

UNIT 48: PROTESTS

October 2003

Overall Duty Act to resolve acquisition complaints and concerns.

Overall Conditions Given acquisition planning, a solicitation, the contract file, and a complaint or concern expressed by an interested party.

Overall Standard Process the protest in accordance with FAR and agency requirements.

Part A: Protests of Set-Aside or Small Business Preference Eligibility

Sub-Duty Develop or forward a protest to SBA and support resolution.

Additional Conditions Given a solicitation with competition limited to one or more concerns with a particular small business classification, an offer in line for award, and a protest regarding the awardee's status.

Sub-Duty Standard With SBA, assure that award is not made to an offeror that falsely represents its eligibility under a solicitation with competition limited to one or more concerns with a particular small business classification. Support any appropriate action against a business entity that has misrepresented its eligibility.

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Part B: Agency Protests

Sub-Duty Respond to any agency protest and support the agency in any appeal process.

Additional Conditions Given an agency protest before or after award, the offer designated for award (if after award), all other offers (if after award), and support from the Government legal counsel.

Sub-Duty Standard Support fair resolution of any agency protest in accordance with all FAR, agency, and other procedural requirements.

Part C: Protests to GAO

Sub-Duty Support resolution of any protest filed with General Accounting Office (GAO).

Additional Conditions Given a GAO protest before or after award, the offer designated for award (if after award), all other offers (if after award), and support from the Government legal counsel.

Sub-Duty Standard Support GAO action to resolve the protest in accordance with all FAR, agency, and other procedural requirements.

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Part D: Protests to the Courts

Duty Support the Government legal counsel in any court action related to contract solicitation and award.

Conditions Given a court filing, the offer designated for award (if after award), all other offers (if after award), and support from the Government legal counsel.

Overall Standard(s) Provide all relevant facts and data required by the Government legal counsel and the courts. Implement the court's decision.

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Policies

<i>FAR</i>	<i>Agency Suppl.</i>	<i>Subject</i>
14-408-8		Protests against award.
15.503(a)		Preaward notices for small business programs.
15.507		Protests against award.
19.101		Explanation of terms.
19.102		Size standards.
19.301		Representation by the offeror of status as a small business concern.
19.302		Protesting a small business representation.
19.305		Protesting representation of disadvantaged business status.
19.306		Protesting representation as a HUBZone small business concern.
33.1		Protests.
52.219-1		Small business program representations.
52.219-22		Small disadvantaged business status.
52.233-2		Service of protest.
52.233-3		Protest after award.

Other KSAs

1. Knowledge of the small business thresholds in accordance with SBA size standards.
2. Knowledge of what is considered an interested party for protest purposes.
3. Knowledge of agency, General Accounting Office (GAO), and FAR standards for protests.
4. Knowledge of typical issues raised in protests.
5. Knowledge of penalties for falsifying affidavits and memoranda of facts.
6. Knowledge of the role of the courts in protest resolution, including who may protest, court jurisdiction, time requirements, procedures, burden of proof, standard of proof, interim remedies, remedies, and appeals.
7. Ability to research previous GAO decisions and case law on protests.
8. Ability to tolerate the stress common in protest situations.
9. Ability to gather and organize information relating to a protest.
10. Ability to conscientiously examine all details relating to a protest.

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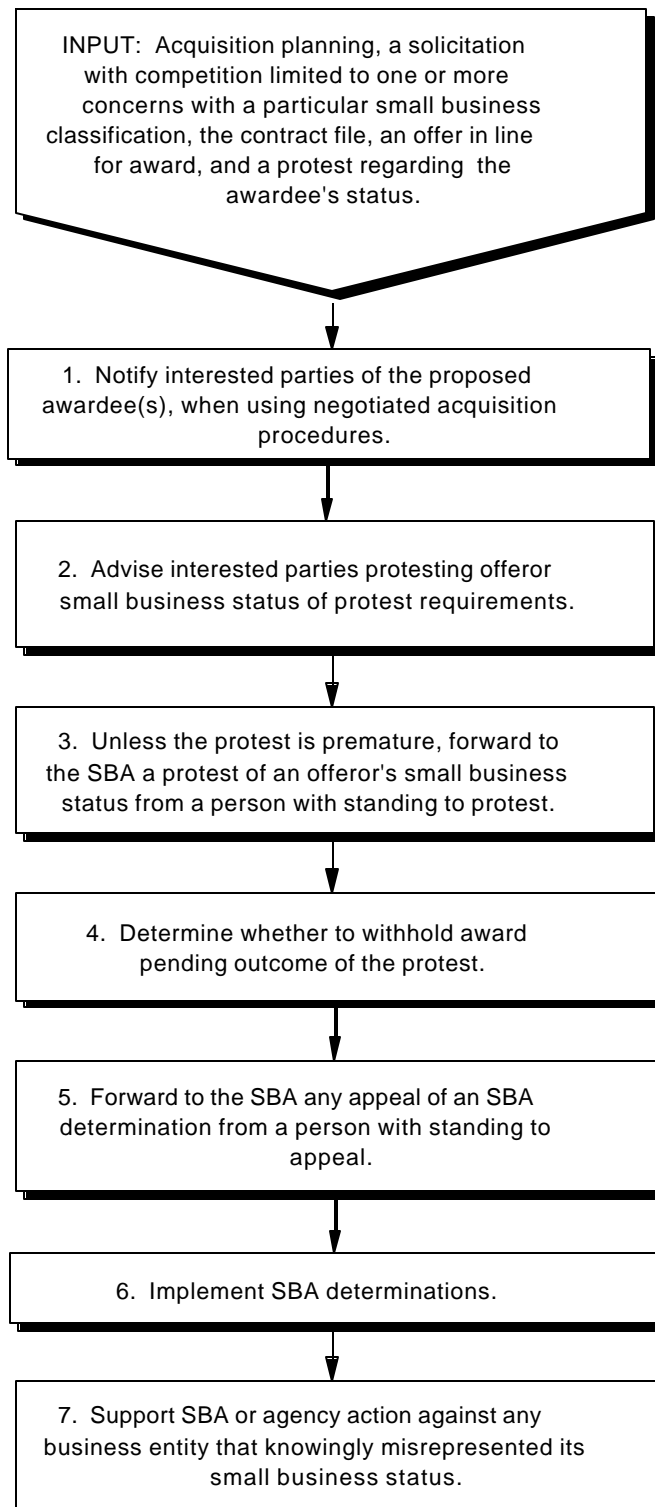
11. Ability to identify problems, generate alternatives, and evaluate those alternatives.
 12. Ability to communicate orally and in writing.
 13. Ability to work with others to resolve a protest.
 14. Ability to maintain a positive view and display a professional image in a protest situation.
 15. Ability to relate well to people and their protest concerns.
 16. Ability to recall relevant information from previous situations.
 17. Ability to maintain a customer focus in resolving protest concerns.
 18. Ability to maintain the honesty and integrity of the acquisition process.
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Other Policies and References (Annotate As Necessary):

UNIT 48 PROTESTS

Part A: Protests of Set-Aside or Small Business Preference Eligibility

October 2003



UNIT 48 PROTESTS

Part A: Protests of Set-Aside or Small Business Preference Eligibility

October 2003

Tasks	Related Standards
<p>1. Notify interested parties of the proposed awardee(s), when using negotiated acquisition procedures.</p>	<p>When using negotiation procedures:</p> <ul style="list-style-type: none"> • Notify each offeror in writing prior to award, upon completion of negotiations, determinations of responsibility, and, if necessary, Small Business Administration (SBA) notification of potential awards to offerors with pending Small Disadvantaged Business (SDB) status: <ul style="list-style-type: none"> - When using a small business set-aside; - When a small disadvantaged business concern receives a benefit based on its disadvantaged status and is the apparently successful offeror; or - When using the HUBZone procedures. • The notice must meet the requirements of FAR 15.503. • Notice is not required: <ul style="list-style-type: none"> - When the Contracting Officer determines in writing that the urgency of the requirement necessitates award without delay; or - For a contract under the 8(a) program.
<p>2. Advise interested parties protesting offeror small business status of protest requirements.</p>	<p>Advise interested parties protesting offeror small business status of protest requirements that the SBA will dismiss any protest that does not meet the following requirements:</p> <ul style="list-style-type: none"> • The protest must be in writing. An oral protest must be confirmed in writing. • The protest must contain the basis for the protest with specific, detailed evidence to support the allegation that the offeror is not small.

UNIT 48 PROTESTS

Part A: Protests of Set-Aside or Small Business Preference Eligibility

October 2003

Tasks	Related Standards
<p>3. Unless the protest is premature, forward to the SBA a protest of an offeror's small business status from an interested party.</p>	<p>Normally, an offeror, the SBA, or another interested party may protest an offeror's small business status.</p> <ul style="list-style-type: none"> • For a competitive 8(a) contract, only an offeror, the Contracting Officer, or the SBA may protest. • For protests concerning disadvantaged business status, offerors (excluding those determined non-responsive or outside the competitive range and those previously found ineligible for the requirement by the SBA), the Contracting Officer, or the SBA may protest. • For protests concerning HUBZone business status: <ul style="list-style-type: none"> - For sole source acquisitions, the SBA or the Contracting Officer may protest the apparently successful offeror's HUBZone small business status. - For all other acquisitions, an offeror, the Contracting Officer, or the SBA may protest the apparently successful offeror's qualified HUBZone small business concern status. <p>A protest is considered premature if it is submitted prior to bid opening (sealed bidding) or prior to preaward notice (negotiated acquisition procedures).</p> <p>If the protest is not premature, forward it to the appropriate SBA Office.</p> <p>In order to affect a specific solicitation, a protest must be timely. Rules for determining timeliness can be found in FAR 19.302(d) and 19.306(d).</p> <ul style="list-style-type: none"> • If the protest is not timely, take the actions required by FAR 19.302(j). • If the protest involves the status of an offeror not being considered for award, include a notation to that effect and notify the protester of this action.

UNIT 48 PROTESTS

Part A: Protests of Set-Aside or Small Business Preference Eligibility

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Tasks	Related Standards
<p>4. Determine whether to withhold award pending outcome of the protest.</p>	<p>After receiving a protest involving an offeror being considered for award:</p> <ul style="list-style-type: none"> • Unless the Contracting Officer determines in writing that an award must be made to protect the public interest, never award the contract until: <ul style="list-style-type: none"> - The SBA has made a determination on the protest; or - The required number of business days for the type of protest involved have expired since SBA's receipt of a protest, whichever occurs first. • After the required number of business days has expired, the Contracting Officer may, when practical, continue to withhold award until the SBA's determination is received, unless further delay would be disadvantageous to the Government. <p>Whenever an award is made before the receipt of SBA's size determination, notify SBA that the award has been made.</p> <p>If a protest is received that challenges the small business status of an offeror not being considered for award, do not suspend contracting action.</p>
<p>5. Forward to the SBA any appeal of an SBA determination from a person with standing to appeal.</p>	<p>An appeal from an SBA small business status determination may be filed within the prescribed number of days for the type of protest involved. The appeal must be filed by an individual or concern permitted to appeal the SBA determination.</p> <p>Follow the appropriate rules for appeal from FAR 19.302(i), 19.305(i) and (j), or 19.306(i) and (j).</p>

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Part A: Protests of Set-Aside or Small Business Preference Eligibility

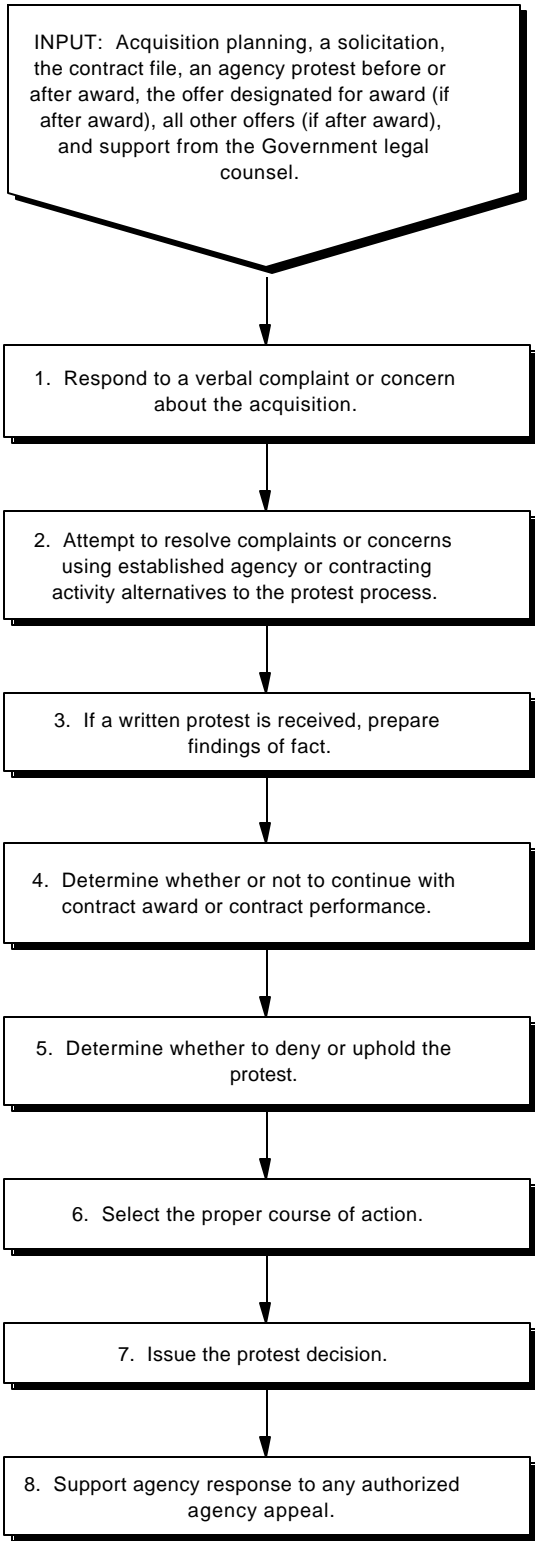
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Tasks	Related Standards
<p>6. Implement SBA determinations.</p>	<p>If award has not been made, make award considering the final SBA determination on a timely protest to the current acquisition.</p> <p>If award has been made or the protest was not timely, normally no action on the current acquisition is appropriate. Consider the final SBA determination in future acquisitions. However, the contractor may agree to terminate an award based on disadvantaged business status after receiving the outcome of an appeal.</p>
<p>7. Support SBA or agency action against any business entity that knowingly misrepresented its small business status.</p>	<p>Provide any support or additional information for SBA or agency action against any business concern that knowingly misrepresented its small business status.</p> <p>The SBA may take action as specified in Section 16(d) of the Small Business Act if the SBA determines that the status of a concern as a small business, veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business has been misrepresented in order to obtain:</p> <ul style="list-style-type: none"> • A set-aside contract; • An 8(a) subcontract; • A subcontract that is to be included as part or all of a goal contained in a subcontracting plan; or • A prime or subcontract to be awarded as a result, or in furtherance of any other provision of Federal law that specifically references Section 8(d) of the Small Business Act for a definition of program eligibility, <p>If the SBA declines to take action, the agency may initiate the process.</p>

UNIT 48: PROTESTS

Part B: Agency Protests

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Part B: Agency Protests

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Tasks	Related Standards
1. Respond to a verbal complaint or concern about the acquisition.	<p>When contacted by an interested party with a verbal complaint or concern about an acquisition:</p> <ul style="list-style-type: none">• Ask questions to clarify the complaint or concern.• Attempt to resolve the complaint or concern with open and frank discussions.<ul style="list-style-type: none">- Provide accurate and relevant information;- Do not disclose information that would not be available to the vendor under the Freedom of Information Act.- Do not disclose information that would give a concern an unfair competitive edge in the current or future acquisitions.• Where necessary, collect additional relevant information to improve chances of resolving the complaint or concern.• Advise the person expressing the complaint or concern about:<ul style="list-style-type: none">- Available methods for resolving a complaint or concern short of filing a protest; and- The requirements at FAR 33.103(d) and (e) for a written agency protest.• Document the complaint or concern and the response given.
2. Attempt to resolve complaints or concerns using established agency or contracting activity alternatives to the protest process.	<p>Use alternatives to the protest process provided by the agency or contracting activity that are:</p> <ul style="list-style-type: none">• Inexpensive;• Informal;• Procedurally simple; and• Expeditious. <p>Available alternatives may include use of:</p> <ul style="list-style-type: none">• An ombudsman;• Alternative dispute resolution techniques;• Third party neutrals; or• Another agency's personnel.

UNIT 48: PROTESTS

Part B: Agency Protests

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Tasks

Related Standards

<p>3. If a written protest is received, prepare findings of fact.</p>	<p>After receiving a protest, the Contracting Officer or other designated official must document key elements of the protest that may affect the agency decision. For example:</p> <ul style="list-style-type: none">• Determine whether protest is timely.<ul style="list-style-type: none">- Protests based on alleged apparent improprieties in a solicitation must be filed before bid opening or the closing date for receipt of proposals.- Other protests must be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier.- Post-award protests must be filed before the later of the following deadlines:<ul style="list-style-type: none">? 10 days after contract award; or? 5 days after a debriefing date offered to the protester under a timely debriefing request.• Determine whether there is any cause or significant issue that makes it appropriate to consider a protest that is not timely.• Identify the issues that form the basis for protest.• Determine whether protest is factually correct.• Determine whether the protest satisfies the requirements of FAR 33.103(d).
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Part B: Agency Protests

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Tasks

Related Standards

4. Determine whether or not to continue with contract award or contract performance.

With a protest before award, do not award a contract pending protest resolution, unless:

- Contract award is:
 - Justified, in writing, for urgent and compelling reasons; or
 - Determined, in writing, to be in the best interest of the Government; and
- Such justification or determination is approved:
 - At a level above the Contracting Officer; or
 - By another designated official.

When necessary, request the offerors, before expiration of the offer acceptance period, to extend the time for acceptance to avoid the need for resolicitation. If such extension(s) cannot be obtained, consider proceeding with award.

After receiving a timely protest after award, immediately suspend performance, pending resolution of the protest within the agency, including any review by an independent higher level official, unless

- Contract award is:
 - Justified, in writing, for urgent and compelling reasons; or
 - Determined, in writing, to be in the best interest of the Government; and
- Such justification or determination is approved:
 - At a level above the Contracting Officer; or
 - By another designated official.

The Contracting Officer may also stay performance of a contract during the period for timely protest after award if the Contracting Officer makes a written determination that:

- A protest is likely to be filed; and
- Delay of performance is in the best interests of the United States.

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Part B: Agency Protests

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Tasks	Related Standards
5. Determine whether to deny or uphold the protest.	The Contracting Officer or other designated official should determine whether to deny or uphold the protest after considering: <ul style="list-style-type: none">• The requirements of FAR 33.102 and 33.103;• The most relevant Comptroller General decisions/cases;• Any additional information obtained from the protester and other sources; and• Legal advice as needed or as required by the agency or contracting activity.
6. Select the proper course of action.	Normally, the alternatives include: <ul style="list-style-type: none">• Preaward:<ul style="list-style-type: none">- If the decision is to uphold the protest:<ul style="list-style-type: none">? Amend solicitation (prior to opening);? Cancel solicitation and resolicit; or? Make correct award.- If the decision is to deny the protest, continue with offer evaluation and award.• Post-award:<ul style="list-style-type: none">- If the decision is to uphold the protest:<ul style="list-style-type: none">? Cancel the contract;? Terminate for convenience; or? Amend the contract as necessary.- If the decision is to deny the protest, remove any contract suspension and continue performance.
7. Issue the protest decision.	An agency protest should be resolved within 35 days after the protest is filed. Provide the protest decision to the protester using a method that provides evidence of receipt (e.g., certified mail).

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Part B: Agency Protests

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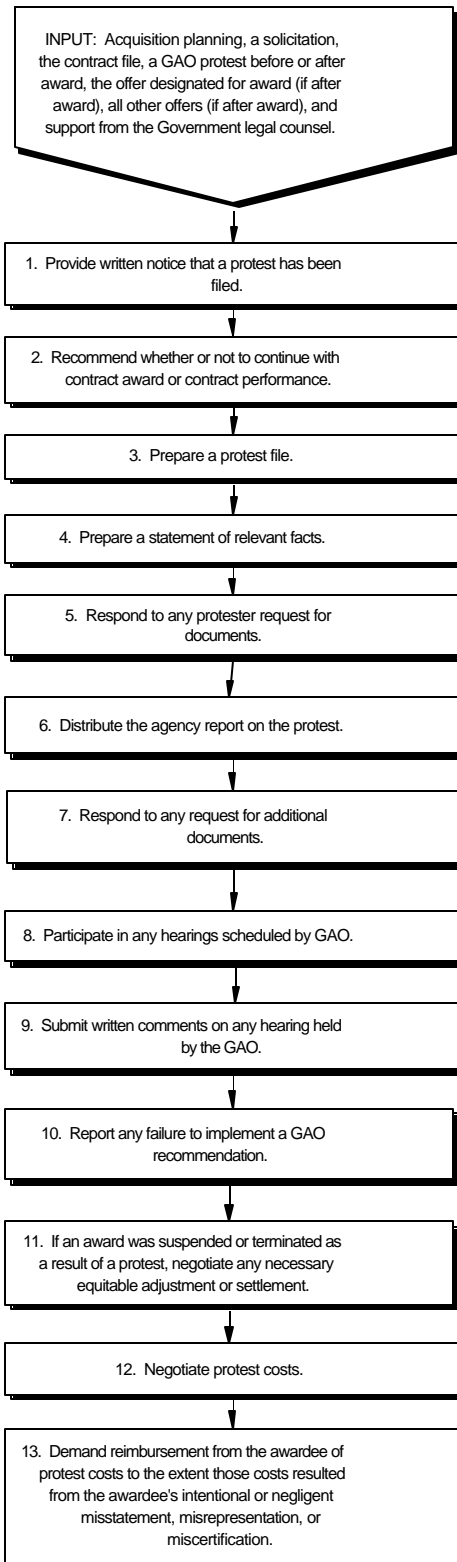
Related Standards

<p>8. Support agency response to any authorized agency appeal.</p>	<p>Agency procedures and/or solicitations may provide for an appeal of the protest decision to an independent official.</p> <ul style="list-style-type: none">• An agency must designate the official(s) who are to conduct this independent review, but the official(s) need not be within the Contracting Officer's supervisory chain.• When practicable, officials designated to conduct the independent review should not have had previous personal involvement in the procurement.• If there is an agency appellate review of the Contracting Officer's decision on the protest, it will not extend GAO's timeliness requirements. <p>Provide the support needed for this independent review in accordance with agency and contracting activity guidelines.</p>
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UNIT 48: PROTESTS

Part C: Protests to GAO

October 2003



UNIT 48: PROTESTS

Part C: Protests to GAO

October 2003

Tasks

Related Standards

Tasks	Related Standards
1. Provide written notice that a protest has been filed.	<p>Immediately after receipt of the GAO's written notice that a protest has been filed:</p> <ul style="list-style-type: none">• Give notice of the protest:<ul style="list-style-type: none">- To the contractor if the award has been made; or- If no award has been made, to all parties who appear to have a reasonable prospect of receiving award if the protest is denied.• If the protest identifies sensitive information and requests a protective order, obtain a redacted version from the protester to furnish to other interested parties, if one has not already been provided.• Furnish copies of the protest submissions (or a redacted version) to parties identified above with instructions for them to:<ul style="list-style-type: none">- Communicate directly with the GAO, and- Provide copies of any such communication to the agency and to other participating parties when they become known.

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Part C: Protests to GAO

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Tasks

Related Standards

<p>2. Recommend whether or not to continue with contract award or contract performance.</p>	<p>With a protest before award, do not award a contract pending GAO protest resolution, unless:</p> <ul style="list-style-type: none">• The head of the contracting activity finds in writing that:<ul style="list-style-type: none">- Urgent and compelling circumstances which significantly affect the interest of the United States will not permit awaiting the decision of the GAO; and- Award is likely to occur within 30 days of the written finding; and• The agency has notified the GAO. <p>When necessary, request the offerors, before expiration of the offer acceptance period, to extend the time for acceptance to avoid the need for resolicitation. If such extension(s) cannot be obtained, consider proceeding with award.</p> <p>When the agency receives timely notice of a protest from the GAO, immediately suspend performance or terminate the awarded contract, except as provided below:</p> <ul style="list-style-type: none">• Following agency procedures, the head of the contracting activity may authorize contract performance upon a written finding that:<ul style="list-style-type: none">- Contract performance will be in the best interests of the United States; or- Urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for the GAO's decision.• Never authorize contract performance until the agency has notified the GAO. <p>When the agency receives notice of a protest filed with the GAO that is not timely, contract performance need not be suspended or terminated unless the Contracting Officer believes that an award may be invalidated and a delay in receiving the supplies or services is not prejudicial.</p>
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UNIT 48: PROTESTS

Part C: Protests to GAO

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Tasks	Related Standards
3. Prepare a protest file.	<p>The protest file must include an index and as appropriate:</p> <ul style="list-style-type: none">• The protest;• The offer submitted by the protester;• The offer being considered for award or being protested;• All relevant evaluation documents;• The solicitation, including the specifications or portions relevant to the protest;• The abstract of offers or relevant portions; and• Any other documents that the agency determines are relevant to the protest, including documents specifically requested by the protester.
4. Prepare a statement of relevant facts.	<p>Prepare a statement of relevant facts for the Contracting Officer's signature, including:</p> <ul style="list-style-type: none">• The best estimate of the contract value;• A memorandum of law;• Findings, actions, and recommendations, and• Any additional evidence or information not provided in the protest file that may be necessary to determine the merits of the protest.
5. Respond to any protester request for documents.	<p>At least 5 days prior to the filing of the agency report to the GAO, in cases in which the protester has filed a request for specific documents, the agency must provide to all parties and the GAO a list of those documents:</p> <ul style="list-style-type: none">• Or portions of documents that the agency has released to the protester or intends to produce in its report, and• That the agency intends to withhold from the protester and the reasons for the proposed withholding. <p>Any objection to the scope of the agency's proposed disclosure or nondisclosure of the documents must be filed with the GAO and the other parties within 2 days after receipt of this list.</p>

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Part C: Protests to GAO

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Tasks

Related Standards

<p>6. Distribute the agency report on the protest.</p>	<p>The agency report to the GAO must include:</p> <ul style="list-style-type: none">• A copy of the protest file;• The Contracting Officer's signed statement of relevant facts; and• A list of parties being provided the documents. <p>At the same time, furnish copies of the report to the protester and any intervenors. Each party must receive all relevant documents, except:</p> <ul style="list-style-type: none">• Those that the agency has decided to withhold from that party for any reason, including:<ul style="list-style-type: none">- Those covered by a protective order issued by the GAO that can be released only in accordance with the terms of the order; and- Other documents that the agency may decide to exclude such as:<ul style="list-style-type: none">? Documents previously furnished to or prepared by a party;? Classified information; and? Information that would give the party a competitive advantage; and• Protester's documents which the agency determines, pursuant to law or regulation, to withhold from any interested party. <p>Also keep GAO apprised of the name, title, and phone number of agency official(s) knowledgeable about the protest's subject matter.</p>
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Part C: Protests to GAO

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Tasks	Related Standards
7. Respond to any request for additional documents.	<p>If the protester requests additional documents within 2 days after the protester knew the existence or relevance of additional documents, or should have known:</p> <ul style="list-style-type: none">• Provide the requested documents to the GAO within 2 days of receipt of the request.• Provide the additional documents to the protester and other interested parties within the 2-day period unless the agency has decided to withhold them for any reason, including:<ul style="list-style-type: none">- Those covered by a protective order issued by the GAO that can be released only in accordance with the terms of the order; and- Other documents that the agency may decide to exclude such as:<ul style="list-style-type: none">? Classified information; and? Information that would give the party a competitive advantage.• Notify the GAO of any documents withheld from the protester and other interested parties and the reasons for withholding them.
8. Participate in any hearings scheduled by GAO.	<p>The GAO may hold a hearing at the request of the agency, a protester, or other interested party. Participate as necessary to support the agency position.</p>
9. Submit written comments on any hearing held by the GAO.	<p>A recording or transcription of the hearing will normally be made, and copies may be obtained from the GAO.</p> <p>Submit relevant written comments on the hearing and the agency report within 5 days of the hearing.</p>

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Part C: Protests to GAO

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Tasks	Related Standards
10. Report any failure to implement a GAO recommendation.	<p>The head of the contracting activity must:</p> <ul style="list-style-type: none">• Implement the GAO recommendation within 60 days of receiving the recommendation; or• Report any failure to implement the GAO recommendation within 65 of receiving the recommendation. <p>The report must explain the reasons why the GAO's recommendation, exclusive of costs, has not been followed by the agency.</p>
11. If an award was suspended or terminated as a result of a protest, negotiate any necessary equitable adjustment or settlement.	If an award was suspended or terminated as a result of a protest, attempt to negotiate a mutual agreement on a no-cost basis.

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Part C: Protests to GAO

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Tasks	Related Standards
12. Negotiate protest costs.	<p>The GAO may recommend that the agency pay to an appropriate protester the cost exclusive of profit, of filing and pursuing the protest.</p> <ul style="list-style-type: none">• Costs may include:<ul style="list-style-type: none">- Reasonable attorney, consultant, and expert witness fees; and- Bid and proposal preparation costs.• Use funds available for the procurement to pay the costs awarded.• Protester failure to file a claim for costs within 60 days time may result in forfeiture of the protester's right to recover those costs.• Attempt to reach an agreement on the amount of costs to be paid.<ul style="list-style-type: none">- If agreement cannot be reached with the protester, the GAO may recommend an amount to the agency.- Within 60 days after the GAO recommends an amount, the agency must notify the GAO of the action taken.• Never pay a party, other than a small business concern, protest costs:<ul style="list-style-type: none">- For consultant and expert witness fees that exceed the highest rate of allowable compensation for Government expert witnesses; or- For attorneys' fees that exceed \$150 per hour, unless the agency determines, based on a Comptroller General recommendation, that the situation justifies a higher fee.• Consider the \$150 per hour rate as a benchmark of a reasonable rate for small business attorney fees.• Before paying a recommended award of costs, consult legal counsel.• Assure that any cost agreement states that any costs covered by the agreement shall not be the subject of subsequent:<ul style="list-style-type: none">- Proposals;- Billings; or- Claims against the Government.

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Part C: Protests to GAO

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Tasks

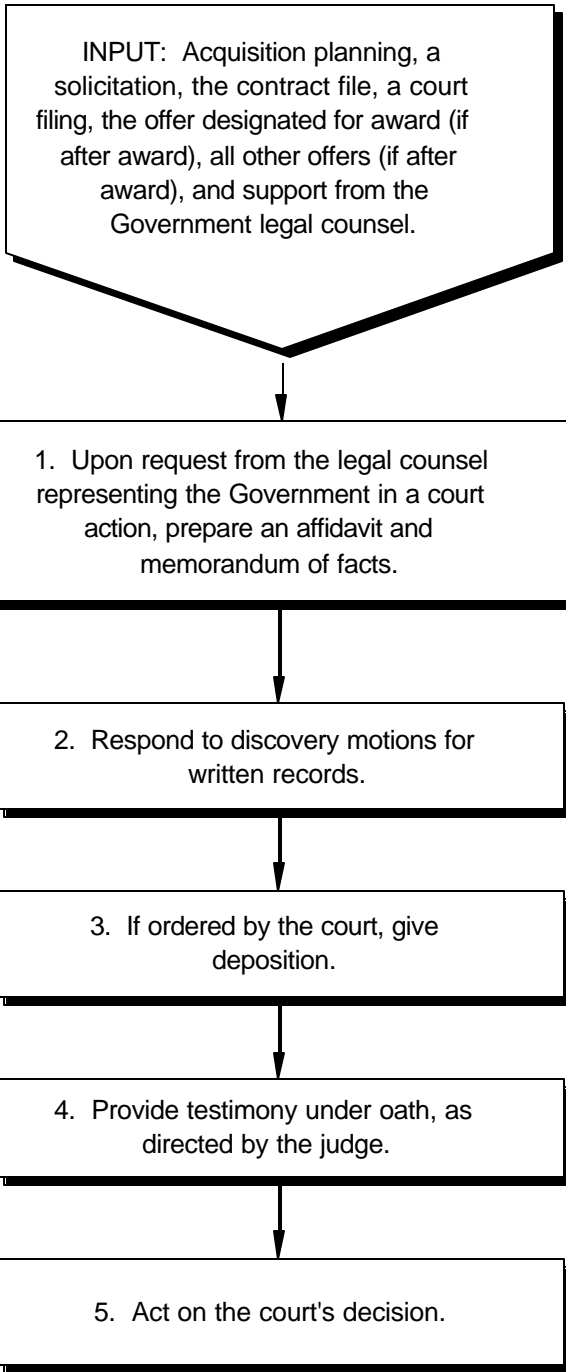
Related Standards

<p>13. Demand reimbursement from the awardee of protest costs to the extent those costs resulted from the awardee's intentional or negligent misstatement, misrepresentation, or miscertification.</p>	<p>If the Government pays protest costs because of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification, the Government may require the awardee to reimburse the Government the amount of those costs.</p> <ul style="list-style-type: none">• Determine whether to demand reimbursement of such costs.• If the Contracting Officer's decision is to demand reimbursement, notify the contractor in writing of the nature and amount of the debt, and the intention to collect by offset if necessary.• Prior to issuing a final decision, afford the contractor an opportunity to:<ul style="list-style-type: none">- Inspect and copy related agency records to the extent permitted by statute and regulation; and- Request review of the matter by the head of the contracting activity.• Determine whether to recover costs by:<ul style="list-style-type: none">- Offset against the contract;- Offset against another contract with the awardee; or- Other available means.
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UNIT 48: PROTESTS

Part D: Protests to the Courts

October 2003



UNIT 48: PROTESTS

Part D: Protests to the Courts

October 2003

Tasks	Related Standards
1. Upon request from the legal counsel representing the Government in a court action, prepare an affidavit and memorandum of facts.	The court action may seek a temporary restraining order or a preliminary and/or final injunction. The affidavit and memorandum of facts is generally equivalent to the agency report for a GAO protest.
2. Respond to discovery motions for written records.	Provide the documents requested or justify why they cannot be provided, such as: <ul style="list-style-type: none">• Classified information; or• Information restricted from release by public law or regulation.
3. If ordered by the court, give deposition.	Under oath, respond to examination from the plaintiff's attorney. <ul style="list-style-type: none">• Answer all questions truthfully.• Consult with the Government legal counsel, before answering any question involving:<ul style="list-style-type: none">- Classified information; or- Other information restricted from release by public law or regulation.
4. Provide testimony under oath, as directed by the judge.	Under oath, respond to examination from the plaintiff's attorney, Government legal counsel, or the judge. <ul style="list-style-type: none">• Answer all questions truthfully.• Consult with the Government's legal counsel, before answering any question involving:<ul style="list-style-type: none">- Classified information; or- Other information restricted from release by public law or regulation.
5. Act on the court's decision.	Implement the court's decision in a timely manner, unless the Government appeals the decision. If the Government appeals, take action as directed by the Government legal counsel.