

A Practitioner's Road Map to GAO Bid Protests

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With an increase in federal government procurements—thanks in part to the American Recovery and Reinvestment Act—and a struggling private construction market, many contractors have decided to take their first stab at bidding federal projects. This dual increase in federal contracts and first-time federal bidders will inevitably lead to an increase in federal bid protests. In the context of federal bid protests, choosing the proper forum for bringing the protest and following the correct procedures are absolutely essential if a contractor expects to stand any chance of succeeding on a protest.

Currently, an eligible bidder/proposer may choose to file a protest challenging a federal contract award, and the procedure by which the contract offers were solicited, in one of three forums: (1) the agency whose procurement procedures are being challenged, (2) the U.S. Government Accountability Office (GAO),¹ or (3) the Court of Federal Claims (COFC). This article provides a procedural guide for bringing a federal bid protest at the GAO.²

“An interested party wishing to protest [a federal government procurement] is encouraged to seek resolution within the agency (see [FAR] 33.103) before filing a protest with the GAO, but may protest to the GAO in accordance with GAO regulations (4 CFR part 21).”³ The procedures for GAO protests are outlined at 4 C.F.R. part 21⁴ and require strict compliance or the GAO will not consider the protest.⁵

In many ways, the GAO represents a happy medium between an agency-level protest and a COFC protest. Although agency-level protests are generally the cheapest and quickest forum for obtaining relief in a procurement protest, such protests have inherent disadvantages.

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Agency-level protests lack the element, or at least the appearance, of totally independent review. After all, in an agency-level protest, the official reviewing the protest is an officer of the very same agency whose conduct and decision is being protested. The GAO provides protestors a venue that retains many of the advantages of an agency-level protest. In addition, it is adjudicated by an official who is not associated with the procurement agency. Although the GAO may not be as fast, cheap, or informal as an agency-level protest, it remains competitive with agency-level protests in all of these factors, and is almost always cheaper and faster than a COFC protest. Also, similar to agency-level protests, the GAO provides timely protestors with an automatic stay of the award or performance of the contract at issue. Unlike at the GAO, there is no automatic stay procedure for protests filed at the COFC. This is a critical difference because if the procurement process is allowed to continue while the protest is pending, a successful protestor will likely be limited to recovering its bid preparation and protest costs. However, if the protestor can stay the procurement process while the protest is pending, then a successful protestor may be entitled to more valuable relief, such as the termination of the contract or resolicitation of the procurement at issue. Another advantage to filing a protest at the GAO is that the person adjudicating the protest is likely to have more experience handling the procedural and substantive intricacies of bid protests. GAO hearing officers are usually highly experienced attorneys who specialize in bid protests, whereas COFC judges handle many other types of cases besides bid protests. However, there are more checks and balances on the quality of COFC judges, who are vetted through the Senate confirmation process, compared to GAO hearing officers, who are simply appointed by the GAO's Office of General Counsel. The biggest disadvantage of GAO protests may be that the GAO's decision serves as a non-binding recommendation to the agency. However, this disadvantage is more one of perception than reality, as nearly all GAO protest decisions are fully implemented by the applicable agency.⁶

History of the GAO

Created by the Budget and Accounting Act of 1921,⁷ the GAO became the first external forum for federal bid protests.⁸ The GAO was established as an independent governmental agency under the control and direction of the Comptroller General for the United States.⁹ Even though the statutes giving GAO jurisdiction to hear bid protests were not enacted until the mid-1980s, the GAO has been hearing bid protests since the 1920s.¹⁰

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Standing to Protest at the GAO

To have standing to bring a bid protest at the GAO, the protestor must be an “interested party.”¹¹ Bid protest regulations define an “interested party” as any “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.”¹² This includes any party that is a disappointed bidder on the federal procurement contract that is the subject of the protest.¹³ However, a disappointed bidder is *not* an interested party if there is no reasonable possibility it would be eligible for the award if the protest were sustained:

A protestor is an interested party to challenge the agency’s evaluation of proposals where there is a reasonable possibility that the protestor’s proposal would be in line for award if its protest were sustained. By contrast, a firm is not an interested party where it would be ineligible to receive award under the protested solicitation if its protest were sustained.¹⁴

The biggest disadvantage of GAO protests may be that the GAO’s decision serves as a nonbinding recommendation to the agency.

For example, if the disappointed bidder were ineligible for award based on grounds not disputed in the protest, then the disappointed bidder cannot be an “interested party.”¹⁵ Likewise, where, even accepting the protesting bidder’s argument, the protesting bidder would not be “next in line” for the award, the protestor is not an “interested party.”¹⁶

The protestor has the burden of setting forth all information establishing that it is an interested party for the purpose of filing a protest.¹⁷

An interested party may protest any of the following to the GAO:

a solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services; the cancellation of such a solicitation or other request; an award or proposed award of such a contract; and a termination of such a contract, if the protest alleges that the termination was based on improprieties in the award of the contract.¹⁸

Procedures for Initiating a GAO Bid Protest

Protests must be in writing¹⁹ and delivered to the GAO by hand, mail, commercial carrier, facsimile, or email.²⁰ A protest must:

- (1) Include the name, street address, electronic mail address, and telephone and facsimile numbers of the protestor,
- (2) Be signed by the protestor or its representative,
- (3) Identify the agency and the solicitation and/or contract number,
- (4) Set forth a detailed statement of the legal and factual grounds of protest including copies of relevant documents,
- (5) Set forth all information establishing that the protestor is an interested party for the purpose of filing a protest,
- (6) Set forth all information establishing the timeliness of the protest,
- (7) Specifically request a ruling by the Comptroller General of the United States, and
- (8) State the form of relief requested.²¹

Failure to comply with any of the above requirements may be grounds for dismissal of the protest.²²

The protestor must furnish the contracting agency whose decision is being challenged with a copy of the GAO protest, including all attachments, within one day of filing the protest with the GAO.²³

A protest also may include requests for a protective order, specific documents relevant to the protest, and a hearing.²⁴

Timeliness of Protest to the GAO

Protests based upon alleged improprieties in a solicitation must be filed before bid opening or the time set for receipt of the proposals, unless the alleged impropriety is not apparent before that time.²⁵ With the exception of negotiated procurement protests, all other bid protests must be filed no later than 10 calendar days after the basis of the protest is known or should have been known, whichever is earlier.²⁶ However, this 10-day requirement is not applicable if the protest is brought before the closing date for receipt of proposals.²⁷ The GAO has taken a variety of views on what constitutes constructive notice such that the 10 days begins to count, such as in the case of website postings of the contract award.²⁸

Where the protest is initially filed with the contracting agency, special timeliness rules apply. In those cases, any subsequent protest to the GAO must be filed not later than 10 days after the protestor learns of the “initial adverse agency action.”²⁹ Additionally, if the agency-level protest is untimely filed, any subsequent protest to the GAO is also untimely.³⁰

“A document is *filed* on a particular day when it is received by the GAO by 5:30 p.m., Eastern Time, on that day.”³¹ The burden is on the protestor to include all information establishing timeliness at the time the protest is filed.³² “Protests untimely on their face may be dismissed.”³³ “Because bid protests may delay the procurement of needed goods and services, GAO, except under limited circumstances, strictly enforces the timeliness

requirements.”³⁴ But “GAO, for good cause shown, or where it determines that a protest raises issues significant to the procurement system, may consider an untimely protest.”³⁵ “The ‘good cause’ exception is limited to circumstances where some compelling reason beyond the protestor’s control prevents the protestor from filing a timely protest.”³⁶ “The significant issue exception is limited to untimely protests that raise issues of widespread interest to the procurement community, and which have not been considered on the merits in a prior decision.”³⁷ These exceptions apply only to save a protest that is untimely, and cannot be used as a basis for considering a protest that is legally or factually insufficient.³⁸

What Can Be Protested at the GAO

Not only does the GAO restrict who can protest and when they can protest, but it also restricts what can be protested to the GAO. Generally, the GAO lacks jurisdiction to consider protests that are based on any of the following grounds: the administration of existing contracts, Small Business Administration issues, an affirmative determination of responsibility by the contracting officer, challenges to the suspension or debarment of contractors, protests asserting that the protestor’s proposal should *not* have been included or kept in the competitive range, or the decision by an agency tender official of whether or not to file a protest.³⁹ Except under a few discrete exceptions, a protest brought on any of these grounds will be summarily dismissed.⁴⁰ Furthermore, unless the procurement agency gives written consent, the GAO will not consider protests concerning (1) awards of subcontracts by or for a federal agency, (2) sales by a federal agency, and (3) procurement actions by government entities that do not fall within the strict definition of federal agencies in 4 C.F.R. § 21.0(c).⁴¹

GAO Actions Upon Receiving Protest

Notice to Parties

Upon receiving a protest, unless the protest is summarily dismissed,⁴² the GAO must give notice of the impending protest to the contracting agency by telephone within one day after the protest is filed, and must promptly send the protestor and the agency a written acknowledgment that the protest has been received.⁴³ Upon receiving this notice, the agency must give all potential “intervenor” notice of the protest and provide them copies of the protest submissions.⁴⁴

Intervention

Other interested parties may be permitted by the GAO to participate in the protest as “intervenor.”⁴⁵ The GAO regulations define an “intervenor” as “an awardee if the award has been made 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.”⁴⁶

If an award has already been made, then generally the GAO only permits the “awardee” to intervene.⁴⁷ If the contract in question has not yet been awarded, then any

interested party wishing to intervene (that is qualified to intervene under the circumstances⁴⁸) should give notice to the GAO and the other parties of its intent to intervene,⁴⁹ and then contact the GAO to learn whether it will be permitted to intervene.⁵⁰ The potential intervenor, or its representative, also should enter a notice of appearance to the GAO to ensure it promptly receives all communications in relation to the protest.⁵¹

Summary Dismissal

If the agency or any intervenor discovers a reason why summary dismissal would be appropriate, it should file a request for dismissal as soon as practicable.⁵² When a request is filed, the GAO will generally permit the protestor to file a brief in opposition to dismissal, and the GAO will promptly address the dismissal request.⁵³

Summary dismissal may be appropriate at any time that the GAO has information to determine the protest is deficient on procedural or jurisdictional grounds.⁵⁴ If the GAO grants the request for summary dismissal, either in whole or in part, the agency is not required to prepare a report in response to the protest or in response to those grounds of protest that were dismissed.⁵⁵

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Automatic Stay

After the agency has received telephonic notice of the protest from the GAO, the agency may not award the contract. If the contract has already been awarded, the agency must suspend performance of the contract if the procuring agency receives notice of a protest from the GAO within 10 days after contract award, or within 5 days after a debriefing date, whichever is later.⁵⁶ However, due to subtleties in the GAO regulations, to ensure that the automatic stay provision in postaward protests is triggered, it is extremely important that the protest is filed at least one full day in advance of the deadline.⁵⁷

An exception to the automatic stay provision exists when the head of the agency authorizes the award “upon a written finding that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General [on the protest.]”⁵⁸ and the Comptroller General is given notice of this finding.⁵⁹

Although the GAO will not review an agency’s decision

to override the automatic stay provision, some federal courts will review the agency's decision to determine if it is arbitrary, capricious, an abuse of discretion, or otherwise clearly and prejudicially in violation of law or regulation.⁶⁰

Dynamics of Discovery in GAO Bid Protests

Agency Report

Once the agency receives telephone notice of the protest, it has 30 days to provide the GAO a complete written report responding to the protest.⁶¹ The report is to include the contracting officer's statement of the relevant facts including a best estimate of the contract value, a memorandum of law, copies of all relevant documents or portions of documents not previously produced, and a list of those documents.⁶² Though the report is to be simultaneously provided to the protestor and any intervenors, "[t]he agency may omit documents, or portions of documents, from the copy of the report provided to the parties if the omitted information is protected and a party receiving the report is not represented by counsel admitted under a protective order."⁶³ "Protected" material includes "proprietary, confidential, or source-selection-sensitive material, as well as other information the release of which could result in a competitive advantage" to one of the parties bidding on the contract.⁶⁴

"Occasionally, the agency may be aware of the existence of relevant documents that only the protestor possesses. In appropriate cases, the agency may request that the protestor produce those documents."⁶⁵

In the protest filing, the protestor may request the agency to produce specific documents that the protestor shows are relevant to the protest.

Requests for Documents

In the protest filing, the protestor may request the agency to produce specific documents that the protestor shows are relevant to the protest.⁶⁶ After the agency report is filed, the protestor may file a request for any additional relevant documents, but such a request is permitted only if made within two days of the protestor having actual or constructive notice of the document's existence or relevance, whichever is earlier.⁶⁷ If the protestor objects to the agency's withholding of any requested documents, the GAO must decide whether the agency is required to produce the withheld documents, or portions of documents, and whether this should be done under a protective order.⁶⁸

Protective Orders

The purpose of a "protective order" is to help the protestor, through its counsel, learn the relevant facts when parts of the record are deemed protected.⁶⁹ The GAO views it as the responsibility of the protestor's counsel in the first instance to request a protective order and to submit timely applications for admission to access protected material under the order.⁷⁰ A protective order may be justified if a relevant document contains "protected" material.⁷¹ If no protective order is issued, the agency may withhold from the parties those portions of the agency report that would ordinarily be subject to a protective order.⁷²

After a protective order has been issued, only parties' counsels or consultants may apply for admission to access material under the protective order.⁷³ For this reason, it is very important that the protestor be represented by counsel in the bid protest process. If the protestor is not represented by counsel, issuing a protective order serves no useful purpose because the protestor cannot apply for access to the protected material without counsel.⁷⁴ Accordingly, any portions of the record that the GAO determines cannot be released without a protective order will not be released at all if the protestor refuses to obtain counsel.⁷⁵

"In considering the propriety of granting or denying an applicant admission to a protective order, [GAO will] review each application in order to determine whether the applicant is involved in competitive decision-making and whether there is otherwise an unacceptable risk of inadvertent disclosure of protected information should the applicant be granted access to protected material."⁷⁶ With respect to the applications of consultants to a protective order, the GAO considers and balances a variety of factors, including the GAO's "desire for assistance in resolving the specific issues of the protest, the protestor's need for consultants to pursue its protest adequately, the nature and sensitivity of the material sought to be protected, and whether there is opposition to an applicant expressing legitimate concerns that the admission of the applicant would pose an unacceptable risk of inadvertent disclosure."⁷⁷

Generally, other parties have two days to object to an application for admission under a protective order.⁷⁸ If there is no objection, the GAO will generally admit the applicant under the protective order.⁷⁹ If the applicant is granted access to protected material, he or she may not disclose any protected information to others.⁸⁰ This creates the unusual circumstance where the protestor's attorney, who is granted access to protected information, cannot disclose relevant information to his client.⁸¹ If the terms of the protective order are violated, both counsel and client are subject to a variety of sanctions, including dismissal of the protest.⁸²

Absent express prior written authorization from the GAO, material to which parties gain access under a GAO protective order may only be used in the protest proceedings for which the protest was issued.⁸³ "GAO has generally permitted the use of protected material in the filing of federal lawsuits and before other administrative tribunals

where the party seeking to use such material establishes that the material will be safeguarded.”⁸⁴

Protestor Comments on Agency Report

After receipt of the agency report, the protestor has 10 days to submit its comments on the report to the GAO. If the protestor does not submit comments within the 10-day period, the GAO will dismiss the protest.⁸⁵ Generally, comments that consist solely of general statements requesting that the GAO review the protest on the existing record are not sufficient to rebut the agency report.⁸⁶

In its comments, a protestor may not introduce new grounds for protest that could have been raised in its initial protest submission.⁸⁷ However, the protestor can raise new grounds of protest if the new grounds were first discovered upon receipt of the agency report and the protestor raises these supplemental issues within 10 working days of its receipt of the agency report.⁸⁸ Following the comment period, neither the agency nor any other party may submit additional statements for the record without GAO permission.⁸⁹

Hearings at the GAO

At the request of a party or on its own initiative, the GAO may conduct a hearing in connection with a protest.⁹⁰ A protestor requesting a hearing should do so in its initial protest filing, setting forth the reasons why a hearing is needed to resolve the protest.⁹¹ Due to the increased cost and burden associated with a hearing, the GAO holds a hearing only when necessary.⁹² If the GAO grants a hearing, it usually holds a prehearing conference to resolve procedural issues.⁹³

The hearing is presided over by the GAO attorney assigned to the protest. Parties must submit a list of expected attendees to the GAO at least one day before the hearing, and the presiding GAO attorney may restrict access to the hearing to prevent the improper disclosure of protected information.⁹⁴ If a witness whose attendance has been requested by the GAO fails to attend the hearing or fails to answer a relevant question, the GAO may infer that the witness’s testimony would have been unfavorable to the party for whom the witness would have testified.⁹⁵

Within five days after the hearing, parties should submit comments to the GAO.⁹⁶ If the protestor fails to submit any comments, the protest is dismissed.⁹⁷

GAO Decision on the Bid Protest

Unless the GAO finds the protest appropriate for fast-tracking under the “express option,” it shall issue a decision on the protest within 100 days after the protest is filed.⁹⁸ If the GAO chooses the express option, a decision will be issued within 65 days after the protest is filed.⁹⁹ The GAO also has the option of using, where appropriate, “flexible alternative procedures to promptly and fairly resolve a protest.”¹⁰⁰ Once signed by the presiding GAO attorney, a copy of the decision is generally available on the GAO’s website within 24 hours and is distributed to the parties.¹⁰¹ If the decision contains protected information,

it will only be distributed to the agency and individuals admitted under the protective order, and, if possible, a redacted version will be made available to the public.¹⁰²

If the GAO determines that the agency’s procurement activities did not comply with statute or regulation, and such noncompliance prejudiced the protestor, the GAO will sustain the protest.¹⁰³ In reviewing an agency’s evaluation, the GAO will “examine the agency’s evaluation to ensure that it was reasonable and consistent with the solicitation’s stated evaluation criteria and applicable procurement statutes and regulations.”¹⁰⁴ “A protestor’s mere disagreement with the agency’s judgment in its determination of the relative merit of competing proposals does not establish that the evaluation was unreasonable.”¹⁰⁵ If the GAO sustains the protest, it will recommend remedial action if “determines to be necessary to promote compliance with procurement statutes and regulations.”¹⁰⁶

If the protestor does not submit comments within the 10-day period, the GAO will dismiss the protest.

GAO decisions are recommendations, and are not binding upon the procurement agency or any of the other parties to the protest.¹⁰⁷ However, the statutory language giving GAO jurisdiction to review procurement decisions indicates “that Congress contemplated and intended that procurement agencies normally would follow the Comptroller General’s recommendation.”¹⁰⁸ In fact, according to the GAO, in fiscal years 2000 through 2008, agencies have only declined to fully adopt the GAO’s recommendations on four occasions.¹⁰⁹ And, in one of these four cases, under threats from Congress to withhold project funding, the agency eventually implemented the GAO’s recommendation.¹¹⁰

Recoverable Costs in a GAO Bid Protest

Generally, if a protest is sustained, the GAO will recommend that the agency reimburse the protestor’s costs incurred filing and pursuing the protest,¹¹¹ including attorney, consultant, and expert witness fees.¹¹² If the protest is sustained, but the protestor is deprived of an opportunity to compete for the contract at issue, then the GAO will likely award the protestor its bid and proposal preparation costs.¹¹³ But “even where an offeror has been wrongfully denied award of a contract, there is no legal basis for allowing recovery of lost profits.”¹¹⁴

If the protest is denied, or closed after the agency takes corrective action prior to the GAO’s final ruling, the protestor may still be awarded its protest costs if the GAO determines that, in the face of a “clearly meritorious”

protest, the agency “unduly delayed in taking corrective action.”¹¹⁵ Thus, even if the protest is “clearly meritorious,”¹¹⁶ the GAO will not recommend the award of costs if the agency takes responsibly prompt corrective action.¹¹⁷

As a general rule, the GAO considers a successful protestor entitled to reimbursement for costs incurred with respect to all issues pursued, not merely those upon which it prevails.¹¹⁸ The GAO will only sever the costs associated with unsuccessful protest issues if the “unsuccessful protest issue . . . is so clearly severable from the successful issues as to essentially constitute a separate protest.”¹¹⁹

If the GAO recommends the protestor be awarded costs, the protestor must file with the GAO a detailed claim for costs, certifying the time expended and costs incurred in pursuing the protest, within 60 days of the GAO’s decision to award costs.¹²⁰ The claim must be supported with adequate documentation.¹²¹ Absent a “compelling reason beyond the control of the protestor [that] prevented the protestor from timely filing the claim,” failure to file an adequately substantiated cost claim within the 60-day window will result in the forfeiture of the protestor’s right to recover costs.¹²²

Any party involved in the bid protest may request reconsideration of the GAO decision.

**Review of GAO Decisions
Request for Reconsideration**

Any party involved in the bid protest may request reconsideration of the GAO decision.¹²³ The GAO must receive the request “not later than 10 days after the basis for reconsideration is known or should have been known, whichever is earlier,” and the request must “contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.”¹²⁴ Unlike the initial protest, a request for reconsideration will not result in an automatic stay of contract award or performance.¹²⁵ Generally, the GAO will assign a different attorney to decide the request for reconsideration.¹²⁶

Appeal to the Court of Federal Claims

Where the protestor fails to obtain its desired relief from the GAO, or where the GAO’s decision to sustain the protest and grant relief to the protestor is not implemented by the procuring agency, the protestor can seek relief in the COFC. Generally, the subject of the COFC’s review is the agency decision, not the GAO recommendation.¹²⁷ Despite the fact that GAO decisions are not

binding on the COFC, “the [COFC] recognizes GAO’s longstanding expertise in the bid protest area and accords its decisions due regard.”¹²⁸

Advice for Counsel

When seeking to protest a federal procurement, an interested party should carefully consider which forum’s protest procedures are most favorable under the circumstances. In some cases, the protestor will find the GAO’s procedures to be most advantageous. The GAO is a quick and inexpensive vehicle for a disappointed bidder to obtain relief from alleged improprieties in the procurement process. However, the GAO’s timelines are strict and normally inflexible. The procedural intricacies at the GAO require the practitioner to be knowledgeable and diligent when bringing a protest at the GAO. The best advice is for counsel to always check and double-check the GAO’s bid protest regulations because even if the protest is strong on its merits, counsel’s failure to follow GAO protest regulations can easily cost the protestor any chance at relief. 

Endnotes

1. Originally titled the General Accounting Office, GAO was renamed the Government Accountability Office in 2004. GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, § 8, 118 Stat. 811, 814 (2004). The name was changed to more accurately reflect GAO’s true role. See James F. Nagle & Bryan A. Kelly, *Federal Forums for Government Contracts*, 2 J. AM. COLL. CONSTR. L. 189, 204 (Winter 2008).

2. For a procedural overview of all three federal bid protest forums, see James F. Nagle & Adam K. Lasky, *Bid Protests*, in FEDERAL GOVERNMENT CONSTRUCTION CONTRACTS (Adrian L. Bastianelli III et al. eds., 2d ed. 2010).

3. 48 C.F.R. § 33.102(e).

4. 4 C.F.R. §§ 21.0–14.

5. For example, protests not filed within the time limits set forth in 4 C.F.R. § 21.2, that lack a detailed statement of the legal and factual grounds of protest as required by 4 C.F.R. § 21.1(c)(4), or that fail to clearly state legally sufficient grounds of protest as required by 4 C.F.R. § 21.1(f) shall be dismissed. 4 C.F.R. §§ 21.5(e)–(f).

6. For a further discussion of agency-level and COFC protests, see Nagle & Lasky, *Bid Protests*, *supra* note 2.

7. Pub. L. No. 67-13, 42 Stat. 20 (1921).

8. The GAO derives its authority to resolve bid protests from the language in § 305 of the Budget and Accounting Act of 1921. Pub. L. No. 67-13, 42 Stat. 20, 24 (1921) (“All claims and demands whatever by the Government of the United States or against it . . . shall be settled and adjusted in the General Accounting Office.”); see 31 U.S.C. §§ 3702, 3526. Prior to 1921, this authority was vested in the Accounting Office of the Treasury Department. See *Globe Indem. Co. v. United States*, 291 U.S. 476, 479–80 (1934).

9. Pub. L. No. 67-13, 42 Stat. 20, 23 (1921).

10. SECTION OF PUBLIC CONTRACT LAW, AMERICAN BAR ASSOCIATION, COMMENTS REGARDING U.S. GEN. ACCOUNTING OFFICE STUDY OF CONCURRENT PROTEST JURISDICTION 7 n.4 (Dec. 29, 1999), printed in U.S. GEN. ACCOUNTING OFFICE, GAO/GGD/OGC-00-72, BID PROTESTS: CHARACTERISTICS OF CASES FILED IN FEDERAL COURTS app. viii, at 58 (April 2000); OFFICE OF GENERAL COUNSEL, U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-471SP, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE 4 (9th ed. 2009) [hereinafter GAO-09-471SP].

11. 4 C.F.R. § 21.0(a)(1).

12. *Id.* A lone exception to the traditional “interested party” test occurs in the context of 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. In such a circumstance, the official responsible for submitting the federal agency tender (i.e., the agency tender official) and any one individual, designated as an agent by a majority of the employees performing that activity or function, who represents the affected employees (i.e., the designated employee agent), are each considered an “interested party” for purposes of having standing to file a protest at GAO. 4 C.F.R. § 21.0(a)(2); GAO-09-471SP, *supra* note 10, at 7.

13. *Stay, Inc. v. Cheney*, 940 F.2d 1457, 1460 (11th Cir. 1991).

14. *ECI Def. Group, Comp. Gen. B-400177 et al.*, July 25, 2008, 2008 CPD ¶ 141, at 5 (citations omitted); *see also Evans Sec. Solutions, Inc., Comp. Gen. B-311035*, Mar. 19, 2008, 2008 CPD ¶ 58 (protestor is not an interested party for purposes of challenging evaluation of awardee’s proposal where record shows that another offeror, not protestor, would be in line for award); *Para Scientific Co., Comp. Gen. B-310976*, Feb. 25, 2008, 2008 CPD ¶ 54 (nonsmall business is not an interested party to argue that a procurement should be set aside for small businesses); *Native Am. Indus. Distributions, Inc., Comp. Gen. B-310737.3 et al.*, Apr. 15, 2008, 2008 CPD ¶ 76 (offeror in a best value procurement whose price was low is an interested party even though another offeror had a higher technical score).

15. *Para Scientific Co.*, 2008 CPD ¶ 54 (protestor’s contention that a procurement must be set aside for small business concerns is dismissed where the protestor did not qualify as a small business under the applicable code, and therefore was not an interested party for the purposes of arguing that the procurement must be set aside), *compare with Designer Assocs., Inc., Comp. Gen. B-293226*, Feb. 12, 2004, 2004 CPD ¶ 114 (protestor was an “interested party” despite the fact that protestor was not an 8(a) contractor, and the procurement was conducted under the 8(a) program, because protestor challenged the procurement on the basis that the decision to place the procurement under the 8(a) program was improper).

16. *Joint Mgmt. & Tech. Servs., Comp. Gen. B-294229, B-294229.2*, Sept. 22, 2004, 2004 CPD ¶ 208 (protestor is not an interested party to challenge evaluation of awardee’s proposal where record shows that another firm, not the protestor, would be in line for award if protestor’s challenge were sustained, and protestor does not challenge evaluation of the other firm’s proposal); *DynCorp Int’l LLC, B-294232, B-294232.2*, Sept. 13, 2004, 2004 CPD ¶ 187; *Triton Elec. Enters., Inc., Comp. Gen. B-294221 et al.*, July 9, 2004, 2004 CPD ¶ 139 (protestor, a proposed debarred contractor, was not an “interested party” as a proposed debarred contractor is not eligible for the award of a federal contract and as such is not in line for contract award even if its protest were sustained); *Sterling Servs., Inc., Comp. Gen. B-291625, B-291626*, Jan. 14, 2003, 2003 CPD ¶ 26 (protestor is not an interested party to maintain protest challenging proposal evaluation where it did not acknowledge material amendment; protestor would be ineligible for award even if protest of evaluation were sustained); *Yoosung T&S, Ltd., Comp. Gen. B-291407*, Nov. 15, 2002, 2002 CPD ¶ 204 (protestor is not an interested party to challenge the agency’s nonresponsibility determination because it would not be in line for award even if its protest were sustained because its proposal was technically unacceptable).

17. *Total Procurement Servs., Inc., Comp. Gen. B-272343.2 et al.*, Aug. 29, 1996, 96-2 CPD ¶ 92 (citing 4 C.F.R. § 21.1(c)(5)).

18. 4 C.F.R. § 21.1(a).

19. 4 C.F.R. § 21.1(b).

20. The protest may be delivered by hand, mail, or commercial carrier, 4 C.F.R. § 21.0(f), to the following address:

General Counsel, Government Accountability Office, 441 G Street, NW, Washington, DC 20548, Attention: Procurement Law Control Group.

4 C.F.R. § 21.1(b). Protests filed by hand or commercial carrier “must be delivered to GAO’s mail center in GAO’s main building at the above-referenced address; the mail center is located on the 4th Street side of GAO’s main building and currently accepts bid protest filings from 7:30 a.m. to 5:30 p.m. Bid protest packages must be identified with one of the following labels: ‘Procurement Law Control Group,’ ‘PLCG,’ ‘Bid Protest,’ or ‘Name of GAO Attorney.’” GAO-09-471SP, *supra* note 10, at 13. Protests also may be filed by facsimile transmission (202-512-9749), or email (protests@gao.gov). *Id.* at 14; 4 C.F.R. § 21.0(f). Protestors that decide to file by email should submit the protest using formatting compatible with Microsoft Office software. GAO-09-471SP, *supra* note 10, at 8.

21. 4 C.F.R. § 21.1(c).

22. 4 C.F.R. § 21.1(i).

23. 4 C.F.R. § 21.1(e).

24. 4 C.F.R. § 21.1(d); GAO-09-471SP, *supra* note 10, at 9.

25. 4 C.F.R. § 21.2(a)(1). “In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation.” *Id.*

26. 4 C.F.R. § 21.2(a). “[P]rotests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required. In such cases, with respect to any protest basis which is known or should have been known either before or as a result of the debriefing, the initial protest shall not be filed before the debriefing date offered to the protestor, but shall be filed not later than 10 days after the date on which the debriefing is held.” 4 C.F.R. § 21.2(a)(2).

27. *MadahCom, Inc.—Recon., Comp. Gen. B-297261.2*, Nov. 21, 2005, 2005 CPD ¶ 209 (protest that a solicitation improperly restricts competition to multiple-award task-order contract holders, and that the task orders will exceed the scope of the underlying contracts, was timely where filed before the closing date for receipt of task-order proposals; dismissal of protest as untimely because it was not filed within 10 days of when the protestor knew that the procurement would be restricted to task-order contract holders therefore is reversed).

28. *CBMC, Inc., Comp. Gen. B-295586*, Jan. 6, 2005, 2005 CPD ¶ 2 (posting of award notice on the FedBizOpps Internet site is constructive notice of the protested contract award, and protest filed more than 10 days after the award posting is untimely). *But see Worldwide Language Res., Inc.; SOS Int’l Ltd., Comp. Gen. B-296984 et al.*, Nov. 14, 2005, 2005 CPD ¶ 206 (announcement of contract award on the Department of Defense’s official website, www.DefenseLink.mil, did not place protestors on constructive notice of the award and thus requires protestors to file their protests within 10 days of the announcement because DefenseLink has not been designated by statute or regulation as the public medium for announcement of procurement actions).

29. 4 C.F.R. § 21.2(a)(3); *see, e.g., Int’l Garment Processors, Comp. Gen. B-299743 et al.*, July 17, 2007, 2007 CPD ¶ 130, at 4 n.5 (protest to GAO brought after failed agency-level protest ruled untimely where brought more than 10 days after protestor learned of agency’s adverse ruling on the protest; “While the protestor apparently delayed filing a protest with [GAO] in order to continue pursuit of the challenges with the agency, a protestor’s continued pursuit of protest matters with a contracting agency does not toll [GAO] timeliness rules.”). “Deciding when adverse agency action occurs is straightforward when the

protestor receives oral or written notice that the agency is denying the agency-level protest. Protestors should keep in mind, however, that GAO views as adverse agency action any action that makes clear that the agency is denying the agency-level protest. Examples of adverse agency action include the agency's proceeding with bid opening or the receipt of proposals, the rejection of a bid or proposal, or the award of a contract despite the agency-level protest. Firms that have filed an agency-level protest and are considering filing a subsequent protest with GAO should be alert to any possible agency action that could be viewed as indicating that the agency is denying the agency-level protest." See GAO-09-471SP, *supra* note 10, at 11.

30. 4 C.F.R. § 21.2(a)(3).

31. 4 C.F.R. § 21.0(f) (emphasis added).

32. 4 C.F.R. § 21.2(b). "[A] protestor will not be permitted to introduce for the first time in a request for reconsideration information necessary to establish that the protest was timely." *Id.*

33. *Id.*

34. See GAO-09-471SP, *supra* note 10, at 10.

35. 4 C.F.R. § 21.2(c). See, e.g., Celadon Labs., Inc., Comp. Gen. B-298533, Nov. 1, 2006, 2006 CPD ¶ 158 (the significant issue exception to our timeliness rules was invoked in this matter where the issue—the application of conflict of interest regulations to peer review evaluators in Small Business Innovation Research (SBIR) procurements—was not one that we had previously decided and was one that could be expected to arise in future SBIR procurements).

36. Goel Servs., Inc., Comp. Gen. B-310822.2, May 23, 2008, 2008 CPD ¶ 99, at 3 (citing Dontas Painting Co., Comp. Gen. B-226797, May 6, 1987, 87-1 CPD ¶ 484, at 2).

37. *Id.* (citing Schleicher Cmty. Corps. Ctr., Inc., Comp. Gen. B-270499.3 et al., Apr. 18, 1996, 96-1 CPD ¶ 192, at 7).

38. Coffman Specialties, Inc., Comp. Gen. B-400706.2, Nov. 12, 2008, 2008 CPD ¶ 211, at 4.

39. 4 C.F.R. § 21.5.

40. See *id.*

41. GAO-09-471SP, *supra* note 10, at 8; 4 C.F.R. §§ 21.5, 21.13(a).

42. If the GAO determines that the protest is lacking in any of the basic elements required by 4 C.F.R. § 21.1(c), the GAO may summarily dismiss the protest and is not required to provide the agency any notice. See, e.g., New Mexico State Univ., Comp. Gen. B-230669, B-230669.2, June 2, 1988, 88-1 CPD ¶ 523.

43. 4 C.F.R. § 21.3(a).

44. *Id.* "Intervenor means an awardee if the award has been made 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." 4 C.F.R. § 21.0(b)(1).

45. See GAO-09-471SP, *supra* note 10, at 17 (citing 4 C.F.R. § 21.0(b)).

46. 4 C.F.R. § 21.0(b)(1). However, for protests filed by an interested party regarding a public-private competition conducted under Office of Management and Budget Circular A-76 regarding an activity or function of a federal agency performed by more than 65 full-time-equivalent employees of the federal agency, the representative of the majority of affected employees and/or the agency tender official also may be intervenors. See GAO-09-471SP, *supra* note 10, at 17; 4 C.F.R. § 21.0(b)(2).

47. See GAO-09-471SP, *supra* note 10, at 17.

48. See 4 C.F.R. § 21.0(b)(1)–(2).

49. See GAO-09-471SP, *supra* note 10, at 17 ("The notice of intervention can be a brief letter that includes the name, address, and telephone and fax numbers of the intervenor or its representative, if any, and advises GAO and all other parties of the intervenor's status.").

50. See *id.*

51. See *id.* (notice should be delivered to the GAO, the protestor, and the procurement agency and should contain the

intervenor's, and/or its representative's, name, address, telephone number, fax number, and email address).

52. 4 C.F.R. § 21.3(b).

53. See GAO-09-471SP, *supra* note 10, at 18.

54. 4 C.F.R. §§ 21.1 (listing procedural requirements), 21.5 (listing procedural and jurisdictional requirements), 21.11(b) ("GAO will dismiss any case where the matter involved is the subject of litigation before, or has been decided on the merits by, a court of competent jurisdiction. GAO may, at the request of a court, issue an advisory opinion on a bid protest issue that is before the court.").

55. 4 C.F.R. § 21.5; see GAO-09-471SP, *supra* note 10, at 18.

56. 31 U.S.C. § 3553(c)–(d); 48 C.F.R. § 33.104(c).

57. Once GAO receives a protest, it has one day to give the agency telephonic notice. 4 C.F.R. § 21.3(a). Therefore, if a protest is filed with GAO 10 days after the contract is awarded, the procuring agency may not receive notice from the GAO until the 11th day, and the automatic stay provision will not be triggered.

58. 31 U.S.C. § 3553(c)(2), (d)(3)(C). For a contract that has already been awarded, the agency may substitute this with a finding that "performance of the contract is in the best interests of the United States[.]" 31 U.S.C. § 3553(d)(3)(C)(i)(I).

59. 31 U.S.C. § 3553(c)(2), (d)(3)(C).

60. 3 STEVEN W. FELDMAN, GOVERNMENT CONTRACT AWARDS: NEGOTIATION AND SEALED BIDDING § 31:3 (2008).

61. 4 C.F.R. § 21.3(c). If GAO determines that fast-tracking the case is appropriate, then the agency has 20 days to issue its report. 4 C.F.R. § 21.10(d).

62. 4 C.F.R. § 21.3(d).

63. See GAO-09-471SP, *supra* note 10, at 23 (citing 4 C.F.R. § 21.3(e)).

64. 4 C.F.R. § 21.4(a).

65. See GAO-09-471SP, *supra* note 10, at 23 (citing 4 C.F.R. § 21.3(d)). While the "reverse discovery" rule permits the contracting agency to request a specific relevant document of which the agency is aware and does not itself possess, the rule does not allow wide-open discovery requests by the agency on broad categories. *Id.*; The Boeing Company, Comp. Gen. B-311344 et al., June 18, 2008, 2008 CPD ¶ 1143.

66. 4 C.F.R. § 21.1(d)(2). "At least 5 days prior to the filing of the report, in cases in which the protestor 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 produce, 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." 4 C.F.R. § 21.3(c).

67. 4 C.F.R. § 21.3(g). The agency must produce the requested documents, or explain why it is not required to do so, within two days of such a request. *Id.* The GAO may grant the protestor leave to make requests for documents outside the two-day window. *Id.*

68. 4 C.F.R. § 21.3(h).

69. See GAO-09-471SP, *supra* note 10, at 19; 4 C.F.R. § 21.4(a).

70. See GAO-09-471SP, *supra* note 10, at 19; 4 C.F.R. § 21.4(a) (GAO can issue an order on its own initiative).

71. 4 C.F.R. § 21.4(a). Any protective order shall include procedures for application for access to protected information, identification and safeguarding of that information, and submission of redacted copies of documents omitting protected information. *Id.*

72. 4 C.F.R. § 21.4(b). Though in these cases the discoverability of information is left to the judgment of the agency, the GAO

reviews *in camera* all information not released to the parties. *Id.*

73. 4 C.F.R. § 21.4(c). “The application shall establish that the applicant is not involved in competitive decision-making for any firm that could gain a competitive advantage from access to the protected information and that there will be no significant risk of inadvertent disclosure of protected information.” *Id.* Consultants retained by counsel also may apply for access. *Id.*

74. *Vistron, Inc.*, Comp. Gen. B-277497, Oct. 17, 1997, 97-2 CPD ¶ 107, at 3 n.2; see GAO-09-471SP, *supra* note 10, at 19.

75. *Am. Indian Law Ctr., Inc.*, Comp. Gen. B-254322, Dec. 9, 1993, 94-1 CPD ¶ 165, at 1 n.1. However, the agency still must provide the protestor with documents adequate to inform the protestor of the basis of the agency’s position. 4 C.F.R. § 21.3(e).

76. *Sys. Research & Applications Corp.; Booz Allen Hamilton, Inc.*, B-299818 et al., Sept. 6, 2007, 2008 CPD ¶ 28. Parties’ in-house or outside counsel may be admitted to the protective order, so long as that attorney is not “involved in competitive decision making for the client (or another relevant firm).” *AirTrak Travel et al.*, Comp. Gen. B-292101 et al., June 30, 2003, 2003 CPD ¶ 117. To determine whether the attorney is “involved in competitive decision making,” the GAO looks to “whether the attorney’s activities, associations, and relationship with the client (or another relevant firm) are such as to involve advice and participation in client’s decisions (such as pricing and product design) made in light of similar corresponding information about a competitor.” *Id.* “Where an attorney is involved in competitive decision making, the attorney will not be admitted to the protective order because there is an unacceptable risk of inadvertent disclosure of non-public information or the proprietary data of another company.” *Id.*

77. *Restoration & Closure Servs., LLC*, Comp. Gen. B-295663.6, B-295663.12, April 18, 2005, 2005 CPD ¶ 92 (consultants’ applications for admission to protective order are denied where the applications agreed to restrict the consultants’ activities only with regard to the particular site for the procurement being protested, and thus permitted the consultants to engage or assist in the preparation of proposals for the same type of work at other sites where a party to the protest may be a competitor.); *Sys. Research*, 2008 CPD ¶ 28 (admission of a consultant to a GAO protective order was appropriate, over the objection that the consultant once held a position with the protestor and that the consultant’s daughter was currently employed by the protestor, where the record shows that the consultant had no continuing interest in the protestor and the consultant’s daughter held a relatively low-level position with the protestor in a division that was unrelated to the work to be performed under the protested contract).

78. 4 C.F.R. § 21.4(c).

79. See GAO-09-471SP, *supra* note 10, at 19.

80. See 4 C.F.R. § 21.4(c); GAO-09-471SP, *supra* note 10, at 19.

81. See generally *Network Sec. Techs., Inc.*, Comp. Gen. B-290741.2, Nov. 13, 2002, 2002 CPD ¶ 193 (GAO provides notice that, in a future case, it may impose the sanction of dismissal where protestor’s attorney discloses protected information to client); *PWC Logistics Servs. Co. KSC(c)*, Comp. Gen. B-310559, Jan. 11, 2008, 2008 CPD ¶ 25 (GAO dismissed bid protest after protestor’s attorney admitted under protective order he revealed protected information to protestor).

82. 4 C.F.R. § 21.4(d). Although the bid protest regulations did not explicitly permit dismissal as a sanction prior to June 2008, see 73 FED. REG. 32,427–30 (June 9, 2008), GAO had acknowledged this sanction and applied it in prior cases. MICHAEL GOLDEN, MANAGING ASSOC. GEN. COUNSEL, GAO, NOTICE REGARDING CHANGES TO PROTECTIVE ORDER 1–2 (Apr. 7, 2008), http://www.gao.gov/legal/notice_protectiveorder04072008.pdf; see also *Network Sec. Techs.*, 2002 CPD ¶ 193 (GAO provides notice that, in a future case, it may impose the sanction of dismissal where protestor’s attorney discloses protected information to

client); *PWC Logistics Servs.*, 2008 CPD ¶ 25 (GAO dismissed bid protest after protestor’s attorney admitted under protective order he revealed protected information to protestor).

83. OFFICE OF GENERAL COUNSEL, U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-716SP, GUIDE TO GAO PROTECTIVE ORDERS 12 (May 2006) [hereinafter GAO-06-716SP]. “Requests for authorization to use protected material in other fora must be made in writing, with notice to all parties, and must establish that protected material will be safeguarded, e.g., by the forum’s issuance of a protective order.” *Id.*

84. *Id.* at 12.

85. 4 C.F.R. § 21.3(i); see, e.g., *Capitol Drywall Supply, Inc.*, Comp. Gen. B-400721, B-400722, Jan. 12, 2009, 2009 CPD ¶ 17, n.1. On a case-by-case basis, the GAO may modify the time period for comments. *Id.* If the express option is used, the parties have five days to submit comments. 4 C.F.R. § 21.10(d)(2).

86. See GAO-09-471SP, *supra* note 10, at 24 (“protests are rarely sustained where the protestor does not file substantive comments on the report”); see, e.g., *DUCOM, Inc.*, B-285485, Aug. 23, 2000, 2000 CPD ¶ 144; *Correa Enters., Inc.*, B-277874.4, May 13, 1998, 98-1 CPD ¶ 162.

87. *Martin Warehousing & Distribution, Inc.*, Comp. Gen. B-270651, B-270651.2, Apr. 25, 2006, 96-1 CPD ¶ 205, at 4 n.2; *Ahern & Assocs., Inc.*, Comp. Gen. B-254907, B-254907.4, Mar. 31, 1994, 94-1 CPD ¶ 236, at 5.

88. 4 C.F.R. § 21.2(a)(2); *Anteon Corp.*, Comp. Gen. B-293523, B-293523.2, Mar. 29, 2004, 2004 CPD ¶ 51, at 4 n.6 (allowing supplemental protest issues that were first discovered from agency report, and raised within 10 days of receipt of agency report); *Planning & Dev. Collaborative Int’l*, Comp. Gen. B-299041, Jan. 24, 2007, 2007 CPD ¶ 28, at 11–12 (supplemental protest issues first discovered from agency report were untimely because they were raised in protestor’s comments filed more than 10 days after receipt of agency report; extension for filing comments does not act to extend for raising protest issues); *Gen. Elec. Aerospace Elec. Sys.*, Comp. Gen. B-250514, 93-1 CPD ¶ 101, 1993 WL 35220 (C.G. Feb. 4, 1993) (supplemental protest issues first discovered from agency report, but not raised within 10 working days of receipt of the report, were dismissed as untimely).

89. 4 C.F.R. § 21.3(j).

90. 4 C.F.R. § 21.7(a).

91. 4 C.F.R. §§ 21.1(d)(3), 21.7(a).

92. See GAO-09-471SP, *supra* note 10, at 25–26.

93. 4 C.F.R. § 21.7(b); see GAO-09-471SP, *supra* note 10, at 25–26.

94. See 4 C.F.R. § 21.7(d); GAO-09-471SP, *supra* note 10, at 25–26.

95. 4 C.F.R. § 21.7(f); *Dep’t of Commerce—Recon.*, Comp. Gen. B-277260, B-277260.4, July 31, 1998, 98-2 CPD ¶ 35, at 3; *Du & Assocs., Inc.*, Comp. Gen. B-280283.3, Dec. 22, 1998, 98-2 CPD ¶ 156, at 6.

96. 4 C.F.R. § 21.7(g). These comments are in addition to those comments submitted after the agency report. See GAO-09-471SP, *supra* note 10, at 26.

97. 4 C.F.R. § 21.7(g).

98. 4 C.F.R. § 21.9.

99. 4 C.F.R. §§ 21.9(b), 21.10. Requests for the express option shall explain in writing why the case is suitable for resolution within 65 days, and must be received by the GAO not later than 5 days after the protest or supplemental/amended protest is filed. 4 C.F.R. § 21.10; see, e.g., *B&S Transp., Inc.*, Comp. Gen. B-299144, Jan. 22, 2007, 2007 CPD ¶ 16, at 1 n.1 (granted agency’s request to use the express option, where agency contended that fast-tracking would allow it to meet its deadlines in the Army’s Base Realignment and Closure plan); *AshBritt, Inc.*, Comp. Gen. B-297889, B-297889.2, Mar. 20, 2006, 2006 CPD ¶ 48, at 6 n.9 (express option used pursuant to agency request).

100. 4 C.F.R. § 21.10(e).

101. 4 C.F.R. § 21.12(b); *see* GAO-09-471SP, *supra* note 10, at 30.

102. 4 C.F.R. § 21.12(a).

103. 4 C.F.R. § 21.8(a); GAO-09-471SP, *supra* note 10, at 7, 28. “Prejudice is an essential element of every viable protest and, where it is not demonstrated or otherwise evident, we will not sustain a protest allegation, even where the record shows that the agency’s actions were arguably improper.” PM Servs. Co., Comp. Gen. B-310762, Feb. 4, 2008, 2008 CPD ¶ 42.

104. Integrated Mgmt. Res. Group, Inc., Comp. Gen. B-400550, Dec 12, 2008, 2008 CPD ¶ 227; Sunrise Med. HHG, Inc., Comp. Gen. B-310230, Dec. 12, 2007, 2008 CPD ¶ 7.

105. *Sunrise Med. HHG, Inc.*, 2008 CPD ¶ 7.

106. 31 U.S.C. § 2554(b)(1)(A)–(G); *see also* Centech Group, Inc. v. United States, 554 F.3d 1029, 1039 (Fed. Cir. 2009) (“Pursuant to 31 U.S.C. § 3554(b)(1), GAO is required to recommend that an agency take specific corrective action if an award does not comply with a statute or regulation, including terminating the contract and awarding a contract consistent with the requirements of the statute and regulations.” (citing *Honeywell, Inc. v. United States*, 870 F.2d 644, 648 (Fed. Cir. 1989)). “In determining the appropriate recommendation(s), GAO shall . . . consider all circumstances surrounding the procurement or proposed procurement including the seriousness of the procurement deficiency, the degree of prejudice to other parties or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement, and the impact of the recommendation(s) on the contracting agency’s mission.” 4 C.F.R. § 21.8(b).

107. *Honeywell*, 870 F.2d at 648; *The Centech Group, Inc. v. United States*, 78 Fed. Cl. 496, 507 (2007) (“Because the Comptroller General may only ‘recommend’ a remedy upon finding a procurement violation, GAO’s rulings do not legally bind the parties to a bid protest.” (citing 31 U.S.C. § 3554(b), (c))); *Advanced Sys. Dev., Inc. v. United States*, 72 Fed. Cl. 25, 30 (2006) (“A GAO decision adverse to an agency is only a recommendation—the GAO has no enforcement powers.”); *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 339, 341 (1997) (“Neither the agency nor this court is bound by the determination of the GAO.”).

108. *Honeywell*, 870 F.2d at 648; *see also Centech Group*, 554 F.3d at 1039 (“a procurement agency’s decision to follow [GAO’s] recommendation even though that recommendation differed from the contracting officer’s initial decision was proper unless [GAO’s] decision itself was irrational” (quoting *Honeywell*, 870 F.2d at 648)). The head of the procuring agency must report to the Comptroller General if the agency has not fully implemented the Comptroller General’s recommendations within 60 days. 31 U.S.C. § 3554(b)(3) (agency must report failures to implement GAO recommendation within 5 days after the end the 60-day period for implementation). The Comptroller General must report annually to Congress each instance of agency noncompliance. *See* 31 U.S.C. § 3554(e)(2); *The Centech Group*, 78 Fed. Cl. at 506 n.19.

109. *See* GAO BID PROTEST ANNUAL REPORTS TO THE CONGRESS (Fiscal Years 2000–2008), available at www.gao.gov/decisions/bidproan.htm (last visited Nov. 16, 2009); KATE M. MANUEL & MOSHE SCHWARTZ, CONG. RESEARCH SERV., REPORT NO. R40228, GAO BID PROTESTS: AN OVERVIEW OF TIMEFRAMES AND PROCEDURES 16 (Feb. 11, 2009). In the following cases, the GAO’s recommendations were not fully implemented by the respective agencies: *Consol. Eng’g Servs., Inc.*, Comp. Gen. B-2391345, B-2391345.2, Dec. 23, 2002, 2002 CPD ¶ 220; *Symplicity Corp.*, Comp. Gen. B-291902, Apr. 29, 2003, 2003 CPD ¶ 89; *Rockwell Elec. Commerce Corp.*, Comp. Gen. B-286201.6, Aug. 30, 2001, 2001 CPD ¶ 162, *modified*, Comp. Gen. B-286201.8, Mar. 5,

2002, 2002 CPD ¶ 47; *Aberdeen Tech. Servs., Inc.*, Comp. Gen. B-283727.2, Feb. 22, 2000, 2000 CPD ¶ 46.

110. In *Symplicity Corp.*, 2003 CPD ¶ 89, Symplicity contested the Office of Personnel Management’s (OPM) award of a task order to TMP Worldwide, Inc. (Monster) for online employment information services. The GAO sustained the protest, recommending that OPM reopen discussions and request revised quotations from vendors. In July 2003, OPM formally declined to follow the GAO’s recommendation, on the basis that the recommendation was “incompatible with the best interest of Federal Government” and “national security.” *See* GAO BID PROTEST ANNUAL REPORT TO THE CONGRESS FOR FISCAL YEAR 2003, B-158766 (2004), available at www.gao.gov/special.pubs/bidpro03.pdf. In August 2003, GAO reported the matter to Congress pursuant to 31 U.S.C. § 3554 and recommended that Congress consider an inquiry into OPM’s failure to fully implement the GAO’s recommendation. *Id.* In reaction to the GAO’s report to Congress, congressional hearings were held, *see Achieving E-Government Efficiencies at the Office of Personnel Management: Hearing Before the H. Subcomm. on Tech., Info., Policy, Intergovernmental Relations and the Census*, 108th Cong. (2003), and the appropriations act for OPM was amended to cut funding for the procurement at issue until OPM complied with GAO recommendations from *Symplicity*. *See* S. Amend. 1899 to H.R. 2989, 108th Cong. (2003). *But see* Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 628, 118 Stat. 3, 356–57 (funding was later restored in conference committee, presumably after OPM agreed to cancel its contract with Monster and reopen the solicitation). Interestingly, upon resolicitation of the procurement, OPM again awarded the contract to Monster in 2005. Jason Miller, *OPM Settles—Again—on Monster for USAJobs Web site*, GOV’T COMPUTER NEWS, Aug. 1, 2005, available at www.gcn.com/online/vol1_no1/36566-1.html. Once again Symplicity protested the award, but this time the GAO denied the protest. *See Symplicity Corp.*, Comp. Gen. B-297060, Nov. 8, 2005, 2005 CPD ¶ 203.

111. 4 C.F.R. § 21.8(d)(1); *see, e.g.*, *Doyon-Am. Mech., JV; NAJV, LLC*, Comp. Gen. B-310003, B-310003.2, Nov. 15, 2007, 2008 CPD ¶ 50, at 5; *R & G Food Serv., Inc., d/b/a Port-A-Pit Catering*, Comp. Gen. B-296435.4, B-296435.9, Sept. 15, 2005, 2005 CPD ¶ 194, at 8.

112. 4 C.F.R. § 21.8(d)(1). Although 31 U.S.C.A. § 3554(c)(2)(B) caps costs for attorneys’ fees at \$150 per hour, the GAO has repeatedly declined to impose a strict cap on fees. The GAO has generally allowed for increased fees if the protestor requests an upward adjustment and presents a basis upon which the adjustment should be calculated, such as an increase in the cost of living. *See, e.g.*, *EBSCO Publ’g, Inc.—Costs*, Comp. Gen. B-298918.4, May 7, 2007, 2007 CPD ¶ 90, at 2–3 (granting attorneys’ fees at \$197 per hour, as increased by the change in Consumer Price Index for All Urban Consumers between 2000 and 2007); *Dep’t-State—Costs*, Comp. Gen. B-295352.5, Aug. 18, 2005, 2005 CPD ¶ 145 (request that Comptroller General recommend reimbursement of attorneys’ fees at a rate higher than the statutory cap of \$150 per hour based on increase in cost of living is granted where protestor’s claim filed with agency presented a reasonable basis for the adjustment). Reimbursement of protest costs associated with the use of consultants or expert witnesses is limited to the highest rate of pay for expert witnesses paid by the federal government pursuant to 5 U.S.C. § 3109 and 5 C.F.R. § 304.105. *Dep’t of the Army; ITT Fed. Servs. Int’l Corp.—Costs*, Comp. Gen. B-296783.4, B-296783.5, Apr. 26, 2006, 2006 CPD ¶ 72, at 3–5 (citing 48 C.F.R. § 33.104). As of January 1, 2009, the maximum fee is the daily rate for a GS-15 step 10 federal employee, \$489.13 per day. *See* 5 C.F.R. § 304.105 (equation for daily rate); U.S. OFFICE OF PERSONNEL MANAGEMENT, SALARY TABLE 2009-GS, available at www.opm.gov/oca/09tables/html/ga.asp (last

visited Dec. 27, 2008) (listing 2009 annual wage of GS-15 step 10 federal employee at \$127,604).

113. See 4 C.F.R. § 21.8(d)(2); see, e.g., Advanced Tech. Sys., Inc., Comp. Gen. B-296493.6, Oct. 6, 2006, 2006 CPD ¶ 151, at 10; Aberdeen Tech. Servs.—Modification of Recommendation, Comp. Gen. B-283727.3, Aug. 22, 2001, 2001 CPD ¶ 146, at 2.

114. Al Long Ford, Comp. Gen. B-297807, Apr. 12, 2006, 2006 CPD ¶ 68, at 11 n.12 (citing Firebird Constr. Corp.—Recon., Comp. Gen. B-246182.2, May 27, 1992, 92-1 CPD ¶ 473, at 2).

115. 4 C.F.R. § 21.8(e); Sysorex Fed., Inc.—Costs, Comp. Gen. B-310273.2, 2008 CPD ¶ 104; Alaska Mech., Inc.—Costs, Comp. Gen. B-289139.2, Mar. 6, 2002, 2002 CPD ¶ 56, at 1. A request for these costs must be filed within 15 days of the protestor having some notice that the GAO has closed the protest based on the agency's decision to take corrective action. 4 C.F.R. § 21.8(e).

116. A protest is “clearly meritorious” if a reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a defensible legal position. World Commc'ns Ctr., Inc.—Costs, Comp. Gen. B-310398.4, Jan. 16, 2008, 2008 CPD ¶ 19; see also Exec Plaza, LLC—Costs, Comp. Gen. B-400107.3, Oct. 24, 2008, 2008 CPD ¶ 206 (protest not clearly meritorious where the GAO would have had to agree that solicitation was defective, which it did not); Burns & Roe Servs. Corp.—Costs, Comp. Gen. B-310828.2, Apr. 28, 2008, 2008 CPD ¶ 81 (protest clearly meritorious where the GAO attorney determined in ADR proceeding that protest was likely to be sustained); Diligent Consulting, Inc.—Costs, Comp. Gen. B-299556.3, June 26, 2007, 2007 CPD ¶ 125 (for a protest to be clearly meritorious, the issue involved must not be a close question); Am. Sys. Consulting, Inc., Comp. Gen. B-298033.4 et al., Mar. 28, 2007, 2007 CPD ¶ 65 (protest not clearly meritorious where the GAO would have had to develop the record and conduct a hearing to reach a decision); Panacea Consulting, Inc.—Costs, Comp. Gen. B-299307.3 et al., July 24, 2007, 2007 CPD ¶ 133 (protest clearly meritorious where the GAO attorney determined in ADR proceeding that protest was likely to be sustained).

117. Major Contracting Servs., Inc., Comp. Gen. B-400737.2, Dec. 17, 2008, 2008 CPD ¶ 230, at 3 (where an agency takes corrective action prior to the submission of its report on a protest, the GAO generally finds the agency's corrective action to be reasonably prompt and will not award costs). See, e.g., Singleton Enters.—GMT Mech., Joint Venture—Costs, Comp. Gen. B-310454.3, Mar. 27, 2008, 2008 CPD ¶ 61 (corrective action taken two days after the agency report was due considered timely). This is so even where the due date for the agency report has been extended. Smith & Wesson, Inc., Comp. Gen. B-400479, Nov. 20, 2008, 2008 CPD ¶ 215. But see Eagle Home Med. Corp.—Costs, Comp. Gen. B-299821.3, Feb. 4, 2008, 2008 CPD ¶ 41 (agency unduly delayed its corrective action where it came not only after the agency report but after the GAO's repeated requests for information). But see World Commc'ns Ctr.—Costs, 2008 CPD ¶ 19 (agency corrective action not prompt when it was taken only after the protestor had filed its comments on the agency report and the GAO attorney assigned to the case had requested additional information to supplement the record).

118. Burns & Roe Servs. Corp.—Costs, Comp. Gen. Dec. B-310828.2, Apr. 28, 2008, 2008 CPD ¶ 81, at 2–3.

119. *Id.* at 3 (citing BAE Tech. Servs., Inc.—Costs, B-296699.3, Aug. 11, 2006, 2006 CPD ¶ 122 at 3; Interface Floorings Sys., Inc.—Claim for Attorneys' Fees, B-225439.5, July 29, 1987, 87-2 CPD ¶ 106, at 2–3). “In determining whether protest issues are so clearly severable as to essentially constitute separate protests, [GAO] consider[s], among other things, the extent to which the issues are interrelated or intertwined—*i.e.*, the successful and unsuccessful arguments share a common core set of facts, are based on related legal theories, or are otherwise not readily severable.” *Id.* (citing Sodexo Mgmt., Inc.—Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 29).

120. 4 C.F.R. § 21.8(f)(1).

121. See, e.g., Malco Plastics, Comp. Gen. B-219886, B-219886.3, 86-2 CPD ¶ 193, 1986 WL 63904, at *2 (C.G. Aug. 18, 1986) (denying protestor's request for attorneys' fees where protestor failed to provide adequate documentation of these fees).

122. Keeton Corrections, Inc.—Costs, Comp. Gen. B-293348.3, Oct. 25, 2004, 2005 CPD ¶ 44, at 2–3.

123. 4 C.F.R. § 21.14(a); Stay, Inc. v. Cheney, 940 F.2d 1457, 1460 (11th Cir. 1991) (“Any interested party is also entitled to seek reconsideration of the GAO's decision. . .”).

124. 4 C.F.R. § 21.14.

125. 4 C.F.R. § 21.14(c).

126. See GAO-09-471SP, *supra* note 10, at 31.

127. Generally, where the COFC reviews a procurement following a GAO decision on the same procurement, “it is the agency's decision, not the decision of the GAO, that is the subject of judicial review.” Analytical & Research Tech., Inc. v. United States, 39 Fed. Cl. 34, 41 (1997) (citing Cubic Applications, Inc. v. United States, 37 Fed. Cl. 339, 341 (1997)); Charles H. Tompkins Co. v. United States, 43 Fed. Cl. 716, 719 (1999); S.K.J. & Assocs., Inc. v. United States, 67 Fed. Cl. 218, 224 (2005); The Ravens Group, Inc. v. United States, 78 Fed. Cl. 390, 403 (2007). In such cases, the GAO decision “serves as a recommendation that becomes a part of the administrative record.” *S.K.J. & Assocs.*, 67 Fed. Cl. at 224 (citing Honeywell, Inc. v. United States, 870 F.2d 644, 647 (Fed. Cir. 1989); *Charles H. Tompkins Co.*, 43 Fed. Cl. at 719 (1999)). However, where the procuring agency changed its conduct in response to the GAO's decision, the COFC reviews the propriety of the GAO's decision, as well as the decision of the agency. *Analytical & Research Tech.*, 39 Fed. Cl. at 41 n.7 (citing *Honeywell, Inc.*, 870 F.2d 644).

128. *Idea Inter'l, Inc. v. United States*, 74 Fed. Cl. 129, 136 n.11 (2006) (quotations omitted); see also *Charles H. Tompkins Co.*, 43 Fed. Cl. at 719 (“in view of the expertise of the GAO in procurement matters,” the COFC may rely upon the GAO decision for “general guidance to the extent it is reasonable and persuasive in light of the administrative record” (quoting *Cubic Applications, Inc.*, 37 Fed. Cl. at 342)).