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BID PROTESTS AND RATIFICATIONS A PRIMER

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WHAT IS A BID PROTEST?

A CHALLENGE

TO A SOLICITATION
OR OTHER REQUEST BY A FEDERAL AGENCY
FOR OFFERS FOR PROCUREMENT OF PROPERTY OR
SERVICES
TO THE CANCELLATION OF SUCH A SOLICITATION OR OTHER REQUEST
AN AWARD
A PROPOSED AWARD
A CONTRACT TERMINATION
PROTEST MUST ALLEGE THAT TERMINATION BASED ON
AWARD
IMPROPRIETIES



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ISSUES NOT FOR CONSIDERATION

CONTRACT ADMINISTRATION

SMALL BUSINESS ADMINISTRATION ISSUES

COMPETITIVE RANGE DETERMINATION

SUSPENSION OR DEBARMENT

SEE 4 C.F.R. §21.5 (REMAINDER OF EXCLUSIONS)



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WHO CAN FILE A PROTEST?

INTERESTED PARTY

ACTUAL OR PROSPECTIVE BIDDER OR OFFEROR WHOSE DIRECT ECONOMIC INTEREST WOULD BE AFFECTED BY AWARD OR FAILURE TO AWARD A CONTRACT

PUBLIC-PRIVATE COMPETITION (OMB CIR. A-76)

OFFICIAL RESPONSIBLE FOR MAKING FEDERAL AGENCY TENDER



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WHERE TO FILE A BID PROTEST?

WITH THE CONTRACTING OFFICER
WITH THE FEDERAL AGENCY
WITH THE GOVERNMENT
ACCOUNTABILITY OFFICE (GAO)

FAR §§ 33.102, 33.103, 33.104



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WHEN TO FILE A BID PROTEST?

PRIOR TO BID OPENING OR TIME SET
FOR RECEIPT OF PROPOSALS

ALLEGED IMPROPRIETIES IN SOLICITATION
APPARENT PRIOR TO BID OPENING OR TIME
SET FOR RECEIPT OF PROPOSALS

4 C.F.R. § 21.2 (a)(1)



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WHEN TO FILE A BID PROTEST?

10 DAYS FROM DATE BASIS FOR PROTEST WAS KNOWN OR SHOULD HAVE BEEN KNOWN – PROTESTS NOT FALLING UNDER 4 C.F.R. §21.2 (a)(1)

NO LATER THAN 10 DAYS FROM DATE ON WHICH A DEBRIEFING IS HELD

WHERE DEBRIEFING IS REQUESTED, AND WHERE REQUESTED, REQUIRED (4 C.F.R. §21.2 (a)(2))



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WHEN TO FILE A BID PROTEST? (cont'd)

10 DAYS FROM DATE ADVERSE AGENCY ACTION WAS KNOWN OR SHOULD HAVE BEEN KNOWN IF AGENCY LEVEL PROTEST FILED IN ACCORDANCE WITH THE FAR PROVISIONS

4 C.F.R. §21.2 (a)(3)



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WHEN TO FILE A BID PROTEST?

WAIVER OF UNTIMELY PROTESTS

FOR GOOD CAUSE SHOWN

WHERE GAO DETERMINES THAT PROTEST RAISES ISSUES
SIGNIFICANT TO THE PROCUREMENT SYSTEM



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WHAT HAPPENS AFTER A PROTEST IS FILED?

CONTRACTING AGENCY MAY BE REQUIRED TO WITHHOLD AWARD OR SUSPEND CONTRACT PERFORMANCE – OFTEN CALLED A “STAY”

CAN BE AVOIDED



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REMEDIES CORRECTIVE ACTION

WHERE GAO DETERMINES THAT A
SOLICITATION, CANCELLATION OF A
SOLICITATION, PROPOSED AWARD OR
AWARD DOES NOT COMPLY WITH
STATUTE OR REGULATION



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REMEDIES CORRECTIVE ACTION

REFRAIN FROM EXERCISING CONTRACT OPTIONS
TERMINATE CONTRACT
RE-COMPETE THE CONTRACT
ISSUE NEW SOLICITATION
MAKE AWARD IN ACCORDANCE WITH STATUTE OR
REGULATION
SUCH OTHER ACTIONS AS GAO DETERMINES TO
PROMOTE COMPLIANCE



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REMEDIES

CORRECTIVE ACTION CONSIDERATIONS

SERIOUSNESS OF PROCUREMENT DEFICIENCY
DEGREE OF PREJUDICE TO OTHER PARTIES
DEGREE OF PREJUDICE TO PROCUREMENT SYSTEM
PARTIES' GOOD FAITH
EXTENT OF PERFORMANCE
COST TO GOVERNMENT
URGENCY OF PROCUREMENT
IMPACT ON AGENCY'S MISSION



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REMEDIES CORRECTIVE ACTION

RECOMMENDATION OF PAYMENT OF:

BID PREPARATION OR PROPOSAL COSTS
ATTORNEY'S FEES
EXPERT WITNESS FEES



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TIME FOR GAO DECISION

100 DAYS AFTER PROTEST FILED

INCLUDES FILING OF SUPPLEMENTAL
PROTEST OR AMENDED PROTEST

65 DAYS – EXPRESS OPTION



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REQUESTS FOR RECONSIDERATION

WITHIN 10 DAYS OF WHEN BASIS FOR
REQUEST WAS KNOWN OR SHOULD
HAVE BEEN KNOWN



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RESOURCES AND REFERENCES

GAO REGULATIONS – 4 C.F.R. §§ 21.0-21.14

<http://www.gao.gov/decisions/bidpro/bid/bibre.html>

FAR §§ 33.102-33.104

GAO DECISIONS



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RATIFICATION OF UNAUTHORIZED COMMITMENTS FAR §1.602.3



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DEFINITIONS

RATIFICATION

ACT OF APPROVING AN UNAUTHORIZED COMMITMENT BY AN OFFICIAL WHO HAS THE AUTHORITY TO DO SO

UNAUTHORIZED COMMITMENT

AN AGREEMENT THAT IS NOT BINDING SOLELY BECAUSE THE GOVT. REP. WHO MADE IT LACKED AUTHORITY TO ENTER INTO THAT AGREEMENT



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DEFINITIONS (CONT'D)

AUTHORITY – SEE FAR §1.602-2

RESPONSIBILITIES OF COs AND
CORs

COR HAS NO AUTHORITY TO
RATIFY AN UNAUTHORIZED
COMMITMENT

HCA HAS AUTHORITY TO RATIFY AN
UNAUTHORIZED COMMITMENT
LEVEL HIGHER THAN HCA HAS
SAME AUTHORITY



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LIMITATIONS

Supplies or services have been provided to and accepted by the Government, or

The Government has obtained or will obtain a benefit from the unauthorized commitment

Ratifying official has authority to ratify the unauthorized commitment

The resulting contract would otherwise have been proper if made by an appropriate CO

The CO determines the price to be fair and reasonable



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LIMITATIONS (cont'd)

CO RECOMMENDS PAYMENT AND
LEGAL COUNSEL CONCURS IN THE
RECOMMENDATION

UNLESS AGENCY PROCEDURES DO NOT
HAVE SUCH A REQUIREMENT
FUNDS ARE AVAILABLE, AND
FUNDS WERE AVAILABLE AT THE TIME THE
UNAUTHORIZED COMMITMENT WAS MADE
RATIFICATION IS IN ACCORDANCE WITH ANY
OTHER LIMITATIONS PRESCRIBED BY AGENCY
PROCEDURES



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NON-RATIFIABLE COMMITMENTS

CASES NOT RATIFIABLE UNDER FAR §1.602-3

MAY BE SUBJECT TO RESOLUTION AS
RECOMMENDED BY GAO (TITLE 4, CHAP. 2)

AUTHORIZED BY FAR § 50.1

SHOULD OBTAIN LEGAL ADVICE



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RATIFICATION DISCUSSION

SAMPLE PROPOSED RATIFICATION ATTACHMENT



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???QUESTIONS???