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.

GENERAL ACCOUNTING OFFICE

4 CFR Part 21

General Accounting Office; Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts

AGENCY: General Accounting Office. **ACTION:** Proposed rule.

SUMMARY: The General Accounting Office (GAO) is proposing to revise its Bid Protest Regulations to implement the Federal Acquisition Streamlining Act of 1994 (FASA) and to conform GAO's current regulation to the practice that has evolved at GAO since April 1991, when GAO last revised part 21. The proposed revision will improve the overall efficiency and effectiveness of the bid protest process at GAO by streamlining the process, by reducing the costs of pursuing protests at GAO for all parties, and by permitting GAO to resolve protests as expeditiously as possible. FASA requires that the implementing regulation be concise and easily understood by vendors and government officials, and the proposed revision reflects this requirement. The proposed revision shortens the regulation, even though several provisions implementing FASA are

DATES: Comments must be submitted on or before April 3, 1995.

ADDRESSES: Comments should be addressed to: Michael R. Golden, Assistant General Counsel, General Accounting Office, 441 G Street, NW., Washington, DC 20548.

FOR FURTHER INFORMATION CONTACT: Michael R. Golden (Assistant General Counsel) or Linda S. Lebowitz (Senior Attorney), 202–512–9732.

SUPPLEMENTARY INFORMATION: The proposed revision to the General Accounting Office's (GAO) Bid Protest Regulations implements statutory changes contained in the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. 103–355, 108 Stat.

3243, dated October 13, 1994. The proposed revision is based on GAO's experience with the prior revision to its regulation, including the use of protective orders and hearings, which became effective on April 1, 1991 (56 FR 3759). The proposed revision conforms GAO's current regulation to the practice that has evolved at GAO since April 1991, and will improve the bid protest process at GAO. In revising its regulation, GAO was guided by the statutory mandate in sec. 10002(e) of FASA that regulations implementing FASA be concise and easily understood by vendors and government officials, and by the principle that GAO's bid protest process remain as uncomplicated and informal as possible, consistent with the goal of providing expeditious and meaningful relief to vendors wrongfully excluded from procurements. More specifically, the proposed revision will streamline the process, reduce the costs of pursuing protests at GAO for all parties, and permit GAO to resolve protests as expeditiously as possible. The regulation is shortened overall, even though several new provisions are added in order to implement FASA. Redundancies are eliminated and language changes reflect an effort to make the regulation clearer and more readable.

Explanations of significant revisions to GAO's Bid Protest Regulations are set forth below.

GAO's proposed regulation at 4 CFR 21.1(f), currently at § 21.3(b), requires that if a protester believes that the protest includes confidential information which should be withheld, the protester must advise GAO of this fact on the front page of the protest submission and must file, simultaneously with the filing of its protest with GAO, a redacted copy of the protest which omits the information. GAO does not anticipate that this requirement will impose a significant burden since a protester is currently obligated to identify, "wherever it appears," information in its protest that it believes should be withheld as permitted by law.

Paragraphs (c) and (d) of § 21.3 implement the statutory requirement set forth in sec. 1015 and 1065 of FASA that if any party to a protest filed with GAO so requests, the agency shall produce a protest file. The statutory

language of those sections calls for the implementing regulation to be consistent with the regulation regarding the preparation and submission of the so-called "rule 4 file" in protests before the General Services Administration Board of Contract Appeals (GSBCA). In light of that direction, and taking into account the somewhat longer period for deciding protests filed with GAO, the proposed regulation provides that when requested, the agency is to prepare and submit a protest file to GAO, the protester, and any intervenors within 20 calendar days after the agency's receipt of the request. (In revising its current regulation, GAO has converted from "working days" to "calendar days" consistent with the requirements of

GAO believes that requiring an agency to produce a protest file, when one is requested, early in the bid protest process will make it easier to carry out the mandate in sec. 1403 of FASA that supplemental protests not delay the issuance of a decision by GAO. Currently, supplemental protests are generally based on information included in the documents contained in the agency report, and must generally be filed within 10 working days of the protester's receipt of the documents. GAO believes that if an agency provides the relevant documents early in the process, supplemental protests will be filed earlier. Consequently, the meaningful protest issues which need to be addressed by GAO will be identified by the parties earlier in the process, thus benefiting all parties in terms of time and costs. Further, GAO believes that early production of the protest file will allow bid protests to be resolved as expeditiously as possible, which will shorten procurement suspensions.

As with the "rule 4 file," the protest file under the proposed regulation will contain only pre-existing documents, rather than documents prepared in response to the protest. As detailed in paragraph (e) of § 21.3, the contracting officer's statement of the relevant facts and a memorandum of law are to be filed within 35 calendar days after the agency receives telephone notice of the protest from GAO.

Section 21.5(h), currently § 21.3(m)(10), removes GAO's consideration of subcontract protests where the subcontract is "by or for the government"; rather, GAO will consider