counsel, General Law Division (OGC-GLD).

(i) Cases in which the evidence is not clear and convincing and/or otherwise doubtful shall be submitted by the Chief of the Contracting Office directly to OGC-GLD.

31 4.407-4 Mistakes after award.

(c) The Head of the Contracting Activity or the Chief of the Contracting Office in consultation with OGC-GLD has the authority to make administrative determinations in connection with mistakes in bid alleged after award. This authority may not be redelegated.

(d) Each proposed determination shall have the concurrence of the Associate General Counsel, General Law Division (OGC-GLD).

b) Amendment to HHSAR 333

PART 333--PROTESTS, DISPUTES, AND APPEALS

Subpart 333.1 --Protests

Sec.

333.1 02 General.

333.103 Protests to the agency.

333.104 Protests to GAO.

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

Subpart 333.1 --Protests

333.102 General.

(g)(1) The OGC-GLD serves as the liaison for protests lodged with GAO; is designated as the office responsible for all protests within HHS; and serves as the notification point with the 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. A copy of each appointment and termination of appointment of protest control officers shall be forwarded to the Director, Division of Acquisition Program Support (DAPS) and Deputy Associate General Counsel for the General Procurement, Fiscal and Information Law Division (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 Office of General Counsel-General Law Division (OGC-GLD). If the protest has been lodged with the Secretary, is addressed to the Secretary or requests referral to the Secretary, approval shall also be obtained from the Director, Division of Acquisition Program Support (DAPS) and OGC-GLD before making the award.

(2) The contracting officer shall require written confirmation of any oral protest. To be considered timely, the written confirmation must be filed in accordance with the applicable provisions in 33.102(a). In the following cases, written protests received by the contracting officer before award shall be forwarded, through acquisition channels, to OGC-GLD for processing. Files concerning these protests shall be submitted in duplicate, or as otherwise specified by OGC-GLD and sent within five (5) calendar days, marked "IMMEDIATE ACTION--PROTEST BEFORE AWARD", any documents relevant to issues raised in the protest.

(i) The protester requests referral to the Secretary of Health and Human Services;

(ii) The protest is known to have been lodged with the Government

Accountability Office (GAO) or the Secretary, or is addressed to either; or

(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 protest be considered by the Secretary or the Government

Accountability Office (GAO). Otherwise,

protests addressed to the contracting officer may be answered by the contracting officer, with the concurrence of the contracting activity's protest control officer and OGC-GLD.

(3) Protests received after award shall be treated as indicated in FAR 33.103(f)(3)

333.1 04 Protests to GAO.

(a) General procedures.

(3)

(ii) OGC-GLD shall process protests filed with GAO, whether pre- or post award. Protest files shall be prepared by the contracting office and distributed 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 33.104(a)(3)(ii) (A) through (G), the protest file shall include the following documents:

(H) The current status of award. 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 33.1 04(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) Acquisition plan and source selection plan and the source selection decision document.

(O) The contracting officer's statement of facts and circumstances, including:

(i) numbered findings of fact prepared with complete documentation and including all the facts and rationale, both favorable and unfavorable, to the Contracting Officer's position.

(ii) The files shall be assembled in a secure binder fastened at the left side with a fastener that will permit the full page to be read. The documents should be indexed numerically, with the first two positions being reserved for the Contracting Officer's Statement of Facts and Circumstances, and the second for OGC's Memorandum of Law. The index of all documents should be paginated. Sizable files should be divided into two or more volumes. The cover of the report should identify it as the protest file and include the solicitation number and the GAO Bid Protest file number (B- number). Drawings should be folded and placed into an envelope in the binder. The solicitation/contract should be enclosed as a separate exhibit if it is voluminous in size.

(4) OGC-GLD is responsible for making the necessary distributions referenced in FAR 33.104(a)(4).

(5) Unless an alternative arrangement is reached with the Office of General Counsel, 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 five (5) calendar days from receipt of the protest. In addition, the Contracting Officer should also accommodate any other OGC-GLD requests for documents which may be needed prior to the aforementioned five-day time period. The contracting officer shall submit the contracting officer's statement of facts and circumstances and the additional copies of documentation within fourteen (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) The 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 Head of the Contracting Activity (HCA) (not delegable), and forward it, along with a written request for approval to make the award (addressed to the Deputy Assistant Secretary for Acquisition Management and Policy (DASAMP)) through OGC-GLD. Should OGC-GLD concur, it will forward the request to DASAMP for final approval. The written request for

approval must contain all relevant documentation as attachments to the request, so that the information may be considered by DASAMP.

(2) If the request to make an award notwithstanding the protest is approved by the Deputy Assistant Secretary for Acquisition Management and Policy (DASAMP), 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 decision of DASAMP, and the contracting activity's protest control officer shall immediately notify the Contracting Officer. Should DASAMP approve the request, then it 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 the protest, a finding shall be prepared by the Contracting Officer using the criteria in FAR 33.104(c)(2), executed by the HCA (not delegable), and forwarded, pursuant to the procedures described in Paragraph (b)(2) of this section. The same procedures for notification stated in paragraph (b)(2) of this section shall be followed.

(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 the protester and any intervenors.

(g) Notice to GAO. FAR 33.104(g) requires the agency to notify GAO if any of its recommendations (other than costs) have not been followed 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 the implementation of the recommendations, and reasons for any non-

compliance. OGC-GLD shall be the 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 established by GAO. OGC-GLD will 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 paragraph (a)(5) will apply.