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Part 533 - Protests, Disputes, and Appeals

Subpart 533.1 - Protests

533.101 Definitions.

533.102 General.

533.103 Protests to the agency.

533.103-1 Filing a protest.

533.103-2 Deciding a protest.

533.104 Protests to GAO.

533.105 Court of Federal Claims Protests.

Subpart 533.2 - Disputes and Appeals

533.209 Suspected fraudulent claims.

533.211 Contracting officer's decision.

533.212 Contracting officer's duties when an appeal is filed.

533.212-1 General.

533.212-2 Procedures when an appeal is filed.

533.212-3 Preservation of Evidence.

533.212-4 Settlement.

533.214 Alternative dispute resolution (ADR).

Parent topic: General Services Administration Acquisition Manual

Subpart 533.1 - Protests

533.101 Definitions.

"Agency Protest Official for GSA" means the Central Office official in the Office of the Chief Acquisition Officer (OCAO) designated to independently review and decide procurement protests filed with GSA when the protester requests an agency review by other than the contracting officer.

"Deciding official" means the person chosen by the protester to decide the agency protest; it may be either the contracting officer or the Agency Protest Official for GSA.

533.102 General.

Unless otherwise authorized by the Office of General Counsel (OGC), OGC contacts anyone outside of GSA involved in protests of GSA contract actions filed with the Comptroller General or in a Federal court.

533.103 Protests to the agency.

533.103-1 Filing a protest.

(a) Any protester filing an agency protest has the choice of requesting either that the contracting officer or the Agency Protest Official decide the protest. If the protest is silent on this matter, the contracting officer will decide the protest. If a party requests a review at a level above the contracting officer, the Agency Protest Official will decide the protest. The decision by the Agency Protest Official for GSA is an alternative to a decision by the contracting officer on a protest. The Agency Protest Official for GSA will not consider an appeal of the contracting officer's decision on an agency protest.

(b) If an agency protest is filed, the deciding official uses the procedures in FAR 33.103 and this section to resolve the protest. The deciding official will provide a fair and quick review of any protest filed with the agency.

(c) The filing timeframes in FAR 33.103(e) apply. An agency protest is filed when the complete protest is received at the location the solicitation designates for serving protests. GSA's hours of operation are 8 a.m. to 4:30 p.m. Protests delivered after 4:30 p.m. will be considered received and filed the following business day.

(d) The protest must meet all the following conditions:

(1) Include the information required by FAR 33.103(d)(2).

(2) Indicate that it is a protest to the agency.

(3) Be filed in writing with the contracting officer.

(4) State whether the protester chooses to have the contracting officer or the Agency Protest Official decide the protest. If the protest does not include the protester's choice, then the contracting officer will decide the protest (see paragraph (a) of this subsection).

(e) The following procedures apply to information submitted in support of or in response to an agency protest:

(1) GSA procedures do not provide for any discovery.

(2) The deciding official has discretion to request additional information from either the agency or the protester, orally or in writing, as may be necessary to render a timely decision on the protest. However, protests are normally decided on the basis of information initially provided by the protester and the agency.

(3) To the extent permitted by law and regulations, the parties may exchange relevant information.

- (4) The agency must make a written response to the protest within ten days unless another date is set by the deciding official.
- (5) The agency must also provide the protester with a copy of the response on the same day it files the protest response with the deciding official. If the agency believes it needs to redact or withhold any information in the response from the protester, it should identify and provide the information to the deciding official for *in camera* review.
- (f) A protester may represent itself or be represented by legal counsel. GSA will not reimburse the protester for any legal fees related to the agency protest.
- (g) GSA may dismiss or stay proceedings on an agency protest if a protest on the same or similar basis is filed with a protest forum outside of GSA.

533.103-2 Deciding a protest.

(a) When the Agency Protest Official is the deciding official:

(1) The contracting officer must ensure that the Agency Protest Official and assigned legal counsel receive a copy of the materials served on the contracting officer within one business day after the filing date.

(2) The Agency Protest Official must conduct a scheduling conference with the protester and assigned agency legal counsel as soon as practicable after the protest is filed. The scheduling conference will establish the Agency Protest Official's plan to develop an appropriate record to assist his/her decision making. The Agency Protest Official, in his/her discretion, may ask the parties to participate in an oral presentation and/or to submit other written material related to the protest issues. In the event the Agency Protest Official deems it necessary to have an oral presentation following submission of the agency's written response, it should be limited to resolving remaining issues of material fact necessary for resolution of the protest, as identified in advance by the Agency Protest Official. In such a case, the Agency Protest Official will determine whether a further written response from both parties is required following the oral conference. Other parties (*e.g.*, representatives of the program office) may attend at the discretion of the Agency Protest Official.

(3) If the Agency Protest Official sustains a protest, the contracting officer must, within thirty (30) days after receiving the protest decision, fully implement the recommended relief.

(b) Conferences and presentations may take place either by telephone or in person.

(c) If GSA receives an agency protest before contract award, the contracting officer shall not make award unless the HCA makes a determination to proceed under FAR 33.103(f)(1). Similarly, if GSA receives an agency protest within ten (10) days after award or within five (5) days after a debriefing date offered to the protester under a timely debriefing request under FAR 15.505 or 15.506, whichever is later, the contracting officer must suspend contract performance unless the HCA makes a determination to proceed under FAR 33.103(f)(3). Any stay of award or suspension of performance remains in effect until the protest is decided, dismissed, or withdrawn.

(d) The deciding official must obtain legal review of all draft protest decisions as required by GSA Order ADM 5000.4, Office of General Counsel Legal Review.

(e) The decision of the deciding official must be in writing, dated, and include the following

information:

- (1) Whether the protest was denied, sustained, or dismissed; and
 - (2) The rationale for the decision.
- (f) If the deciding official sustains the protest, relief may consist of any of the following recommendations:
- (1) Terminating the contract.
 - (2) Recompeting the requirement.
 - (3) Amending the solicitation.
 - (4) Refraining from exercising contract options.
 - (5) Reevaluating the offers or bids and awarding a contract consistent with statute, regulation, and the terms of the solicitation.
 - (6) Other action determined appropriate by the deciding official.

533.104 Protests to GAO.

(a) *General procedures.*

- (1) The expeditious and timely handling of Government Accountability Office (GAO) protests is a GSA priority.
- (2) As soon as GAO receives a protest filed against GSA, it informs the GSA Office of General Counsel (OGC). OGC will —
 - (i) Formally request a Statement of Fact and Position and compilation of documents (see FAR 33.104(a)(3)) from the contracting officer;
 - (ii) Notify the contracting officer of the designated protest counsel (the GSA attorney responsible for handling the case);
 - (iii) Provide GAO with the name, title, and telephone number of one or more GSA officials who may be contacted by GAO regarding the protest.
- (3) If the contracting activity receives a protest before being informed of it by OGC, he/she must immediately forward it to OGC.
- (4) The designated protest counsel is responsible for preparing a report to GAO, based upon the Contracting Officer's Statement of Fact and Position.
- (5) The Contracting Officer's Statement of Fact and Position shall be reviewed by designated protest counsel and the contracting director.
- (6) The Contracting Officer's Statement of Fact and Position and the compilation of documents under FAR 33.104(a)(3)(ii) are due to the designated protest counsel within 10 business days after

receipt of the protest by the contracting officer. The time period may be reduced if the GAO so decides. If the contracting officer cannot complete the Statement of Fact and Position and the compilation of documents within the time, the contracting officer must promptly telephone the designated protest counsel with the reason for the delay. The designated protest counsel has the discretion to authorize or disapprove the request; if the extension would delay submission of GSA's report to GAO beyond 30 days from receipt of the protest, the designated protest counsel must first consult with GAO.

(7) Once the Statement of Fact and Position has been sent to the designated protest counsel, the contracting officer and Regional Counsel are responsible for promptly informing the designated protest counsel of any later developments that may affect the case.

(8) The contracting officer is responsible for informing all interested parties that a GAO protest has been filed. (See FAR 33.104(a)(2).) This should be done in writing using a method that provides evidence of receipt.

(b) *Competition in Contracting Act (CICA) stay overrides.* GSA requires the contracting officer to prepare the written determination and findings (D&F) under FAR 33.104(b) and (c) and obtain the concurrence of the Associate General Counsel (and Regional Counsel if a regional procurement) before submitting the D&F for the HCA's approval and signature. Once the D&F is signed, the designated protest counsel must inform GAO of the findings and intention to award, or authorize contract performance, before GSA can actually take the intended action. Copies of the decision must be distributed in accordance with FAR 33.104(d).

(c) *Content of Report to GAO.*

(1) *All reports.* In addition to the requirements of FAR 33.104(a)(3), the GSA report contains all the following:

- (i) GAO protest number (GAO case file number).
- (ii) Solicitation or contract number.
- (iii) Full corporate name of the protesting organization and other firms involved.
- (iv) Statement indicating if the protest was filed before or after award.

(2) *Report for protest after award.* If the protest is filed after award, the report also includes:

- (i) Identity of the awardee.
- (ii) Date of award.
- (iii) Contract number.
- (iv) Date and time of bid opening (including a statement if the date of bid opening was extended by amendments).
- (v) Total number of offerors.
- (vi) Complete chronological statement of all relevant events and administrative actions taken (including reasons and authority for the actions taken).

(vii) Other relevant documents believed helpful in determining the validity of the protest. This evidence should be referenced and identified within the text of the position statement, alphabetically or numerically, *e.g.*, Tab A, Exhibit 1, etc.

(d) *Notice to GAO*. OGC concurs on the HCA's report to the Comptroller General if GSA has decided not to comply with GAO's recommendation.

533.105 Court of Federal Claims Protests.

(a) Upon receipt of either a copy of a protest filed in the Court of Federal Claims (COFC) or a telephone call from the Department of Justice (DOJ) advising of the filing of a COFC protest, the contracting officer shall immediately notify and/or send a copy of any filed documents received to OGC.

(b) OGC is responsible for communicating and coordinating with DOJ regarding defense of any COFC protest. The contracting officer shall provide information and support as directed by OGC, including compilation of necessary documents and other materials.

Subpart 533.2 - Disputes and Appeals

533.209 Suspected fraudulent claims.

In GSA, the agency official responsible for investigating fraud is the Office of Inspector General.

533.211 Contracting officer's decision.

The contracting officer's written decision must include the paragraph at FAR 33.211(a)(4)(v). The contracting officer shall state in the decision that a contractor's notice of appeal to the Civilian Board of Contract Appeals (CBCA) should include a copy of the contracting officer's decision.

533.212 Contracting officer's duties when an appeal is filed.

533.212-1 General.

(a) The contractor may elect to appeal the contracting officer's decision by filing a notice of appeal with the Civilian Board of Contract Appeals (CBCA) or by filing suit in the United States Court of Federal Claims (COFC). In cases brought before the CBCA, GSA is represented by the GSA Office of General Counsel (OGC). In cases brought before the COFC, GSA is represented by the Department of Justice (DOJ), with the assistance of OGC.

(b) When a case is brought before the CBCA or the COFC, OGC will notify the contracting officer of the designated litigation counsel (the GSA attorney responsible for handling the case). The contracting officer shall provide assistance to designated litigation counsel as specified in this section or as otherwise requested by designated litigation counsel.

(c) Notwithstanding the filing of an appeal, the contracting officer retains existing authorities with respect to the administration of the contract. However, the contracting officer is not authorized to represent GSA before the CBCA or the COFC or to an attorney representing the contractor. If the contracting officer is contacted by an attorney for the contractor, the contractor's attorney must be referred to GSA's designated litigation counsel.

(d) If a contractor appeals a decision that has been deemed to be denied in accordance with the Contract Disputes Act (CDA), the CBCA or COFC may require the contracting officer to issue a decision in accordance with the CDA at 41 U.S.C. §605.

533.212-2 Procedures when an appeal is filed.

(a) Timeliness. If the contracting officer believes that the appeal is untimely filed, either at the CBCA or COFC, the contracting officer shall immediately transmit to designated litigation counsel copies of documentary evidence related to timeliness, including a copy of the final decision and certified mail receipt.

(b) CBCA Appeal File.

(1) When an appeal is filed before the CBCA, the contracting officer shall prepare the file of documentary exhibits required in the Board's Rules of Procedure at <https://www.cbca.gsa.gov>, in accordance with the Board's rules governing the Appeal File.

(2) Generally, the Appeal File shall include all documents referenced in and supporting the agency's position, including, the contract, the claim, and the contracting officer's decision.

(3) The contracting officer should consult with the counsel to obtain general assistance in preparing the Appeal File, and consult with designated litigation counsel to determine requirements specific to the appeal, including possible electronic submission of the Appeal File. If the contract is voluminous and the dispute pertains only to a discrete portion of the contract, the contracting officer should consult with designated litigation counsel to determine whether inclusion of a portion of the contract is acceptable.

(4) In preparing the Appeal File, the contracting officer must adhere to the following particular requirements:

(i) The exhibits must be placed in a 3-ring binder(s), with numbered tabbed division sheets separating each exhibit.

(ii) The exhibits must be assembled in chronological order, with the oldest exhibit coming first.

(iii) If a multi-page exhibit lacks internal pagination, page numbering must be added, by hand, label, stamp or other means.

(iv) An index must be prepared including a brief description of each exhibit, the date of the exhibit, and the tab number corresponding to the exhibit.

(5) The contracting officer shall submit the proposed Appeal File, together with an electronic version of the index, to designated litigation counsel within 20 days of receiving notice of appeal, or shorter, if notified that accelerated procedures apply. Should the volume of exhibits or other factors require additional time for preparation of the Appeal File, the contracting officer should immediately

notify designated litigation counsel in order that an extension may be obtained.

(6) After designated litigation counsel has reviewed the proposed Appeal File and index, the contracting officer shall make revisions as requested. Unless otherwise requested, the contracting officer shall produce five copies of the Appeal File and transmit four copies to designated litigation counsel.

(c) COFC Litigation Report.

(1) When a case is filed at the COFC, the agency is required to furnish a litigation report to DOJ. The contracting officer shall furnish all necessary information to designated litigation counsel for preparation of the litigation report.

(2) At a minimum, the information to be furnished shall include—

(i) A narrative of the factual background underlying the dispute;

(ii) A copy of the claim and the contracting officer's decision;

(iii) Copies of documents related to the dispute, including copies of documents referenced in the claim or contracting officer's decision;

(iv) Name and contact information for GSA and other personnel involved in the dispute.

(d) *Answer to Complaint.* When an appeal is filed at the CBCA or COFC, the contractor is required to file a formal pleading called a Complaint, which sets forth the allegations of fact upon which the claim is based. The Government, except for the situation discussed below, is obligated to respond to the Complaint by admitting, denying, or otherwise responding to the contractor's allegations in a formal pleading called the Answer. The contracting officer shall assist designated litigation counsel in the drafting of the Answer by advising whether the contractor's allegations of fact should be admitted or denied. If a response to an allegation in the complaint requires information in the possession of other GSA personnel, the contracting officer shall conduct sufficient research reasonably necessary in order to form a belief as to the truth of the allegation. If the information necessary to form a belief as to the truth of the allegation is not in GSA's possession, the contracting officer shall so advise designated litigation counsel. In some cases, the Government may respond to the Complaint by filing a motion to dismiss in lieu of filing an Answer. Designated litigation counsel will advise the contracting officer if a motion to dismiss will be filed.

(e) *Discovery.* After the complaint and answer are filed with the CBCA or COFC, each party will usually commence discovery. The contracting officer shall assist designated litigation counsel in responding to all discovery requests, including providing information in response to interrogatories, identifying and locating requested documents, and assisting with production of witnesses for depositions.

533.212-3 Preservation of Evidence.

When an appeal is filed, the contracting officer is required to ensure that evidence in his or her control related to a dispute is preserved. In addition to physical documentation, such evidence includes electronic data stored on agency computer systems. The contracting officer shall assist designated litigation counsel with preservation of evidence by identifying relevant files containing physical documentation, including not only the contract file but files containing information related

to the dispute that are maintained by other GSA organizations. The contracting officer shall also assist designated litigation counsel in identifying other GSA personnel whose electronic data, including email, word processing documents, spreadsheets, and other electronic files may include information relating to the dispute.

533.212-4 Settlement.

Notwithstanding the contracting officer's claim of settlement authority, the contracting officer is not authorized to settle a case brought before the CBCA or COFC. Only OGC may authorize settlement of a case before the CBCA or concur on behalf of GSA to the settlement of a case before the COFC, subject to internal OGC approval requirements. The contracting officer shall provide requested assistance to designated litigation counsel in the negotiation, review, and approval of settlements.

533.214 Alternative dispute resolution (ADR).

It is GSA's policy to use ADR to effect the prompt, efficient and just resolution of disputes. The contracting officer should refer to GSA Order CSL 5050.1, Using Alternative Dispute Resolution Techniques, and consult with designated litigation counsel on the use of ADR.