protests concerning awards of subcontracts by or for a Federal agency as nonstatutory protests in accordance with § 21.13 where the agency awarding the prime contract has requested in writing that subcontract protests be decided by GAO. In US West Communications Services, Inc. v. United States, 940 F.2d 622 (Fed. Cir. 1991), the court called into question the GSBCA's review of a prime contractor's award of a subcontract based on the language in the Competition in Contracting Act of 1984, 40 U.S.C. 759(f)(9)(A) (1988), which authorizes the GSBCA to review protests of a solicitation by a Federal agency for bids or proposals for a proposed contract or contract. GAO's statutory language in this regard is basically identical to that of the GSBCA. In the absence of any language in FASA which addresses this matter, GAO believes that it is appropriate to treat protests against awards of subcontracts by or for a Federal agency as nonstatutory protests.

Comments concerning the proposed rule should reference file number B-259187. Comments may be filed by hand delivery or mail at the address in the address line, or comments may be filed by facsimile transmission at 202-512-9749.

List of Subjects in 4 CFR Part 21

Administrative practice and procedure, 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 revised to read as follows:

1. Part 21 is revised to read as follows:

PART 21—BID PROTEST REGULATIONS

Sec.

- 21.0 Definitions.
- 21.1 Filing a protest.
- 21.2 Time for filing.
- Notice of protest, submission of agency report, and time for filing of comments on report.
- 21.4 Protective orders.
- 21.5 Protest issues not for consideration.
- Withholding of award and suspension of contract performance.
- 21.7 Hearings.
- 21.8 Remedies.
- 21.9 Time for decision by GAO.
- 21.10 Express option.
- 21.11 Effect of judicial proceedings.
- 21.12 Distribution of decisions.
- 21.13 Nonstatutory protests.
- 21.14 Request for reconsideration.

Authority: 31 U.S.C. 3551-3556.

§ 21.0 Definitions.

- (a) *Interested party* means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.
- (b) 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.
- (c) Federal 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.

(d) Contracting agency means a Federal agency which has awarded or proposes to award a contract under a

protested procurement.

- (e) Days are calendar days. In computing a period of time for the purpose of this part, the day from which the period begins to run is not counted. When the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. Similarly, when the General Accounting Office (GAO), or another Federal agency where a filing is due, is closed for all or part of the last day, the period extends to the next day on which the agency is open.
- (f) Adverse agency action is any action or inaction by a contracting agency which is prejudicial to the position taken in a protest filed with the agency, including a decision on the merits of a protest; the opening of bids or receipt of proposals, the award of a contract, or the rejection of a bid despite a pending protest; or contracting agency acquiescence in continued and substantial contract performance.
- (g) A document is *filed* on a particular day when it is received by GAO by 5:30 p.m., eastern time, on that day. A document may be filed by hand delivery or mail; parties wishing to file a document by facsimile transmission or other electronic means must ensure that the necessary equipment is operational at GAO's Procurement Law Control Group and that the entire document is received by 5:30 p.m. on the due date.

§ 21.1 Filing a protest.

(a) An interested party may protest 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.
- (b) Protests must be in writing and addressed as follows: General Counsel, General Accounting Office, 441 G Street, NW., Washington, DC 20548, Attention: Procurement Law Control Group.
 - (c) A protest filed with GAO shall:
- (1) Include the name, address, and telephone number of the protester,
- (2) Be signed by the protester or its representative,
- (3) Identify the contracting agency and the solicitation and/or contract
- (4) Set forth a detailed statement of the legal and factual grounds of protest including copies of relevant documents,
- (5) Specifically request a ruling by the Comptroller General of the United States,
- (6) State the form of relief requested, and
- (7) Request specific documents relevant to the protest grounds.
- (d) The protester shall furnish a copy of the protest to the individual or location designated by the contracting agency in the solicitation for receipt of protests, or if there is no designation, to the contracting officer. The designated individual or location (or, if applicable, the contracting officer) must receive a copy of the protest no later than 1 day after the protest is filed with GAO. The protest document must indicate that a copy is being furnished within 1 day to the appropriate individual or location.
- (e) No formal briefs or other technical forms of pleading or motion are required. Protest submissions should be concise and logically arranged, and should clearly state legally sufficient grounds of protest. Protests of different procurements should be separately filed.
- (f) GAO will not withhold material submitted by a protester from any party outside the government unless it is permitted to do so by law. 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, simultaneously with the filing of its protest with GAO, a redacted copy of the protest which omits the information.
- (g) Parties who intend to file documents containing classified information should notify GAO in advance to obtain advice regarding