

# CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation  
**A Lawyer's View of New GAO Bid Protests Rules**  
 March 27, 1991

## New GAO Bid Protest Rules by Jerry A. Walz

Read em and weep – That vernacular of the poker player may be a good introduction to this issue of A Lawyer's View. The General Accounting Office's ("GAO") new rules governing bid protests become effective on April 1, 1991. Because these rules have a significant effect on the Department's procurement offices, this issue will offer a review of both the current rules and the changes introduced by the new rules. [The changes to the rules were published on January 31, 1991, in Volume 56 of the Federal Register beginning on page 3759. (56 FR 3759). The rules are codified at Title 4 of the Code of Federal Regulations, Part 21. (4 CFR §21).]

The major changes in this revision of the rules include:

- (1) discovery,
- (2) protective orders,
- (3) hearings and
- (4) award of fees.

But before we get into the changes it may be well to review the basic bid protest process at the GAO with emphasis on those requirements that directly impact on the procurement offices.

### Initiation of a protest.

A protest may be filed with the GAO by any "interested party" — an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. Other interested parties that may participate in a protest include the awardee, or if no award has been made, all bidders or offerors who appear to have a substantial prospect of receiving an award if the protest is denied.

There are few formalities for a protest. A protest must be in writing and should be concise, logically arranged, and clearly state legally sufficient grounds of protest. The protester must also furnish a copy of the protest (including relevant documents not issued by the contracting agency) to the contracting agency designated in the solicitation for receipt of protests. The designated individual, usually the contracting officer, must receive a copy of the protest by 1 day after the protest is filed with the General Accounting Office. There may be some unexpected good news too. Now that it costs at 29¢ to file a protest instead of the old 25¢, the ever optimistic Contract Law Division attorneys are holding open the possibility for a decrease in the number of protests filed.

### CO's notification of other interested parties

The contracting officer must immediately give notice of the protest to the contractor if award has been made or, if no award has been made, to all bidders or offerors who appear to have a substantial and reasonable prospect of receiving an award if the protest is denied. The contracting agency shall furnish copies of the protest submissions to such parties with instructions to communicate further directly with the General Accounting Office. Note that the CO is required to send copies of

the protest submissions to all interested parties. (In the past, we have seen some COs simply provide a notice that a protest has been filed, without providing copies.) The CO should also advise the parties that the Contract Law Division should be copied on any communications that a party sends to the GAO.

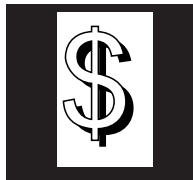
Although not a new provision, contracting officer's should be sensitive that material submitted by a protester may not be withheld from any interested party, except to the extent the withholding of information is permitted or required by law or regulation. If the protester considers that the protest contains material which should be withheld, the rules require that a statement advising of this fact must be affixed to the front page of the protest submission and the allegedly protected information must be so identified wherever it appears. Arguably, protesters who request that part of its submissions be withheld should file for a protective order now available under the new rules.

### The agency report

With one exception, the agency report requirements are unchanged. The report is to contain all relevant documents including, as appropriate: the protest, the bid or proposal submitted by the protester, the bid or proposal of the firm which is being considered for award, or whose bid or proposal is being protested, all evaluation documents, the solicitation, including the specifications or portions relevant to the protest, the abstract of bids or offers or relevant portions, any other documents that are relevant to the protest, and the contracting officer's statement setting forth findings, actions, recommendations and any additional evidence or information deemed necessary in determining the validity of the protest. The new rules now expressly require the submission of all relevant evaluation documents. CO's are reminded that the Department follows the requirements of the GSBGA for organization of the agency report submitted to the GAO.

### Protective order blues

The Contract Law Division believes that the new requirement for protective orders will greatly burden bid protest practice at the GAO, both for the Division and the procurement offices. Simply stated, a protective order is a means to control documents where the documents are claimed to contain information that is privileged, or the release of which would result in a competitive advantage. In the past, we were generally able to avoid most disclosure problems by providing this type of



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- **A Lawyer's View** is an aperiodic 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 FTS 377-1122

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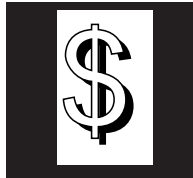
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material to the GAO, and not to the protester and other interested parties. For instance, if fairness of the evaluation was at issue, we might provide the GAO with copies of detailed technical scoring/rating documents from the individual raters, but would not provide this material to the protester because that type of record is protected from mandatory disclosure under the FOIA. Similarly, we would not provide one firm's technical or cost proposal to another party as such disclosure would impair the ongoing competition and also risk violating the criminal law provisions of 18 U.S.C. §1905, the Trade Secrets Act, and to avoid civil actions for disclosure of an offeror's proprietary information.

Under the new rules, if a party believes that material should be protected, the party must apply to the GAO for a protective order. The protective order will describe the information to be protected and the persons to which it can be released. We read the new rules as requiring the Department to apply for a protective order in almost all protests if the agency report will contain any material which is privileged, or the release would result in a competitive advantage. Of course, we also expect a good deal of new contentiousness as the parties battle over terms of the order.

It also is highly probable, as we have also learned from our GSBCA bid protest practice, that more firms will join in a protest as interested parties simply to protect the firm's proprietary information. (As discussed below, we also expect a greater number of protests given the new provisions for hearings.)



### More lawyers

Readers will be pleased to learn that the new rules may also have a positive effect in bringing the country out of its economic doldrums. Because the GAO has essentially adopted the outside counsel rule, many lawyers will be able to get off the unemployment roles and become gainfully employed. The outside counsel rule provides that while most parties will not be able to see protected material, an attorney not connected with the competitive business operations of the party may have access to the material. Attorneys in this role must agree not to provide the information except to those named in the protective order.

Furthermore, with the outside counsel rule for access to protected material, we expect a far more adversarial bid protest practice at the GAO as more protests will be pursued by firms with outside counsel. Presently, principals or management personnel represent about half of the protesters at the GAO. Although it is possible that a few firms may decide not to protest if the firm must hire outside counsel, we doubt that will defer more than a trivial number of actions.

### Hearings

GAO's decision to adopt provisions for hearings will likely have the most impact on the bid protest practice before the GAO. Although GAO will decide if a hearing is needed, most members of the contract bar expect hearings will be ordered in a significant number of protests. Hearings also seem to be more probable because the new rules eliminate the former provision that allowed the GAO to hold an informal conference to

discuss protest issues. For the first time in GAO bid protest practice, the rules provide that the GAO may hold the hearings in locations other than Washington, D.C. Contracting offices may expect superlative support from Division attorneys for hearings in San Diego, San Francisco and Honolulu.

The new hearing rules provide for examination of witnesses by the parties and the GAO, transcription of hearings, and filing of comments [briefs] within 7 days of the hearing. The 7 day requirement is one of the several new relatively short time requirements contained in the new rules. Evidentiary, testimonial or procedural matters for the hearings are not presently addressed by the rules.

Obviously, if a hearing is held, considerable time and effort will be required of Division attorneys, Bureau officials and procurement offices to develop testimony and prepare witnesses to defend the government's position. Additionally, the new briefing requirement is a considerable change from past practice where comments following an informal conference generally only required a minimal submission. The new rules require that post-hearing comments reference all relevant evidence elicited at the hearing. Same or next day transcripts plus a good deal of attorney effort will be required to comply with the 7 day rule.

It is no secret that the new provisions for more discovery, protective orders and hearings are GAO's response to the general acclaim that the GSBCA has received from the private bar and Congress for the Board's adjudication of bid protests under its Brooks Act jurisdiction. Although only speculative, it seems reasonable to expect that the rules will be revised in the future to add even more formality to the GAO process. For example, the rules make no provision for interrogatories or depositions, usually necessary for a party to prepare its case and cross examination.

### Fees

The new provisions at 4 CFR § 21.6(e) establish more detailed procedures for the award of costs and fees to a protester, including a new procedure for resolving cases where the agency and protester cannot agree on the amount of costs and fees the protester is entitled to receive. The rules also add a new express provision that the GAO may award costs and fees if the agency takes corrective action in response to a protest. Under prior practice the GAO would not usually award fees if corrective action was taken early in the protest process. This prior practice seems to have been discarded.

### The bottom line

COs and the Bureaus may expect more protests, a more contentious and adversarial process, and finally more demands on procurement resources, both human and financial. The Division will work closely with all of the procurement offices as protests are filed under the new rules. With cooperation, and a little luck, we should all be able to become familiar with the rules during the next three months and be ready for the fourth quarter onslaught of protests.

Finally, and unfortunately, we have no basis to give any credence to the rumor that the April 1, 1991 effective date is part of a GAO April Fool's Day joke.