

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

GOVERNMENT ACCOUNTABILITY OFFICE

4 CFR Part 21

Government Accountability Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts

AGENCY: Government Accountability Office.

ACTION: Proposed rule.

SUMMARY: The Government Accountability Office (GAO) is proposing to amend its Bid Protest Regulations, promulgated in accordance with the Competition in Contracting Act of 1984 (CICA), to implement the requirements in sec. 326 of the National Defense Authorization Act for Fiscal Year 2008, enacted on January 28, 2008, and to make certain administrative changes. Regarding sec. 326 of the National Defense Authorization Act for Fiscal Year 2008, the proposed amendments to GAO's Bid Protest Regulations implement the legislation's provisions related to the bid protest process concerning Office of Management and Budget (OMB) Circular A-76, as revised on May 29, 2003. In this regard, the legislation expands the protest rights of Federal employees in an A-76 competition to grant "any one individual" who represents the majority of affected employees the status of an "interested party" to file a protest at GAO or the status of an intervenor to participate in a protest filed at GAO, to remove the current restriction limiting protests of A-76 competitions to those competitions affecting 65 or more full-time equivalent employees of a Federal agency, and to allow a protest of a decision to convert a function performed by Federal employees to private sector performance without a competition. At this time, GAO believes that these proposed revisions are the only regulatory changes necessary to implement the statutory requirements expanding the protest rights of Federal

employees in an A-76 competition. Regarding administrative changes, the proposed amendments to GAO's Bid Protest Regulations are to reflect current practice and to streamline the bid protest process. GAO welcomes comments on these proposed revisions.

DATES: Comments must be submitted on or before April 21, 2008.

ADDRESSES: Comments may be submitted by e-mail at bidprotestregs@gao.gov or by facsimile at 202-512-9749. Due to delivery delays, submission by regular mail is discouraged. Comments may be sent by Federal Express or United Parcel Service addressed to: Ralph O. White, Assistant General Counsel, Government Accountability Office, 441 G Street, NW., Washington, DC 20548. GAO intends to make all comments filed available to the public, including names and other identifying information. Information in a submission that the sender does not believe should be released should be clearly marked.

FOR FURTHER INFORMATION CONTACT: Michael R. Golden (Managing Associate General Counsel), Ralph O. White (Assistant General Counsel) or Jonathan L. Kang (Senior Attorney), 202-512-3315.

SUPPLEMENTARY INFORMATION:

Comments Invited

GAO is not subject to the Administrative Procedures Act and accordingly is not required by law to seek comments before issuing a final rule. However, GAO has decided to invite interested persons to participate in this rulemaking by submitting written comments regarding the proposed revisions. Application of the Administrative Procedures Act to GAO is not to be inferred from this invitation for comments.

GAO will consider all comments received on or before the closing date for comments. GAO may change the proposed revisions based on the comments received.

Background

GAO determined to undertake these revisions to GAO's Bid Protest Regulations as the result of statutory changes in GAO's bid protest jurisdiction in the Department of Homeland Security Appropriations Act, 2008 (enacted as Division E of the Consolidated Appropriation Act, 2008,

Pub. L. 110-161, 121 Stat. 1844, on December 26, 2007), and the National Defense Authorization Act for Fiscal Year 2008. Section 568 of the Department of Homeland Security Appropriations Act, 2008, made the Transportation Security Administration (TSA) subject to the Federal Acquisition Regulation such that, as of the June 23, 2008 effective date, GAO has protest jurisdiction over TSA procurements. Section 326 of the National Defense Authorization Act for Fiscal Year 2008 expands the protest rights of Federal employees in an A-76 competition or non-competitive decision to convert a function performed by Federal employees to private sector performance. Section 843 of the National Defense Authorization Act for Fiscal Year 2008 amends GAO's jurisdiction under 10 U.S.C. 2304c(e) and 41 U.S.C. 253j(e) to authorize GAO to hear protests of the award or proposed award of certain task and delivery orders under certain indefinite-delivery/indefinite-quantity contracts.

After careful consideration, GAO concluded that no change in GAO's Bid Protest Regulations is necessary in order to effectuate the provisions of sec. 568 of the Department of Homeland Security Appropriations Act, 2008, with respect to TSA procurements, or to effectuate the provisions of sec. 843 of the National Defense Authorization Act for Fiscal Year 2008, with respect to task or delivery orders. The proposed revisions to GAO's Bid Protest Regulations to implement sec. 326 of the National Defense Authorization Act for Fiscal Year 2008 and to make certain administrative changes are set forth below:

Interested Party

In accordance with sec. 326 of the National Defense Authorization Act for 2008, GAO proposes to revise paragraph (a)(2) and to add new paragraphs (a)(2)(A) and (a)(2)(B) to 4 CFR 21.0, to expand the definition of an interested party to include, in any public-private competition conducted under OMB Circular A-76 regarding performance of an activity or function of a Federal agency, or any decision to convert a function performed by Federal employees to private sector performance without a competition under OMB Circular A-76, the official who submitted the agency tender in any such

competition and any one individual designated as the representative of the majority of affected Federal employees, and to delete the current restrictions on protests of competitions concerning fewer than 65 full time equivalent employees of a Federal agency.

Intervenor

In accordance with sec. 326 of the National Defense Authorization Act for 2008, GAO proposes to revise paragraph (b)(2) of 4 CFR 21.0, to expand the definition of an intervenor to include, in any public-private competition conducted under OMB Circular A-76 regarding performance of an activity or function of a Federal agency, or any decision to convert a function performed by Federal employees to private sector performance without a competition under OMB Circular A-76, any one individual designated as the representative of the majority of affected Federal employees, and to delete the current restrictions on protests of competitions concerning fewer than 65 full time equivalent employees of a Federal agency.

Contracting Agency

For administrative purposes, GAO proposes to delete the definition of "contracting agency" at paragraph (d) of 4 CFR 21.0, and to replace the term "contracting agency" with the term "agency" throughout 4 CFR 21. GAO also proposes to revise paragraph (c) of 4 CFR 21.0 to clarify that the definition of "federal agency" also applies to the general term "agency." It is the opinion of GAO that these administrative changes will clarify and simplify GAO's Bid Protest Regulations.

Filing of Documents

It has been GAO's experience that bid protest documents are occasionally directed to GAO departments unrelated to GAO's bid protest process. To clarify how a document is "filed" under GAO's Bid Protest Regulations, GAO proposes to revise paragraph (g) of 4 CFR 21.0, newly redesignated as paragraph (f), to provide GAO's designated facsimile transmission number and email address for bid protests, and to advise parties to check GAO's Web site to ensure that the contact information is current. GAO also proposes to remove a provision in 4 CFR 21.0 regarding electronic filing to conform with current practice and to coordinate with changes to paragraph (b) of 4 CFR 21.4, which are discussed below.

Disclosure of Protest Materials

The GAO bid protest process is covered by the GAO disclosure of

materials regulations in 4 CFR part 81, subject to the restrictions of our protective order process. To ensure that the practice of the GAO bid protest process is consistent with the GAO disclosure of materials regulations and to advise that the GAO will not generally provide filed materials to the public while a protest is pending, GAO proposes to revise paragraph (g) of 4 CFR 21.1 to reflect that GAO will disclose protest materials submitted by any party after issuing a decision on the protest, in accordance with GAO's rules at 4 CFR part 81 and the protective order process.

Document Requests to Agencies

In cases in which the protester has filed a request for specific documents, GAO's Bid Protest Regulations currently require that the agency provide, at least 5 days prior to the filing of its report, a list of the documents or portions of documents which the agency has released to the protester or intends to produce in its report and of the documents or portions of documents requested that it intends to withhold, and the reasons for the proposed withholding. It is GAO's experience that the index of documents provided by agencies is often not sufficient to answer specific document requests and does not identify what is being withheld and why. In order to clarify what GAO requires from agencies in response to specific document requests, GAO proposes to revise paragraph (c) of 4 CFR 21.3 to require that an agency's response to a document request identify, at a minimum, whether requested documents exist, which of the documents or portions of documents the agency intends to produce, which of the documents or portions of documents the agency intends to withhold, and the basis for withholding any of the requested documents. GAO understands that this proposed revision may be perceived by agencies as an additional requirement; however, the language of the proposed revision tracks closely to the original intent of GAO in 4 CFR 21.3(c).

Document Requests to Other Parties

GAO's Bid Protest Regulations currently limit document requests to those made by the protester to the agency, and in certain circumstances, by the agency to the protester. Due to GAO's statutory requirement to complete bid protests within 100 days, and in the interest of fairness, there may be circumstances in which documents held by a party that are not in the possession of the agency are necessary for the swift resolution of a bid protest.

To permit parties to make document requests of another party, GAO proposes to revise paragraph (d) of 4 CFR 21.3, to state that, in appropriate circumstances, one party may request that another party produce documents that are not in the agency's possession and not currently in the record. GAO does not expect these requests to arise often, and retains the discretion to determine the appropriateness of granting such requests.

Additional Statements

To reflect GAO practice, GAO proposes to revise paragraph (j) of 4 CFR 21.3 to clarify that parties must seek GAO's prior approval before submitting additional statements and that GAO reserves the right to disregard statements that are submitted without prior approval.

Electronic Transmissions

The current admonition in paragraph (b) of 4 CFR 21.4 against the electronic transmission of documents in bid protests subject to a protective order is inconsistent with GAO's protective order admission notice, which permits the electronic transmission of documents unless a party has objected. To reconcile GAO's Bid Protest Regulations with current practice, GAO proposes to delete the last sentence of paragraph (b) of 4 CFR 21.4 to remove the admonition against the electronic transmission of documents in bid protests subject to a protective order.

Sanctions

In the protest of *Network Security Technologies, Inc.*, B-290741.2, November 13, 2002, 2002 CPD ¶ 193, GAO gave notice that the dismissal of a protest was a potential sanction for the violation of a GAO protective order. In the protest of *PWC Logistics Services Co. KSC(c)*, B-310559, January 11, 2008, 2008 CPD ¶ 25, GAO employed that sanction for the first time, dismissing the protest as the direct result of the protester's counsel's violation of the GAO protective order in the protest. GAO views its authority to impose dismissal and other sanctions as inherent to its authority to issue and administer protective orders. To clearly advise that dismissal of a protest is a potential sanction for violation of a GAO protective order, GAO proposes to revise paragraph (d) of 4 CFR 21.4 to reflect that dismissal is among the sanctions that GAO will consider in response to violation of a GAO protective order, as is prohibition from participation in the remainder of a protest as an intervenor, which is another sanction GAO has used in the

past to address a protective order violation.

Small Business Administration

Standard industrial classification codes have been replaced by the North American Industry Classification System standards. For administrative purposes, GAO proposes to revise paragraph (b) of 4 CFR 21.5 to replace the term “standard industrial classification” with the term “North American Industry Classification System.”

Statutory Stays

31 U.S.C. 3553(c) and (d) address agencies’ requirements to withhold contract award or suspend contract performance when a protest is filed at GAO. Although a protest to GAO is the triggering event under these statutory authorities, the authorities provide no role for GAO in this process. GAO proposes to revise 4 CFR 21.6, to clarify that GAO has no role in administering the statutory requirements to withhold contract award or suspend contract performance.

Notification to Agency

GAO is required under 31 U.S.C. 3554(d) to provide notice to the parties in a protest. GAO proposes to simplify the list of agency contacts in paragraph (a) of 4 CFR 21.12 to reflect GAO’s current practice in meeting its statutory obligations.

Reconsideration

Certain grounds for requesting reconsideration of a protest decision, such as the repetition of arguments previously made, do not merit reconsideration by GAO. Requests for reconsideration are required to be filed within 10 days of the issuance of a protest decision. GAO can see no reason to reconsider arguments so recently considered here, and will therefore dismiss requests for reconsideration based on such arguments without development or further consideration. To clarify the requirements of a request for reconsideration and to emphasize that repetitive arguments will be summarily dismissed, GAO proposes to revise paragraph (c) of 4 CFR 21.14, to state that a request for reconsideration must show that the prior decision contains errors of fact or law, or must present information not previously considered that warrants reversal or modification of the prior decision, and to state that GAO will not consider requests based on the repetition of arguments previously raised.

Additionally, GAO proposes to delete language in paragraph (c) of 4 CFR 21.14

regarding agencies’ obligation to withhold award and suspend performance in the event of a request for reconsideration because, as discussed above, GAO has no role in this process. By deleting this provision, however, GAO does not express any view regarding agencies’ obligations under 31 U.S.C. 3553(c) and (d).

List of Subjects in 4 CFR Part 21

Administrative practice and procedure, Appeals, Bid protest regulations, Government contracts.

For the reasons set out in the preamble, Title 4, Chapter I, Subchapter B, Part 21 of the Code of Federal Regulations is proposed to be amended as follows:

PART 21—BID PROTEST REGULATIONS

1. The authority citation for part 21 continues to read as follows:

Authority: 31 U.S.C. 3551–3556.

2. In part 21, remove the words “a contracting agency” and “the contracting agency” wherever they appear and add in their place the words “an agency” or “the agency,” respectively.

3. Amend § 21.0 by revising paragraphs (a)(2), (b)(2), and (c); removing paragraph (d); and redesignating paragraph (e) as paragraph (d), redesignating paragraph (f) as paragraph (e), redesignating paragraph (g) as paragraph (f) and revising it, and redesignating paragraph (h) as paragraph (g).

The revisions read as follows:

§ 21.0 Definitions.

(a)(1) * * *

(2) In a public-private competition conducted under Office of Management and Budget Circular A–76 regarding performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under OMB Circular A–76, *interested party* also means

(A) the official responsible for submitting the Federal agency tender, and

(B) any one individual, designated as an agent by a majority of the employees performing that activity or function, who represents the affected employees.

(b)(1) * * *

(2) If an interested party files a protest in connection with a public-private competition conducted under OMB Circular A–76 regarding an activity or function of a Federal agency, the official responsible for submitting the Federal

agency tender, or the agent representing the Federal employees as described in paragraph (a)(2)(B) of this section, or both, may also be *intervenors*.

(c) *Federal agency* or *agency* means any executive department or independent establishment in the executive branch, including any wholly owned government corporation, and any establishment in the legislative or judicial branch, except the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his direction.

(f) A document is *filed* on a particular day when it is received by GAO by 5:30 p.m., eastern time, on that day. Protests and other documents may be filed by hand delivery, mail, commercial carrier, facsimile transmission (202–512–9749), or e-mail (protests@gao.gov). Please check GAO’s Web site (<http://www.gao.gov/legal/bidprotest.html>) for current filing information. Hand delivery and other means of delivery may not be practicable during certain periods due, for example, to security concerns or equipment failures. The filing party bears the risk that the delivery method chosen will not result in timely receipt at GAO.

4. Amend § 21.1 by revising paragraph (g) to read as follows:

§ 21.1 Filing a protest.

(g) Unless precluded by law, GAO will not withhold material submitted by a protester from any party outside the government after issuing a decision on the protest, in accordance with GAO’s rules at 4 CFR part 81. If the protester believes that the protest contains information which should be withheld, a statement advising of this fact must be on the front page of the submission. This information must be identified wherever it appears, and the protester must file a redacted copy of the protest which omits the information with GAO and the agency within 1 day after the filing of its protest with GAO.

5. Amend § 21.3 by revising paragraphs (c), (d), and (j) to read as follows:

§ 21.3 Notice of protest, submission of agency report, and time for filing of comments on report.

(c) The contracting agency shall file a report on the protest with GAO within 30 days after the telephone notice of the protest from GAO. The report provided to the parties need not contain documents which the agency has

previously furnished or otherwise made available to the parties in response to the protest. At least 5 days prior to the filing of the report, in cases in which the protester has filed a request for specific documents, the agency shall respond to the request for documents in writing. The agency's response shall, at a minimum, identify whether the requested documents exist, which of the requested documents or portions thereof the agency intends to withhold, and the basis for not producing any of the requested documents or portions thereof. Any objection to the scope of the agency's proposed disclosure or nondisclosure of documents must be filed with GAO and the other parties within 2 days of receipt of this list.

(d) The report shall include the contracting officer's statement of the relevant facts, including a best estimate of the contract value, a memorandum of law, and a list and a copy of all relevant documents, or portions of documents, not previously produced, 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; the abstract of bids or offers; and any other relevant documents. In appropriate cases, a party may request that another party produce relevant documents, or portions of documents, that are not in the agency's possession.

* * * * *

(j) GAO may request or permit the submission of additional statements by the parties and by other parties participating in the protest as may be necessary for the fair resolution of the protest. The agency and other parties must receive GAO's approval before submitting any additional statements. GAO reserves the right to disregard material submitted without prior approval.

6. Amend § 21.4 by revising paragraphs (b) and (d) to read as follows:

§ 21.4 Protective orders.

* * * * *

(b) If no protective order has been issued, the agency may withhold from the parties those portions of its report that would ordinarily be subject to a protective order. GAO will review in camera all information not released to the parties.

* * * * *

(d) Any violation of the terms of a protective order may result in the

imposition of such sanctions as GAO deems appropriate, including referral to appropriate bar associations or other disciplinary bodies, restricting the individual's practice before GAO, prohibition from participation in the remainder of the protest, or dismissal of the protest.

7. Amend § 21.5 by revising paragraph (b)(1) to read as follows:

§ 21.5 Protest issues not for consideration.

* * * * *

(b) *Small Business Administration issues.* (1) Small business size standards and North American Industry Classification System (NAICS) standards. Challenges of established size standards or the size status of particular firms, and challenges of the selected NAICS code may be reviewed solely by the Small Business Administration. 15 U.S.C. 637(b)(6).

* * * * *

8. Revise § 21.6 to read as follows:

§ 21.6 Withholding of award and suspension of contract performance.

Where a protest is filed with GAO, the contracting agency may be required to withhold award and to suspend contract performance. The requirements for the withholding of award and the suspension of contract performance are set forth in 31 U.S.C. 3553(c) and (d); GAO does not administer the requirements to stay award or suspend contract performance under CICA at 31 U.S.C. 3553(c) and (d).

9. Amend § 21.12 by revising paragraph (a) to read as follows:

§ 21.12 Distribution of decisions.

(a) Unless it contains protected information, a copy of a decision shall be provided to the protester, any intervenors, and the agency involved; a copy shall also be made available to the public. A copy of a decision containing protected information shall be provided only to the agency and to individuals admitted to any protective order issued in the protest. A public version omitting the protected information shall be prepared wherever possible.

* * * * *

10. Amend § 21.14 by revising paragraph (c) to read as follows:

§ 21.14 Request for reconsideration.

* * * * *

(c) GAO will summarily dismiss any request for reconsideration that fails to state a valid basis for reconsideration or is untimely. To obtain reconsideration, the requesting party must show that our prior decision contains errors of either fact or law, or must present information

not previously considered that warrants reversal or modification of our decision; GAO will not consider a request for reconsideration based on repetition of arguments previously raised.

Gary L. Kepplinger,

General Counsel, United States Government Accountability Office.

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BILLING CODE 1610-02-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 54

[REG-110136-07]

RIN 1545-BG48

Notice Requirements for Certain Pension Plan Amendments Significantly Reducing the Rate of Future Benefit Accrual

AGENCY: Internal Revenue Service (IRS), Department of the Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations that would provide guidance relating to the application of section 4980F of the Internal Revenue Code to a plan amendment that is permitted to reduce benefits accrued before the plan amendment's applicable amendment date. These regulations would also reflect certain amendments made to section 4980F by the Pension Protection Act of 2006, Public Law 109-280 (120 Stat. 780). These proposed regulations would affect sponsors, administrators, participants, and beneficiaries of pension plans. This document also provides a notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by June 19, 2008. Outlines of topics to be discussed at the public hearing scheduled for July 10, 2008, at 10 a.m. must be received by June 20, 2008.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-110136-07), Room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington DC, 20044. Submissions may be hand-delivered Monday through Friday, between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-110136-07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC, 20224 or sent via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS REG-