

# CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

## A Lawyer's View of FASA - Protests

January 13, 1995

### FASA Provisions Dealing With GAO and GSBCA Protests

by Fred Kopatich

While some of us in the Government may have been encouraged that a law titled the "Federal Acquisition Streamlining Act" would actually overhaul the current protest system, it was not to be. Like death and taxes, however, it appears that protests will always be with us in some form or another regardless of the extent of any "streamlining" in the procurement process. While FASA made numerous changes to the laws governing protests in the General Accounting Office and the General Services Board of Contract Appeals, its changes can appropriately be characterized as merely tinkering with the current system, with many of the statutory changes putting into law what had long been accepted practices.

The changes described in this article are effective upon enactment of final implementing regulations. In December, 1994, GSBCA published proposed changes to its rules of procedure. Once final rules are published, they will be considered the necessary implementing regulations. It appears that the provisions relating to GAO will be effective upon issuance of final regulations amending FAR Part 33; this is expected within the next two months.

#### Protests to the General Accounting Office

##### The Definition of "Protest"

Prior to FASA, a protest was statutorily defined as an objection to either a solicitation or an award. Despite this rather narrow definition, protests have been entertained by GAO and the Boards of Contract Appeals in any number of situations not strictly falling within the statutory definition, such as protests against cancellation of a solicitation. FASA Section 1401 has rewritten the definition of "protest" to conform to this practice. A protest is now defined more broadly as a written objection to: (1) a solicitation or other request for offers for a contract; (2) the cancellation of a solicitation; (3) an award or proposed award of a contract; or (4) the termination or cancellation of an award if the termination or cancellation is based upon improprieties con-

cerning the award of the contract.

#### New Rules Regarding Debriefing

FASA has now spelled out certain debriefing requirements for negotiated procurements which have not previously been addressed in either statute or the FAR. Those requirements, found in Section 1064, include the following: (1) notice in the solicitation of the availability of a debriefing and what is to be disclosed in it; (2) scheduling of a debriefing within 5 days of the request if the request is made within 3 days of notice of award; and (3) disclosures to be made in the debriefing. [Ed: Topic of the next Lawyer's View]

#### Authority to Suspend Performance Pending a Protest

Under current law, the contracting officer has authority to suspend contract performance only if a protest is actually filed within 10 days after contract award. Under FASA Section 1402, the contracting officer may withhold his or her authorization to proceed with contract performance if a protest is likely to be filed during either of two periods: (1) within 10 days of contract award or (2) within 5 days after a debriefing date offered to an unsuccessful offeror. If a protest is actually filed within 10 days of award or 5 days of a debriefing date, FASA retains the current rule that the contractor must immediately be notified to cease work on the contract unless there is a finding that urgent and compelling circumstances justify continuing performance.

#### Changes in Time Frames for Required Actions

Various time frames for actions by either the parties or GAO have been changed, generally by substituting calendar days for working days. The agency report and protest file will now be



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**A Lawyer's View** is a periodic publication of the Contract Law Division designed to give practical advice to the Department's procurement officers. Comments, criticisms, and suggestions for future topics are welcome.—Call Jerry Walz at 202-482-1122, or via e-mail to Jerry Walz@FinLit@OGC or jwalz@doc.gov.

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due 35 calendar days after notice of a protest rather than 25 working days after the notice. The Comptroller General is now required to issue its decision within 125 days of the protest. If GAO selects the case for processing under express option procedures, the agency report and protest file are due 20 calendar days after notice of the protest and the decision will be rendered within 65 days.

### Payment of Attorney's Fees and Other Costs to a Successful Protestor

Under FASA, as in current law, a successful protestor or other interested party may be awarded its attorney's fees in pursuing the protest, as well as bid proposal and other costs. Section 1403 sets out the requirements for payment of fees and costs in more detail than current law and generally tracks recent GAO decisions in this area. Under FASA, GAO may recommend the award, as part of the cost of pursuing a protest, of both reasonable attorney's fees and consultant and expert witness fees. FASA does not set a maximum rate for payment of attorney, consultant or expert witness fees if the successful protestor is a small business. However, if the protestor is not a small business, then attorney's fees normally may not exceed \$150 per hour and costs for consultants and experts may not exceed the highest rate of compensation for expert witnesses paid by the Federal Government.



Note: FASA changed the mandatory requirement for the agency to pay fees to that of a recommendation by the GAO. This change presumably resolves the constitutional "separation of powers" problem whereby the GAO, a legislative body, was directing an action by the Executive.

### Failure to Follow GAO Recommendations

Because GAO is a creature of Congress, executive agencies are not legally bound to follow the "recommendations" contained in its protest decisions. As a practical matter, however, we all know that an agency ignores GAO at its peril come budget time unless it has a compelling reason for not implementing the protest decision. FASA Section 1403 retains the requirement that an agency is required to inform GAO if it fails to fully implement GAO's recommendations within

60 days after the decision is implemented. In case agencies are under any illusions about the ramifications of failing to implement GAO's recommendations, Section 1403 contains a requirement for the Comptroller General to report to Congress any instance of an agency not following a protest decision with recommendations for Congressional action, including further Congressional investigation, private relief legislation, or "legislative rescission or cancellation of funds[!]"

### Other Changes in GAO Procedures

FASA Section 1403 now provides authority for GAO to issue protective orders. Although GAO had issued such orders in the past, it did so without express statutory authorization. Following enactment of FASA, GAO revised its protective order procedures.

Under current procedures, when a protest is filed, the agency prepares a protest or "Rule 4" file, containing documents relevant to the protest, for use by GAO or GSBCA and parties involved in the protest. FASA Section 1065 now allows any actual or prospective offeror, even if they have not intervened in the protest, to be provided access to a copy of the protest file upon request, with any proprietary information deleted.

### Protests to the General Services Board of Contract Appeals

#### The Definition of "Protest"

FASA Section 1438 has amended the definition of "protest" for ADPE procurements to conform to the new definition applicable to GAO. In addition, Section 1432 specifically empowers GSBCA to review not only alleged violations of law or regulation by an agency, but also violations of the conditions of a delegation of procurement authority.

#### Suspension of Procurement Authority

FASA did not change the basic rule that GSBCA will suspend an agency's procurement authority during the pendency of a protest unless the agency can demonstrate that urgent and compelling circumstances will not permit stopping contract performance. FASA has clarified what actions an agency can take under a sus-

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pension order, however. FASA Section 1433 provides that a suspension order “does not preclude the Federal agency concerned from continuing the procurement process up to but not including award of the contract unless the board determines that such action is not in the best interests of the United States.”

FASA also provides for a suspension hearing if the protest is filed within five days after a debriefing, and it retains the rule that a suspension hearing will be held if a protest is filed within 10 days of contract award. The suspension hearing will be held within 5 days of the date of the protest.

### Time to Issue Final Decision

FASA does not change the current requirement that GSBCA is to give priority to ADPE protests. FASA Section 1433 does change the required time for issuance of a final Board decision from 45 working days to 65 calendar days after filing of the protest. In addition, FASA requires the Board to resolve “to the maximum extent practicable” within 65 days of the initial filing any new issues raised in an amendment to the protest.

### Payment of Attorney’s Fees and Other Costs to a Prevailing Party

FASA Section 1435 has updated GSBCA’s authority to award attorney fees and other costs to a protestor or other interested party and brought such rules in line with those applicable to GAO. FASA specifies that GSBCA may award consultant and expert witness fees as well as attorney fees and bid and proposal preparation costs. The cap on hourly fees for attorneys and consultants or expert witnesses applied to GAO are also applicable to GSBCA. FASA also apparently expands which parties can be awarded costs and fees. Under prior law, an “interested party,” defined as an offeror with a direct economic interest in the contract was entitled to fees and costs. Under FASA, a “prevailing party,” defined as any party who has demonstrated a violation of statute, regulation or conditions of a delegation of procurement authority, may be awarded fees and costs. This change appears to mean that any protestor or intervenor, even if



they are not in line for award as a result of the protest decision, may be awarded costs if their legal position is upheld by the Board.

### Expanded Sanctions For Frivolous or Bad Faith Protests

Under current law, GSBCA had explicit statutory authority to dismiss any protest it deemed frivolous or which, on its face, did not state a valid basis for protest. FASA Section 1437 gives the Board somewhat expanded powers to deal with frivolous or bad faith protests. FASA now allows GSBCA to “impose appropriate procedural sanctions, including dismissal of the protest” if it finds a protest is frivolous, was brought or is pursued in bad faith, or if any person has willfully abused the Board’s process during the course of a protest. Under this expanded authority, the Board can look not only to the nature of the protest itself to determine if sanctions are appropriate, but also to the conduct of parties and attorneys in pursuing the protest. In addition, GSBCA can apply a whole range of procedural sanctions short of outright dismissal, such as exclusion of documentary evidence or witnesses, if it finds that its processes are being abused.

In a recent case, *Integrated Systems Group, Inc. v. Department of the Treasury*, GSBCA No. 11336-C, the Board ruled that FASA does not give it the authority to impose monetary sanctions upon a party for filing a frivolous or bad faith protest. The Board noted that the House version of FASA would have allowed the imposition of monetary sanctions, but the final version as passed by Congress expressly provided for only procedural sanctions.

Note: GAO has previously ruled that it has no authority to impose monetary sanctions against a protestor who files a frivolous protest. FASA did not provide authority for GAO to impose either procedural or monetary sanctions against a protestor for filing of a frivolous or bad faith protest.

### Submission of Settlement Agreements to the Board

FASA Section 1436 has added a new requirement that when an agency agrees to settle a

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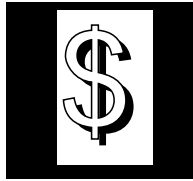
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protest prior to a Board decision and the settlement terms involve an expenditure of appropriated funds, the agreement must be submitted to the Board and made a part of the public record. In addition, the contracting officer must include a statement to the Board describing the agency's position on the protest and settlement. This section appears to address concerns that some agencies were routinely agreeing to pay a protestor's costs in exchange for an agreement to dismiss a protest. Now, all such agreements will be part of the Board's file and available for review by any member of the public.

### Is FASA Just the Beginning?

FASA's statutory amendments to the protest process can best be characterized as merely tinkering with the current system. Real change may be just over the horizon, however. In the last couple of years, a series of studies have addressed the shortcomings of the current protest system, with its multiple overlapping jurisdictions; in each case, a substantial revamping of the system has been recommended. Proposed changes include consolidating all existing Boards of Contract Appeals into a single board, eliminating any federal court jurisdiction over protests, and even consolidating all protest jurisdiction in a single forum, which would decide protests similar to GAO's practice, with little, if any, formal discovery and few hearings. The 104th Congress is likely to deal with some or all of these proposals over the next two years.

A final note: Fiscal year 1994 statistics showed a significant decrease in protests--GAO reported a 20% decrease for the year, while GSBICA noted a whopping 38% decrease. Something to cheer about as we enter the New Year!



"(D) A termination or cancellation of an award of such a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract."

(b) TECHNICAL AMENDMENTS.--Section 3551 of such title is further amended--

(1) in paragraph (2)--

(A) by inserting "The term" after "(2)"; and

(B) by striking out "; and" and inserting in lieu thereof a period; and

(2) in paragraph (3), by inserting "The term" after "(3)".

SEC. 1402. REVIEW OF PROTESTS AND EFFECT ON CONTRACTS PENDING DECISION.

(a) PERIODS FOR CERTAIN ACTIONS.--Section 3553 of title 31, United States Code, is amended--

(1) in subsection (b)--

(A) in paragraph (1), by striking out "one working day of" and inserting in lieu thereof "one day after"; and

(B) in paragraph (2)--

(i) in subparagraph (A), by striking out "25 working days from" and inserting in lieu thereof "35 days after"; and

(ii) in subparagraph (C), by striking out "10 working days from" and inserting in lieu thereof "20 days after"; and

(2) in subsection (c)(3), by striking out "thereafter" and inserting in lieu thereof "after the making of such finding".

(b) SUSPENSION OF PERFORMANCE.--Subsection (d) of such section is amended to read as follows:

"(d)(1) A contractor awarded a Federal agency contract may, during the period described in paragraph (4), begin performance of the contract and engage in any related activities that result in obligations being incurred by the United States under the contract unless the contracting officer responsible for the award of the contract withholds authorization to proceed with performance of the contract.

"(2) The contracting officer may withhold an authorization to proceed with performance of the contract during the period described in paragraph (4) if the contracting officer determines in writing that--

"(A) a protest is likely to be filed; and

"(B) the immediate performance of the contract is not in the best interests of the United States.

"(3)(A) If the Federal agency awarding the contract receives notice of a protest in accordance with this section during the period described in paragraph (4)--

"(i) the contracting officer may not authorize performance of the contract to begin while the protest is pending; or

"(ii) if authorization for contract performance to proceed was not withheld in accordance with paragraph (2) before receipt of the notice, the contracting officer shall immediately direct the contractor to cease performance under the contract and to suspend any related activities that may result in additional obligations being incurred by the United States under that contract.

"(B) Performance and related activities suspended pursuant to subparagraph (A)(ii) by reason of a protest may not be resumed while the protest is pending.

"(C) The head of the procuring activity may authorize the performance of the contract (notwithstanding a protest of which the Federal agency has notice under this section)--

"(i) upon a written finding that--

"(I) performance of the contract is in the best interests of the United States; or

"(II) urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision

### PART I--PROTESTS TO THE COMPTROLLER GENERAL SEC. 1401. PROTEST DEFINED.

(a) IN GENERAL.--Paragraph (1) of section 3551 of title 31, United States Code, is amended to read as follows:

"(1) The term 'protest' means a written objection by an interested party to any of the following:

"(A) A solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services.

"(B) The cancellation of such a solicitation or other request.

"(C) An award or proposed award of such a contract.

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of the Comptroller General concerning the protest; and  
 "(ii) after the Comptroller General is notified of that finding.  
 "(4) The period referred to in paragraphs (2) and (3)(A), with respect to a contract, is the period beginning on the date of the contract award and ending on the later of--  
 "(A) the date that is 10 days after the date of the contract award; or  
 (B) the date that is 5 days after the debriefing date offered to an unsuccessful offeror for any debriefing that is requested and, when requested, is required."

### SEC. 1403. DECISIONS ON PROTESTS.

(a) PERIODS FOR CERTAIN ACTIONS.--Section 3554(a) of title 31, United States Code, is amended--

(1) in paragraph (1), by striking out "90 working days from" and inserting in lieu thereof "125 days after";

(2) in paragraph (2), by striking out "45 calendar days from" and inserting "65 days after";

(3) by redesignating paragraph (3) as paragraph (4); and

(4) by inserting after paragraph (2) the following new paragraph (3):  
 "(3) An amendment to a protest that adds a new ground of protest, if timely made, should be resolved, to the maximum extent practicable, within the time limit established under paragraph (1) of this subsection for final decision of the initial protest. If an amended protest cannot be resolved within such time limit, the Comptroller General may resolve the amended protest through the express option under paragraph (2) of this subsection."

(b) GAO RECOMMENDATIONS ON PROTESTS.--(1) Section 3554 of title 31, United States Code, is amended in subsection (b) by adding at the end the following new paragraph:

"(3) If the Federal agency fails to implement fully the recommendations of the Comptroller General under this subsection with respect to a solicitation for a contract or an award or proposed award of a contract within 60 days after receiving the recommendations, the head of the procuring activity responsible for that contract shall report such failure to the Comptroller General not later than 5 days after the end of such 60-day period."

(2) Subsection (c) of such section is amended to read as follows:

"(c)(1) If the Comptroller General determines that a solicitation for a contract or a proposed award or the award of a contract does not comply with a statute or regulation, the Comptroller General may recommend that the Federal agency conducting the procurement pay to an appropriate interested party the costs of--

"(A) filing and pursuing the protest, including reasonable attorneys' fees and consultant and expert witness fees; and

"(B) bid and proposal preparation.

"(2) No party (other than a small business concern (within the meaning of section 3(a) of the Small Business Act)) may be paid, pursuant to a recommendation made under the authority of paragraph (1)--

"(A) costs for consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Federal Government; or

"(B) costs for attorneys' fees that exceed \$150 per hour unless the agency determines, based on the recommendation of the Comptroller General on a case by case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

"(3) If the Comptroller General recommends under paragraph (1) that a Federal agency pay costs to an interested party, the Federal agency shall--

"(A) pay the costs promptly; or

(B) if the Federal agency does not make such payment, promptly report to the Comptroller General the reasons for the failure to follow

the Comptroller General's recommendation.

"(4) If the Comptroller General recommends under paragraph (1) that a Federal agency pay costs to an interested party, the Federal agency and the interested party shall attempt to reach an agreement on the amount of the costs to be paid. If the Federal agency and the interested party are unable to agree on the amount to be paid, the Comptroller General may, upon the request of the interested party, recommend to the Federal agency the amount of the costs that the Federal agency should pay."

(3) Subsection (e) of such section is amended to read as follows:

"(e)(1) The Comptroller General shall report promptly to the Committee on Governmental Affairs and the Committee on Appropriations of the Senate and to the Committee on Government Operations and the Committee on Appropriations of the House of Representatives any case in which a Federal agency fails to implement fully a recommendation of the Comptroller General under subsection (b) or (c). The report shall include--

"(A) a comprehensive review of the pertinent procurement, including the circumstances of the failure of the Federal agency to implement a recommendation of the Comptroller General; and

"(B) a recommendation regarding whether, in order to correct an inequity or to preserve the integrity of the procurement process, the Congress should consider--

"(i) private relief legislation;

"(ii) legislative rescission or cancellation of funds;

"(iii) further investigation by Congress; or

"(iv) other action.

"(2) Not later than January 31 of each year, the Comptroller General shall transmit to the Congress a report containing a summary of each instance in which a Federal agency did not fully implement a recommendation of the Comptroller General under subsection (b) or (c) during the preceding year. The report shall also describe each instance in which a final decision in a protest was not rendered within 125 days after the date the protest is submitted to the Comptroller General."

(4) Costs to which the Comptroller General declared an interested party to be entitled under section 3554 of title 31, United States Code, as in effect immediately before the enactment of this Act, shall, if not paid or otherwise satisfied by the Federal agency concerned before the date of the enactment of this Act, be paid promptly.

(c) RESTRICTION ON ACCESS TO CERTAIN INFORMATION.--Section 3553(f) of title 31, United States Code, is amended--

(1) by inserting "(1)" after "(f)"; and

(2) by adding at the end the following:

"(2)(A) The Comptroller General may issue protective orders which establish terms, conditions, and restrictions for the provision of any document to a party under paragraph (1), that prohibit or restrict the disclosure by the party of information described in subparagraph (B) that is contained in such a document.

"(B) Information referred to in subparagraph (A) is procurement sensitive information, trade secrets, or other proprietary or confidential research, development, or commercial information.

"(C) A protective order under this paragraph shall not be considered to authorize the withholding of any document or information from Congress or an executive agency."

### SEC. 1404. REGULATIONS.

(a) COMPUTATION OF PERIODS.--Section 3555 of title 31, United States Code, is amended--

(1) by redesignating subsection (b) as subsection (d); and

(2) by inserting after subsection (a) the following new subsection (b):

"(b) The procedures shall provide that, in the computation of any pe-



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riod described in this subchapter--

"(1) the day of the act, event, or default from which the designated period of time begins to run not be included; and  
 "(2) the last day after such act, event, or default be included, unless--  
 "(A) such last day is a Saturday, a Sunday, or a legal holiday; or  
 "(B) in the case of a filing of a paper at the General Accounting Office or a Federal agency, such last day is a day on which weather or other conditions cause the closing of the General Accounting Office or Federal agency, in which event the next day that is not a Saturday, Sunday, or legal holiday shall be included."

(b) ELECTRONIC FILINGS AND DISSEMINATIONS.--Such section, as amended by subsection (a), is further amended by inserting after subsection (b) the following new subsection:

"(c) The Comptroller General may prescribe procedures for the electronic filing and dissemination of documents and information required under this subchapter. In prescribing such procedures, the Comptroller General shall consider the ability of all parties to achieve electronic access to such documents and records."

(c) REPEAL OF OBSOLETE DEADLINE.--Subsection (a) of such section is amended by striking out "Not later than January 15, 1985, the" and inserting in lieu thereof "The".

### PART II--PROTESTS IN PROCUREMENTS OF AUTOMATIC DATA PROCESSING SEC. 1431. REVOCATION OF DELEGATIONS OF PROCUREMENT AUTHORITY.

Section 111(b)(3) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759(b)(3)) is amended by inserting before the period at the end of the third sentence the following: ", including the authority to revoke a delegation of authority with respect to a particular contract after award of the contract, except that the Administrator may revoke a delegation of authority after the contract is awarded only when there is a finding of a violation of law or regulation in connection with the contract award."

### SEC. 1432. AUTHORITY OF THE GENERAL SERVICES ADMINISTRATION BOARD OF CONTRACT APPEALS.

The first sentence of section 111(f)(1) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759(f)(1)) is amended to read as follows: "Upon request of an interested party in connection with any procurement that is subject to this section (including any such procurement that is subject to delegation of procurement authority), the board of contract appeals of the General Services Administration (hereafter in this subsection referred to as the 'board') shall review, as provided in this subsection, any decision by a contracting officer that is alleged to violate a statute, a regulation, or the conditions of a delegation of procurement authority."

### SEC. 1433. PERIODS FOR CERTAIN ACTIONS.

(a) SUSPENSION OF PROCUREMENT AUTHORITY.--Section 111(f) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759(f)) is amended--

(1) in paragraph (2)(B)--

(A) by redesignating clauses (i) and (ii) as subclauses (I) and (II), respectively;

(B) by inserting "(i)" after "(B)"; and

(C) by adding at the end the following:

"(ii) A suspension under this subparagraph shall not preclude the Federal agency concerned from continuing the procurement process up to but not including award of the contract unless the board determines such action is not in the best interests of the United States."; and

(2) in paragraph (3), by striking out subparagraph (A) and inserting in lieu thereof the following:

"(A)(i) If, with respect to an award of a contract, the board receives

notice of a protest under this subsection within the period described in clause (ii), the board shall, at the request of an interested party, hold a hearing to determine whether the board should suspend the procurement authority of the Administrator or the Administrator's delegation of procurement authority for the protested procurement on an interim basis until the board can decide the protest.

"(ii) The period referred to in clause (i) is the period beginning on the date on which the contract is awarded and ending at the end of the later of--

"(I) the tenth day after the date of contract award; or

"(II) the fifth day after the debriefing date offered to an unsuccessful offeror for any debriefing that is requested and, when requested, is required.

"(iii) The board shall hold the requested hearing within 5 days after the date of the filing of the protest or, in the case of a request for debriefing under the provisions of section 2305(b)(5) of title 10, United States Code, or section 303B(e) of this Act, within 5 days after the later of the date of the filing of the protest or the date of the debriefing."

(b) FINAL DECISION.--Paragraph (4)(B) of such section 111(f) is amended--

(1) by striking out "45 working days" and inserting in lieu thereof "65 days"; and

(2) by adding at the end the following: "An amendment which adds a new ground of protest should be resolved, to the maximum extent practicable, within the time limits established for resolution of the initial protest."

### SEC. 1434. DISMISSALS OF PROTESTS.

Section 111(f)(4) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759(f)(4)) is amended by striking out subparagraph (C) and inserting in lieu thereof the following:

(C) The board may dismiss a protest that the board determines--  
 "(i) is frivolous;

"(ii) has been brought or pursued in bad faith; or

"(iii) does not state on its face a valid basis for protest."

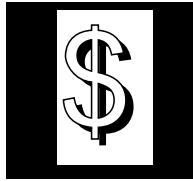
### SEC. 1435. AWARD OF COSTS.

(a) AWARD.--Section 111(f)(5) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759(f)(5)) is amended by striking out subparagraph (C) and inserting in lieu thereof the following:

"(C) Whenever the board makes such a determination, it may, in accordance with section 1304 of title 31, United States Code, further declare an appropriate prevailing party to be entitled to the cost of filing and pursuing the protest (including reasonable attorneys' fees and consultant and expert witness fees), and bid and proposal preparation. However, no party (other than a small business concern (within the meaning of section 3(a) of the Small Business Act)) may be declared entitled to costs for consultants and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Federal Government, and no party (other than a small business concern (within the meaning of section 3(a) of the Small Business Act)) may be declared entitled to attorneys' fees that exceed \$150 per hour unless the board, on a case by case basis, determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee."

(b) DEFINITION OF PREVAILING PARTY.--Section 111(f)(9) of such Act (40 U.S.C. 759(f)(9)) is amended by adding at the end the following:

"(C) The term 'prevailing party', with respect to a determination of the board under paragraph (5)(B) that a challenged pursuant to this section, means a party that demonstrated such violation."



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### SEC. 1436. DISMISSAL AGREEMENTS.

Section 111(f)(5) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759(f)(5)), as amended by section 1435, is further amended by adding at the end the following new subparagraphs:

"(D) Any agreement that provides for the dismissal of a protest and involves a direct or indirect expenditure of appropriated funds shall be submitted to the board and shall be made a part of the public record (subject to any protective order considered appropriate by the board) before dismissal of the protest. If a Federal agency is a party to a settlement agreement, the submission of the agreement to the board shall include a memorandum, signed by the contracting officer concerned, that describes in detail the procurement, the grounds for protest, the Federal Government's position regarding the grounds for protest, the terms of the settlement, and the agency's position regarding the propriety of the award or proposed award of the contract at issue in the protest.

"(E) Payment of amounts due from an agency under subparagraph (C) or under the terms of a settlement agreement under subparagraph (D) shall be made from the appropriation made by section 1304 of title 31, United States Code, for the payment of judgments. The Federal agency concerned shall reimburse that appropriation account out of funds available for the procurement."

### SEC. 1437. MATTERS TO BE COVERED IN REGULATIONS.

Section 111(f) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759(f)) is further amended-

(1) by inserting after paragraph (6) the following:

"(7)(A) The board shall adopt and issue such rules and procedures as may be necessary to the expeditious disposition of protests filed under the authority of this subsection.

"(B) The procedures shall provide that, in the computation of any period described in this subsection--

"(i) the day of the act, event, or default from which the designated period of time begins to run not be included; and

"(ii) the last day after such act, event, or default be included, unless--

"(I) such last day is a Saturday, a Sunday, or a legal holiday; or

"(II) in the case of a filing of a paper at the board, such last day is a day on which weather or other conditions cause the closing of the board in which event the next day that is not a Saturday, Sunday, or legal holiday shall be included.

"(C) The procedures may provide for electronic filing and dissemination of documents and information required under this subsection and in so providing shall consider the ability of all parties to achieve electronic access to such documents and records.

"(D) The procedures shall provide that if the board expressly finds that a protest or a portion of a protest is frivolous or has been brought or pursued in bad faith, or that any person has willfully abused the board's process during the course of a protest, the board may impose appropriate procedural sanctions, including dismissal of the protest."; and

(2) by striking out paragraph (8).

### SEC. 1438. DEFINITION OF PROTEST.

Section 111(f)(9) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759(f)(9)) is amended--

(1) by striking out "subsection--" and inserting in lieu thereof "subsection:";

(2) by striking out subparagraph (A) and inserting in lieu thereof the following:

"(A) The term 'protest' means a written objection by an interested party to any of the following:

"(i) A solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services.

"(ii) The cancellation of such a solicitation or other request.

"(iii) An award or proposed award of such a contract.

"(iv) A termination or cancellation of an award of such a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract."; and

(3) by capitalizing the first letter of the first word in subparagraph (B).

SEC. 1439. OVERSIGHT OF ACQUISITION OF AUTOMATIC DATA PROCESSING EQUIPMENT BY FEDERAL AGENCIES. Section 111 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759) is amended by adding at the end the following new subsection:

"(h) DATA COLLECTION.--(1) The Administrator shall collect and compile data regarding the procurement of automatic data processing equipment under this section. The data collected and compiled shall include, at a minimum, with regard to each contract for such a procurement, the following:

"(A) The procuring agency.

"(B) The contractor.

"(C) The automatic data processing equipment and services procured.

"(D) The manufacturer of the equipment procured.

"(E) The amount of the contract, to the extent that the amount is not proprietary information.

"(F) The type of contract used.

"(G) The extent of competition for award.

"(H) Whether compatibility restrictions were used in awarding the contract.

"(I) Significant modifications of the contract.

"(J) Contract price, to the extent that the price is not proprietary information.

"(2) The head of each Federal agency shall report to the Administrator in accordance with regulations issued by the Administrator all information that the Administrator determines necessary in order to satisfy the requirements in paragraph (1).

"(3) The Administrator--

"(A) shall carry out a systematic, periodic review of information received under this subsection;

"(B) shall use such information, as appropriate, to determine the compliance of Federal agencies with the requirements of this section; and

"(C) may take appropriate corrective action regarding an agency's authority to lease and purchase automatic data processing equipment upon any substantial failure by the head of the agency to report to the Administrator in accordance with this subsection.

"(4) The Administrator shall take appropriate corrective action upon failure of a Federal agency to comply with the terms of any delegation of authority to lease or purchase automatic data processing equipment or failure to comply with any applicable law or regulation.

"(5) The Administrator shall require in the regulations implementing this subsection that (A) data collected pursuant to this subsection be drawn from existing Federal agency information; and (B) no new or additional information reporting requirements may be imposed on offerors or contractors to collect such data."

