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Parent topic: Federal Acquisition Regulation

33.000 Scope of part.

This part ~~prescribes~~ outlines policies and procedures for filing protests and for processing contract disputes and appeals.

~~33.001 General.~~

~~There are other Federal court related protest authorities and dispute appeal authorities that are not covered by this part of the FAR, e.g., 28 U.S.C. 1491 for Court of Federal Claims jurisdiction. Contracting officers should contact their designated legal advisor for additional information whenever they become aware of any litigation related to their contracts.~~

Subpart 33.1 - Protests

33.100 Purpose of the bid protest system.

(a)The bid protest system provides a prompt, fair, and transparent way to resolve disputes concerning federal procurement actions.

(b)The objectives of the protest system are to:

(1) Ensure protests are decided efficiently and without undue delay, to minimize disruption to contract award and performance;

(2) Support the effective and economical operation of the Government by correcting procurement errors, as quickly as possible;

(3) Deter and discourage abuse of the bid protest process by requiring clear and substantiated allegations of procurement impropriety;

(4) Safeguard the rights of interested parties to obtain independent review of procurement actions alleged to violate law, or regulation; and

(5)Promote integrity, competition, accountability, and public confidence in the federal acquisition system by using available, timely and appropriate remedies.

(c)All participants in the protest process, including protesters, agency officials, and intervenors, should act in a manner consistent with these purposes to help resolve protests fairly and quickly.

(d)The protest process is not intended to serve as a way for offerors to get post-award explanations, debriefings, or additional insight into the Government's acquisition decision. Interested parties should address questions regarding the evaluation, award rationale, or proposal deficiencies through established preaward or postaward communication procedures, including formal debriefings where applicable under FAR 15 or other relevant FAR parts.

(e)Protests should not be used by incumbent contractors as a way to disrupt transition or induce extensions of their current contracts when there is no reasonable prospect of success on the merits of the protest.

33.101 Applicability.

(a)This subpart applies to protests filed with an agency or the Government Accountability Office (GAO).

(b) This subpart, except for 33.100, does not apply to bid protest or dispute appeal authorities where the United States Court of Federal Claims has jurisdiction (see 28 U.S.C. 1491).

(c) This subpart does not apply to protests of small business status (see 13 CFR part 121).

33.102 Definitions.

As used in this subpart-

(a) Day means a calendar day, unless otherwise specified. In the computation of any period-

(1) The day of the act, event, or default from which the designated period of time begins to run is not included; and

(2) The last day after the act, event, or default is included ~~unless~~. However, if the last day is a Saturday, Sunday, or Federal holiday, or the place for filing is closed for all or part of the last day, then the deadline for filing is the next day the place is open.

~~(i) The last day is a Saturday, Sunday, or Federal holiday; or~~

~~(ii) In the case of a filing of a paper at any appropriate administrative forum, the last day is a day on which weather or other conditions cause the closing of the forum for all or part of the day, in which event the next day on which the appropriate administrative forum is open is included.~~

Filed means the complete receipt of any document by an agency before its close of business. Documents received after close of business are considered filed as of the next day. Unless otherwise stated, the agency close of business is presumed to be 4:30 p.m., local time.

Interested Party for the purpose of filing a protest means an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.

Protest means a written objection by an interested party to any of the following:

(1) A solicitation or other request by an agency for offers for a contract for the procurement of property or services.

(2) The cancellation of the solicitation or other request.

(3) An award or proposed award of the contract.

(4) A termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

~~Protest venue means protests filed with the agency, the Government Accountability Office, or the U.S. Court of Federal Claims. U.S. District Courts do not have any bid protest jurisdiction.~~

33.102 103 General.

(a) Consulting with legal counsel. Whenever a contracting officer becomes aware of a protest on one of their acquisitions, they should consult with their designated legal advisor.

~~(b) (a) Without regard to the protest venue, contracting officers shall consider all protests and seek legal advice, whether protests are submitted before or after award and whether filed directly with the agency, the Government Accountability Office (GAO), or the U.S. Court of Federal Claims. (See 19.302 for protests of small business status, 19.305 for protests of disadvantaged~~

~~business status, 19.306 for protests of HUBZone small business status, and 19.307 for protests of service-disabled veteran-owned small business status, and M) for protests of the status of an economically disadvantaged women-owned small business concern or of a women-owned small business concern eligible under the Women-Owned Small Business Program.)~~

Agency action on protests. If

~~(b) If, in connection with a protest,~~ the head of an agency determines that a solicitation, proposed award, or award does not comply with the requirements of law or regulation, then, according to 41 U.S.C. 3708, the head of the agency may—

(1) Take any action that could have been recommended by the Comptroller General had the protest been filed with the Government Accountability Office; (see 31 U.S.C. 3554(b)(1)(A)-(H));

(2) Pay appropriate costs as ~~stated~~provided in ~~33.104(h); and~~31 U.S.C. 3554(c);

(3)(i) Require the awardee contractor to reimburse the Government's costs, ~~as provided in this paragraph,~~ where a postaward protest is sustained as due to the ~~result of an awardee's~~contractor's intentional or negligent misstatement, misrepresentation, or miscertification. ~~In addition to any other remedy available, and pursuant to the requirements of subpart 32.6, the Government may collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government, as described in 52.233-3.~~

~~(i)(ii)~~ When a protest is sustained by GAO under circumstances that may allow the Government to seek reimbursement for protest costs, the contracting officer will determine whether the protest was sustained based on the awardee's contractor's negligent or intentional misrepresentation. If the protest was sustained on several issues, protest costs ~~shall~~must be apportioned according to the costs attributable to the awardee's contractor's actions.

~~(ii)(iii)(A)~~ The contracting officer ~~shall~~must review the amount of the debt, degree of the awardee's fault, and costs of collection, to determine whether a demand for reimbursement ought to be made.

(B) If it is in the best interests of the Government to seek reimbursement, the contracting officer ~~shall~~must notify the contractor in writing of the nature and amount of the debt, and the intention to collect by offset if necessary.

(C) ~~Prior to~~Before issuing a final decision, the contracting officer ~~shall afford~~must give the contractor an opportunity to inspect and copy agency records ~~pertaining to~~about the debt to the extent permitted by statute and regulation, and to request review of the matter by the head of the contracting activity.

~~(iii) When appropriate, the contracting officer shall also refer the matter to the agency suspending and debarring official for consideration under subpart 9.4.~~

(c) ~~In accordance with 31 U.S.C. 1558, with respect to any protest filed with the GAO, if the~~Availability of funds ~~available to the agency for a contract at the time.~~ (1) When a protest is filed ~~in connection with~~GAO regarding a solicitation ~~for,~~ proposed award ~~of,~~ or award of ~~such~~aa contract, and the agency's contract funds available at the time the protest is filed would

otherwise ~~expire, such~~ lapse, those funds ~~shall~~ must remain available for obligation for 100 days ~~after following~~ the date ~~on which of~~ the final ruling ~~is made~~ on the protest. ~~(31 U.S.C. 1558).~~

(2) A ruling is considered final on the date on which the time allowed for filing an appeal or request for reconsideration has expired, or the date on which a decision is rendered on such appeal or request, whichever is later.

(d) ~~Protest likely after award.~~ Stop work order. Whenever the contracting officer is required or decides to suspend performance under this subpart, the contracting officer may ~~stay performance of a contract within the time period contained in paragraph 33.104(c)(1) if the contracting officer makes issue~~ a written ~~determination that~~ stop-work order.

~~(1) A protest is likely to be filed; and~~

~~(2) Delay of performance is, under the circumstances, in the best interests of the United States.~~

~~(e) An interested party wishing to protest is encouraged to seek resolution within the agency (see 33.103) before filing a protest with the GAO, but may protest to the GAO in accordance with GAO regulations (4 CFR Part 21).~~

~~(f) No person may file a protest at GAO for a procurement integrity violation unless that person reported to the contracting officer the information constituting evidence of the violation within 14 days after the person first discovered the possible violation (41 U.S.C. 2106).~~

33.104

~~33.103~~ Protests to the agency.

33.104-1 Scope.

(a) ~~Reference.~~ This section implements Executive Order 12979, Agency Procurement Protests, ~~establishes policy on agency procurement protests.~~

~~(b) Prior to submission of an agency protest, all parties shall (b) use their best efforts to resolve concerns raised by an interested party at the contracting officer level through open and frank discussions.~~

~~(e)~~ The agency should provide for inexpensive, informal, procedurally simple, and ~~expeditious~~ quick resolution of protests. Where appropriate, the use of alternative dispute resolution techniques, third party neutrals, and another agency's personnel are acceptable protest resolution methods.

~~(d) The following~~ 33.104-2 Preaward.

(a) Filing. Protests based on alleged apparent improprieties in a solicitation must be filed before bid opening or the closing date for receiving proposals. If no closing time has been established, or if no further submissions are anticipated, any alleged solicitation improprieties must be protested within 10 days of when the alleged impropriety was known or should have been known.

(b) Action upon receiving a protest before award.(1) A contract may not be awarded until the agency resolves the protest, unless a written justification is made for urgent and compelling reasons, or award is determined in writing to be in the best interest of the Government.
(2)If award is withheld pending agency resolution of the protest, the contracting officer will inform the offerors whose offers might become eligible for award of the contract. If appropriate to avoid the need to resolicit, the contracting officer should request that offerors extend the time to accept their proposals. If offers are not extended, then consideration should be given to proceeding with award pursuant to paragraph (b)(1) of this section.

33.104-3 Postaward.

(a) If a protest is received, within 10 days after contract award or within 5 days after a debriefing date offered to the protester under a timely debriefing request in accordance with 15.505 or 15.506, whichever is later, then the contracting officer must immediately suspend performance, pending resolution of the protest within the agency, including any independent review by a higher level official, unless continued performance is justified.

(b)Continued performance may be justified upon a written finding that there are urgent and compelling reasons, or continued performance is determined in writing to be in the best interest of the Government.

33.104-4 Other procedures.

(a) General. These procedures are established to resolve agency protests effectively, to build confidence in the Government's acquisition system, and to reduce protests outside of the agency:

(1)Before submitting an agency protest, parties must use their best efforts to resolve concerns raised by an interested party at the contracting officer level through open and frank discussions.

(2)Protests ~~shall~~must be concise and logically presented to facilitate review by the agency. Failure to substantially comply with any of the requirements of paragraph (d)(2) of this section may be grounds for dismissal of the protest.

~~(2-3)~~Protests ~~shall~~must include the following information: Failure to comply may result in dismissing the protest.

(i)Name, email address, and ~~fax and~~telephone ~~numbers~~number of the protester.

(ii)Solicitation or contract number.

(iii)Detailed statement of the legal and factual grounds for the protest, ~~to include~~including a description of resulting prejudice to the protester.

(iv)Copies of relevant documents.

(v)Request for a ruling by the agency.

(vi)Statement as to the form of relief requested.

(vii) All information establishing that the protester is an interested party for the purpose of filing a protest.

(viii) All information establishing the timeliness of the protest.

~~(3) All~~ (i) Protests filed directly with the agency will be addressed to the contracting officer or other official designated to receive protests.

(ii) As soon as practicable after a protest is filed, the contracting officer must notify the head of the contracting activity, in accordance with agency procedures.

(5)

~~(4) (i)~~ In accordance with agency procedures, interested parties may request an independent review of their protest at a level above the contracting officer; solicitations should advise potential bidders and offerors that this review is available.

(ii) Agency procedures and/or solicitations must-

(A) shall Notify potential bidders and offerors whether this independent review is available as an alternative to consideration by the contracting officer of a protest, or is available as an appeal of a contracting officer decision on a protest.

(B) Ensure that the protester receives a redacted copy of the source selection decision, if applicable, or if not already provided to the protester, within a reasonable time after the protester elects the independent review;

(C) Provide the protester an opportunity to submit a supplemental statement to the independent review official based on the documents provided, subject to timeliness requirements at 33.104-2 and 33.104-3.

(iii) Agencies shall must designate the official(s) who are to conduct this independent review, but the official(s) need not be within the contracting officer's supervisory chain. When ~~practicable~~ possible, officials designated to conduct the independent review should not have ~~had previous personal involvement~~ been previously personally involved in the procurement.

(b) Timeliness. (1) The agency may consider the merits of any protest that is not filed in time for good cause shown, or where it determines that a protest raises issues significant to the agency's acquisition system.

(2) Filing an agency protest does not extend the time for obtaining a stay at GAO. Agencies may include, as part of the agency protest process, a voluntary suspension period when agency protests are denied and the protester subsequently files at GAO.

(3) If there is an agency appellate review of the contracting officer's decision on the protest, it will not extend GAO's timeliness requirements. Therefore, any subsequent protest to the GAO must be filed within 10 days of knowledge of initial adverse agency action (4 ~~CFR~~ 21 CFR 21.2(a)(3)).

~~(e) Protests based on alleged apparent improprieties in a solicitation shall be filed before bid opening or the closing date for receipt of proposals. In all other cases, protests shall be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier. The agency, for good cause shown, or where it determines that a protest raises issues significant to the agency's acquisition system, may consider the merits of any protest which is not timely filed.~~

~~(f) Action upon receipt of protest. (1) Upon receipt of a protest before award, a contract may not be awarded, pending agency resolution of the protest, unless contract award is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government. Such justification or determination shall be approved at a level above the contracting officer, or by another official pursuant to agency procedures.~~

~~(2) If award is withheld pending agency resolution of the protest, the contracting officer will inform the offerors whose offers might become eligible for award of the contract. If appropriate, the offerors should be requested, before expiration of the time for acceptance of their offers, to extend the time for acceptance to avoid the need for resolicitation. In the event of failure to obtain such extension of offers, consideration should be given to proceeding with award pursuant to paragraph (f)(1) of this section.~~

~~(3) Upon receipt of a protest within 10 days after contract award or within 5 days after a debriefing date offered to the protester under a timely debriefing request in accordance with 15.505 or 15.506, whichever is later, the contracting officer shall immediately suspend performance, pending resolution of the protest within the agency, including any review by an independent higher level official, unless continued performance is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government. Such justification or determination shall be approved at a level above the contracting officer, or by another official pursuant to agency procedures.~~

~~(4) Pursuing (c) Protest decisions. (1) Agencies must~~ an agency protest does not extend the time for obtaining a stay at GAO. Agencies may include, as part of the agency protest process, a voluntary suspension period when agency protests are denied and the protester subsequently files at GAO.

~~(g) Agencies shall~~ make their best efforts to resolve agency protests within 35 days after the protest is filed. To the extent permitted by law and regulation, the parties may exchange relevant information received by the contracting officer or an official conducting an independent review requested according to paragraph (a)(5).

~~(h) Agency (2) Protest decisions shall~~ must be well-reasoned, ~~and~~ explain the agency position. for sustaining or denying the protest ~~decision shall, and~~ be provided to the protester using a method that provides evidence of receipt.

33.104 105 Protests to GAO.

33.105-1 GAO Bid Protest Regulations.

Procedures for protests to GAO are found at 4 CFR Part 21 ~~(GAO, Bid Protest Regulations)~~. ~~In the event guidance concerning GAO procedure in this section conflicts with 4 CFR Part 21, 4 CFR Part 21 governs.~~

33.105-2 Preaward.

(a) ~~General procedure.~~ (1) ~~A protester is required to furnish a copy~~ If the agency receives notice of its complete ~~a~~ protest to the official and location designated in the solicitation or, in the absence of such a designation, to the contracting officer, so it is received no later than 1 day after the protest is filed with the from ~~GAO. The GAO may dismiss the protest if the protester fails to furnish a complete copy of the protest within 1 day.~~ before

~~(2) Immediately after receipt of the GAO's written notice that a protest has been filed, the agency shall give notice of the protest to the contractor if the award has been made, or, if no award has been made, to all parties who appear to have a reasonable prospect of receiving award if the protest is denied. The agency shall furnish copies of the protest submissions to such parties with instructions to (i) communicate directly with the GAO, and (ii) provide copies of any such communication to the agency and to other participating parties when they become known. However, if the protester has identified sensitive information and requests a protective order, then the contracting officer shall obtain a redacted version from the protester to furnish to other interested parties, if one has not already been provided.~~

~~(3) (i) Upon notice that a protest has been filed with the GAO, the contracting officer shall immediately begin compiling the information necessary for a report to the GAO. The agency shall submit a complete report to the GAO within 30 days after the GAO notifies the agency by telephone that a protest has been filed, or within 20 days after receipt from the GAO of a determination to use the express option, unless the GAO-~~

~~(A) Advises the agency that the protest has been dismissed; or~~

~~(B) Authorizes a longer period in response to an agency's request for an extension. Any new date is documented in the agency's file.~~

~~(ii) When a protest is filed with the GAO, and an actual or prospective offeror so requests, the procuring agency shall, in accordance with any applicable protective orders, provide actual or prospective offerors reasonable access to the protest file. However, if the GAO dismisses the protest before the documents are submitted to the GAO, then no protest file need be made available. Information exempt from disclosure under 5 U.S.C. 552 may be redacted from the protest file. The protest file shall be made available to non-intervening actual or prospective offerors within a reasonable time after submittal of an agency report to the GAO. The protest file shall include an index and as appropriate-~~

~~(A) The protest;~~

~~(B) The offer submitted by the protester;~~

~~(C) The offer being considered for award or being protested;~~

~~(D) All relevant evaluation documents;~~

~~(E) The solicitation, including the specifications or portions relevant to the protest;~~

~~(F) The abstract of offers or relevant portions; and~~

~~(G) Any other documents that the agency determines are relevant to the protest, including documents specifically requested by the protester;~~

~~(iii) At least 5 days prior to the filing of the report, in cases in which the protester has filed a request for specific documents, the agency shall provide to all parties and the GAO a list of those documents, or portions of documents, that the agency has released to the protester or intends to produce in its report, and those documents that the agency intends to withhold from the protester and the reasons for the proposed withholding. Any objection to the scope of the agency's proposed disclosure or nondisclosure of the documents must be filed with the GAO and the other parties within 2 days after receipt of this list.~~

~~(iv) The agency report to the GAO shall include—~~

~~(A) A copy of the documents described in 33.104(a)(3)(ii);~~

~~(B) The contracting officer's signed statement of relevant facts, including a best estimate of the contract value, and a memorandum of law. The contracting officer's statement shall set forth findings, actions, and recommendations, and any additional evidence or information not provided in the protest file that may be necessary to determine the merits of the protest; and~~

~~(C) A list of parties being provided the documents.~~

~~(4) (i) At the same time the agency submits its report to the GAO, the agency shall furnish copies of its report to the protester and any intervenors. A party shall receive all relevant documents, except—~~

~~(A) Those that the agency has decided to withhold from that party for any reason, including those covered by a protective order issued by the GAO. Documents covered by a protective order shall be released only in accordance with the terms of the order. Examples of documents the agency may decide to exclude from a copy of the report include documents previously furnished to or prepared by a party; classified information; and information that would give the party a competitive advantage; and~~

~~(B) Protester's documents which the agency determines, pursuant to law or regulation, to withhold from any interested party.~~

~~(i) If the protester requests additional documents within 2 days after the protester knew the existence or relevance of additional documents, or should have known, the agency shall provide the requested documents to the GAO within 2 days of receipt of the request.~~

~~(A) The additional documents shall also be provided to the protester and other interested parties within this 2-day period unless the agency has decided to withhold them for any reason (see subdivision (a)(4)(i) of this section). This includes any documents covered by a protective order~~

~~issued by the GAO. Documents covered by a protective order shall be provided only in accordance with the terms of the order.~~

~~(B) The agency shall notify the GAO of any documents withheld from the protester and other interested parties and shall state the reasons for withholding them.~~

~~(5) The GAO may issue protective orders which establish terms, conditions, and restrictions for the provision of any document to an interested party. Protective orders prohibit or restrict the disclosure by the party of procurement sensitive information, trade secrets or other proprietary or confidential research, development or commercial information that is contained in such document. Protective orders do not authorize withholding any documents or information from the United States Congress or an executive agency.~~

~~(i) Requests for protective orders. Any party seeking issuance of a protective order shall file its request with the GAO as soon as practicable after the protest is filed, with copies furnished simultaneously to all parties.~~

~~(ii) Exclusions and rebuttals. Within 2 days after receipt of a copy of the protective order request, any party may file with the GAO a request that particular documents be excluded from the coverage of the protective order, or that particular parties or individuals be included in or excluded from the protective order. Copies of the request shall be furnished simultaneously to all parties.~~

~~(iii) Additional documents. If the existence or relevance of additional documents first becomes evident after a protective order has been issued, any party may request that these additional documents be covered by the protective order. Any party to the protective order also may request that individuals not already covered by the protective order be included in the order. Requests shall be filed with the GAO, with copies furnished simultaneously to all parties.~~

~~(iv) Sanctions and remedies. The GAO may impose appropriate sanctions for any violation of the terms of the protective order. Improper disclosure of protected information will entitle the aggrieved party to all appropriate remedies under law or equity. The GAO may also take appropriate action against an agency which fails to provide documents designated in a protective order.~~

~~(6) The protester and other interested parties are required to furnish a copy of any comments on the agency report directly to the GAO within 10 days, or 5 days if express option is used, after receipt of the report, with copies provided to the contracting officer and to other participating interested parties. If a hearing is held, these comments are due within 5 days after the hearing.~~

~~(7) Agencies shall furnish the GAO with the name, title, and telephone number of one or more officials (in both field and headquarters offices, if desired) whom the GAO may contact who are knowledgeable about the subject matter of the protest. Each agency shall be responsible for promptly advising the GAO of any change in the designated officials.~~

~~(b) Protests before award. (1) When the agency has received notice from the GAO of a protest filed directly with the GAO,~~ a contract may not be awarded unless the head of the contracting activity authorizes contract award and performance.

~~(b) authorized, in accordance with agency procedures, by~~ The head of the contracting activity, on a nondelegable basis, may authorize contract award and performance upon a written finding that—

~~(i)~~

(1) Urgent and compelling circumstances which significantly affect the interest of the United States will not ~~permit awaiting the~~ allow waiting for a decision ~~of the~~ from GAO; and

~~(ii)~~ (2) Award is likely to occur within 30 days of the written finding.

~~(2) A contract~~ (c) An agency may not authorize contract award ~~shall not be authorized and performance~~ until the agency has notified ~~the~~ GAO of the finding in paragraph (b)(1) of this section.

~~(3)~~ (d) When a protest against the making of an award is received and award will be withheld pending disposition of the protest, the contracting officer should inform the offerors whose offers might become eligible for award of the protest. If appropriate, those offerors should be requested, before ~~expiration of the time for acceptance of~~ accepting their ~~offer~~ offers expires, to extend the time for acceptance to avoid the need for resolicitation. ~~In the event of failure to obtain such extensions of offers, If offers are not extended, then~~ consideration should be given to proceeding under paragraph (b)(1) of this section.

33.105-3 Postaward.

(a) If a protest is likely after award, then the contracting officer may direct the contractor to stop performance within the time period contained in paragraph (b)(1) of this section if the contracting officer makes a written determination that—

(1) A protest is likely to be filed; and

(2) Delay of performance is, under the circumstances, in the best interests of the United States.

~~(e) Protests after award. (1) When~~ (b)(1) If the agency receives notice of a protest from the GAO within 10 days after contract award or within 5 days after a debriefing date offered to the protester for any debriefing that is required by 15.505 or 15.506, whichever is later, then the contracting officer ~~shall~~ must immediately suspend performance or terminate the awarded contract, ~~except as provided in paragraphs (c)(2) and (3)~~ unless the head of this section ~~the contracting activity authorizes contract performance.~~

~~(2) In accordance with agency procedures,~~ The head of the contracting activity ~~may~~, on a nondelegable basis, may authorize contract performance, ~~notwithstanding the protest,~~ upon a written finding that—

(i) Contract performance will be in the best interests of the United States; or

(ii) Urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for the GAO's decision.

~~(3) Contract~~(c) An agency must not authorize contact performance ~~shall not be authorized~~ until the agency has notified the GAO of the finding in paragraph (e)(2) of this section.

(4d) When it is decided to suspend performance or terminate the awarded contract, the contracting officer should attempt to negotiate a mutual agreement on a no-cost basis.

~~(5e)~~ When the agency receives notice of a protest filed with the GAO after the dates contained in paragraph ~~(e)~~subparagraph (b)(1), the contracting officer ~~need~~does not have to suspend contract performance or terminate the awarded contract unless the contracting officer believes that an award may be invalidated and a delay in receiving the supplies or services is not prejudicial to the Government's interest.

~~(d) Findings and~~ 33.105-4 Other procedures.

(a) Agency report. Upon notice, ~~If the decision is to proceed that a protest has been filed~~ with contract award, or continue contract performance under paragraphs (b) or (c) of this section GAO, the contracting officer ~~shall include the written findings or other required documentation in the file. The contracting officer also shall give written notice of the decision to the protester and other interested parties.~~

(e) Hearings. The GAO may hold a hearing at the request of must immediately notify legal counsel and begin compiling the information necessary for the agency, ~~a protester, or other interested party who has responded to the notice in paragraph (a)(2) of this section. A recording or transcription of the hearing report that will normally be made, and copies may be obtained from the GAO. All parties may file comments on the hearing and the agency report within 5 days of the hearing.~~

(f) GAO decision time. ~~GAO issues its recommendation on a protest within 100 days from the date of filing of the protest filed with the GAO, or within 65 days under the express option. The GAO attempts to issue its recommendation on an amended protest that adds a new ground of protest within the time limit of the initial protest. If an amended protest cannot be resolved within the initial time limit, the GAO may resolve the amended protest through an express option GAO.~~

(gb) Notice to GAO. If the agency has not fully implemented the GAO recommendations with respect to a solicitation for a contract or an award or a proposed award of a contract within 60 days of receiving the GAO recommendations, then the head of the contracting activity ~~responsible for that contract shall~~ must report the failure to the GAO ~~not later than~~ by 5 days ~~after the expiration of the 60-day period.~~ later. The report ~~shall~~ must explain the reasons why the GAO's recommendation, exclusive of costs, has not been followed by the agency.

(h) Award of costs. (1) ~~If the GAO determines that a solicitation for a contract, a proposed award, or an award of a contract does not comply with a statute or regulation, the GAO may recommend that the agency pay to an appropriate protester the cost, exclusive of profit, of filing and pursuing~~

~~the protest, including reasonable attorney, consultant, and expert witness fees, and bid and proposal preparation costs. The agency shall use funds available for the procurement to pay the costs awarded.~~

~~(2) The protester shall file its claim for costs with the contracting agency within 60 days after receipt of the GAO's recommendation that the agency pay the protester its costs. Failure to file the claim within that time may result in forfeiture of the protester's right to recover its costs.~~

~~(3) The agency shall attempt to reach an agreement on the amount of costs to be paid. If the agency and the protester are unable to agree on the amount to be paid, the GAO may, upon request of the protester, recommend to the agency the amount of costs that the agency should pay.~~

~~(4) Within 60 days after the GAO recommends the amount of costs the agency should pay the protester, the agency shall notify the GAO of the action taken by the agency in response to the recommendation.~~

~~(5) No agency shall pay a party, other than a small business concern within the meaning of section 3(a) of the Small Business Act (see 2.101, "Small business concern"), costs under paragraph (h)(2) of this section-~~

~~(i) For consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Government pursuant to 5 U.S.C.3109 and 5 CFR 304.105; or~~

~~(ii) For attorneys' fees that exceed \$150 per hour, unless the agency determines, based on the recommendation of the Comptroller General on a case-by-case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. The cap placed on attorneys' fees for businesses, other than small businesses, constitutes a benchmark as to a "reasonable" level for attorneys' fees for small businesses.~~

~~(6) Before paying a recommended award of costs, agency personnel should consult legal counsel. Section 33.104(h) applies to all recommended awards of costs that have not yet been paid.~~

~~(7) Any costs the contractor receives under this section shall not be the subject of subsequent proposals, billings, or claims against the Government, and those exclusions should be reflected in the cost agreement.~~

~~(8) If the Government pays costs, as provided in paragraph (h)(1) of this section, where a postaward protest is sustained as the result of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification, the Government may require the awardee to reimburse the Government the amount of such costs. In addition to any other remedy available, and pursuant to the requirements of subpart 32.6, the Government may collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government~~[106 Protests](#)

~~33.105~~ ~~Protest~~ at the U.S. Court of Federal Claims.

Procedures for protests at the U.S. Court of Federal Claims are set forth in the rules of the U.S. Court of Federal Claims. ~~The rules may be~~ found at <https://www.uscfc.uscourts.gov/rules-forms-filing-bid-protest>.

33.~~106~~107 Solicitation provision and contract clause.

(a) The contracting officer ~~shall~~must insert the provision at 52.233-2, Service of Protest, in solicitations for contracts expected to exceed the simplified acquisition threshold.

(b) The contracting officer ~~shall~~must insert the clause at 52.233-3, Protest After Award, in all solicitations and contracts. If a cost reimbursement contract is ~~contemplated~~being considered, the contracting officer ~~shall~~must use the clause with its Alternate I.

Subpart 33.2 - Disputes and Appeals

33.200 Scope.

41 U.S.C. chapter 71, Contract Disputes, establishes procedures and requirements for asserting and resolving claims subject to the Disputes statute.

33.201 Definitions.

As used in this subpart—

Accrual of a claim means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury caused by the Government's action or the contractor's action must have occurred. However, monetary damages need not have been incurred.

Alternative dispute resolution (ADR) means any type of procedure or combination of procedures voluntarily used to resolve issues in controversy. These procedures may include, but are not limited to, conciliation, facilitation, mediation, fact-finding, minitrials, arbitration, and use of ombudsmen.

Defective certification means a certificate ~~which~~that alters or otherwise deviates from the language in ~~33.207(e)~~52.233-1(d)(2)(iii) or which is not executed by a person authorized to bind the contractor with respect to the claim. Failure to certify ~~shall~~must not be deemed to be a defective certification.

Issue in controversy means a material disagreement between the Government and the contractor that -

(1) may result in a claim; or (2) is all or part of an existing claim.

Misrepresentation of fact means a false statement of substantive fact, or any conduct ~~which~~that leads to the belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

33.202 ~~Disputes~~ Applicability.

~~41 U.S.C. chapter 71, Disputes, establishes procedures and requirements for asserting and resolving claims subject to the Disputes statute. In addition, the Disputes statute provides for-~~

~~(a) The payment of interest on contractor claims;~~

~~(b) Certification of contractor claims; and~~

~~(c) A civil penalty for contractor claims that are fraudulent or based on a misrepresentation of fact.~~

~~33.203~~ Applicability.

(a) Except as specified in paragraph (b) ~~of below~~, this ~~section, this part~~ subpart applies to any express or implied contract covered by the Federal Acquisition Regulation.

(b) This subpart does not apply to any contract with-

(1) A foreign government or agency of that government; or

(2) An international organization or a subsidiary body of that organization, if the agency head determines that the application of the Contract Disputes statute to the contract would not be in the public interest.

(c) This ~~part~~ subpart applies to all disputes with respect to contracting officer decisions on matters "arising under" or "relating to" a contract. Agency Boards of Contract Appeals (BCAs) (e.g., Armed Services Board of Contract Appeals or Civilian Board of Contract Appeals) authorized under the Disputes statute continue to have all of the authority they possessed before the Disputes statute ~~with respect to~~ about disputes arising under a contract, as well as authority to decide disputes relating to a contract.

(d) The clause at 52.233-1, Disputes, ~~Disputes,~~ recognizes the "all disputes" authority established by the Disputes statute, and states certain requirements and limitations of the Disputes statute ~~for the guidance of~~ to guide contractors and contracting agencies. The clause is not intended to affect the rights and obligations of the parties as provided by the Disputes statute or to constrain the authority of the statutory agency BCAs in ~~the~~ handling and deciding ~~of~~ contractor appeals under the Disputes statute.

33.203 Relationship of the Disputes statute to Pub. L. 85-804.

(a) A contractor's allegation that it is entitled to rescission or reformation of its contract in order to correct or mitigate the effect of a mistake must be treated as a claim under the Dispute statute.

(b) A claim that is first submitted to the contracting officer for consideration under the Disputes statute and is either denied or not approved in its entirety under the Disputes statute may be presented by the contractor as a request for relief under Pub. L. 85-804 (50 U.S.C. 1431-1435) as implemented by subpart 50.1.

33.204 Policy.

~~The Government's~~ As a matter of policy ~~is to try, the Government tries~~ to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level. Reasonable efforts should be made to resolve controversies ~~prior to the submission of a claim. Agencies are encouraged to use ADR procedures to the maximum extent practicable. before submitting a claim~~ Certain factors, however, may make the use of ADR inappropriate (see 5 U.S.C. 572(b)). ~~Except for arbitration conducted pursuant to the Administrative Dispute Resolution Act (ADRA), (5 U.S.C.571, etseq.) agencies have authority which is separate from that provided by the ADRA to use ADR procedures to resolve issues in controversy. Agencies may also elect to proceed under the authority and requirements of the ADRA.~~

33.205 ~~Relationship of~~ Postaward.

33.205-1 Contractor claim.

(a) Contractor claims against the Disputes statute to Pub. L. Government. (1) Contractor requirements for submission of claims are located at 52.233-1(d). ~~85-804.~~

~~(a) Requests for relief under Public Law 85-804 (50 U.S.C. 1431-1435) are not claims within the Disputes statute or the Disputes clause at 52.233-1, Disputes, and shall be processed under subpart 50.1, Extraordinary Contractual Actions. However, relief formerly available only under Public Law 85-804; i.e., legal entitlement to rescission or reformation for mutual mistake, is now available within the authority of the contracting officer under the Contract Disputes statute and the Disputes clause. In case of a question whether the contracting officer has authority to settle or decide specific types of claims, the contracting officer should seek legal advice.~~

~~(b) A contractor's allegation that it is entitled to rescission or reformation of its contract in order to correct or mitigate the effect of a mistake shall be treated as a claim under the Disputes statute. A contract may be reformed or rescinded by the contracting officer if the contractor would be entitled to such remedy or relief under the law of Federal contracts. Due to the complex legal issues likely to be associated with allegations of legal entitlement, contracting officers shall make written decisions, prepared with the advice and assistance of legal counsel, either granting or denying relief in whole or in part.~~

~~(c) A claim that is either denied or not approved in its entirety under paragraph (b) of this section may be cognizable as a request for relief under Public Law 85-804 as implemented by subpart 50.1. However, the claim must first be submitted to the contracting officer for consideration under the Disputes statute because the claim is not cognizable under Public Law 85-804, as implemented by subpart 50.1, unless other legal authority in the agency concerned is determined to be lacking or inadequate.~~

33.206 Initiation of a claim.

~~(a) Contractor claims shall be submitted, in writing, to the contracting officer for a decision within 6 years after accrual of a claim, unless the contracting parties agreed to a shorter time period. This 6-year time period does not apply to contracts awarded prior to October 1, 1995. The contracting officer shall document the contract file with evidence of the date of receipt of any~~

~~submission from the contractor deemed to be a claim by the contracting officer.~~ (2) The contracting officer must document in the contract file the date of receipt of a claim submitted by a contractor.

(b) Government claims against a contractor. The contracting officer must

~~(b) The contracting officer shall~~ issue a written decision on any Government claim ~~initiated~~ against a contractor within 6 years after accrual of the claim, unless the contracting parties agreed to a shorter time period. ~~The 6-year period shall not apply to contracts awarded prior to October 1, 1995, or to a Government claim, or the claim is~~ based on a contractor claim involving fraud.

33. ~~207~~ 205-2 Contractor certification.

(a) ~~Contractors shall provide the~~ Contractor requirements for certification ~~specified in paragraph (e) of this section when submitting any claim~~ of claims exceeding \$100,000.

~~(b) The certification requirement does not apply to issues in controversy that have not been submitted as all or part of a claim.~~

~~(c) The certification shall state as follows:~~

~~I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.~~ located at 52.233-1(d).

~~(d)~~ (b) Use the aggregate amount of both increased and decreased costs ~~shall be used in determining to determine~~ when the dollar thresholds requiring certification are met (see example in 15.403-4(a)(1)(iii) regarding certified cost or pricing data).

~~(e) The certification may be executed by any person authorized to bind the contractor with respect to the claim.~~

~~(f)~~ (c) A defective certification ~~shall~~ does not deprive a court or an agency BCA of jurisdiction over that claim. ~~Prior to~~ Before the entry of a final judgment by a court or a decision by an agency BCA, ~~however,~~ the court or agency BCA ~~shall~~ must require a defective certification to be corrected.

33. ~~208~~ 205-3 Interest on claims.

(a) The Government ~~shall~~ must pay interest on a contractor's claim on the amount found due and unpaid from the date that ~~—~~

(1) The contracting officer receives the claim (certified if required by 33. ~~207~~ 205-2(a)); or

(2) Payment otherwise would be due, if that date is later, until the date of payment.

(b) Simple interest on claims ~~shall~~must be paid at the rate, fixed by the Secretary of the Treasury as provided in the Disputes statute, which ~~is applicable~~applies to the period during which the contracting officer receives the claim and then at the rate ~~applicable~~that applies for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim. (See the clause at 52.232-17 for the right of the Government to collect interest on its claims against a contractor-~~)).~~

(c) ~~With regard to~~Interest must be paid on claims having defective certifications, ~~interest shall be paid from either~~ starting on the date that the contracting officer initially receives the claim ~~or October 29, 1992, whichever is later. However, if a contractor has provided a proper certificate prior to October 29, 1992, after submission of a defective certificate, interest shall be paid from until~~ the date ~~of receipt by the Government of a proper certificate.~~the claim was paid, see 52.233-1(h).

33.~~209~~205-4 Suspected fraudulent claims.

If the contractor is unable to support any part of the claim and ~~there is~~ evidence reveals that the inability is ~~attributable~~due to misrepresentation of fact or to fraud on the part of the contractor, the contracting officer ~~shall~~must refer the matter to the agency official responsible for investigating fraud.

33.~~210~~205-5 Contracting officer's authority.

~~Except as provided in this section,~~(a) Contracting officers are authorized, within any specific limitations ~~of defined in~~ their warrants, to decide or resolve all claims arising under or relating to a contract subject to the Disputes statute. ~~In accordance with agency policies and 33.214, contracting officers are authorized to use ADR procedures to resolve claims. The, except this authority to decide or resolve claims~~ does not extend to —

~~(a)-1)~~ A claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine; or

~~(b)-2)~~ The settlement, compromise, payment, or adjustment of any claim involving fraud.

~~33.214~~(b) Contracting officers can use ADR procedures to resolve claims, according to agency policies and 33.205-8.

33.205-6 Contracting officer's decision.

(a) When a claim by or against a contractor cannot be satisfied or settled by mutual agreement and a decision on the claim is necessary, the contracting officer ~~shall~~must —

(1) Review the facts ~~pertinent~~relevant to the claim;

(2) ~~Secure assistance~~Get help from legal and other advisors;

(3) Coordinate with the contract administration officer or contracting office, as appropriate; and

(4) Prepare a written decision that ~~shall include~~ —

(i) ~~A description of the claim or dispute;~~

(ii) ~~A reference to the pertinent contract terms;~~

(iii) ~~A statement of the factual areas of agreement and disagreement;~~

(iv) ~~A statement of~~ Includes the contracting officer's decision, ~~with~~ and supporting rationale for the decision reached;

(v) ~~Paragraphs substantially as follows:~~

(ii) Substantially conveys the following:

"This is the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice ~~shall~~ must indicate that an appeal is intended, ~~reference~~ refer to this decision, and identify the contract by number.

With regard to appeals to the agency board of contract appeals, you may, solely at your election, proceed under the board's ~~—~~

(A)(1) Small claim procedure for claims of \$50,000 or less or, in the case of a small business concern (as defined in the Small Business Act and regulations under that Act), \$150,000 or less; or

(B)(2) Accelerated procedure for claims of \$100,000 or less.

Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims (except as provided in 41 U.S.C. 7102(d), regarding Maritime Contracts) within 12 months of the date you receive this decision"; and

~~(vi)~~ iii) Makes a demand for payment prepared ~~in accordance with~~ according to 32.604 and 32.605 in all cases where the decision results in a finding that the contractor is indebted to the Government.

(b) The contracting officer ~~shall~~ must furnish a copy of the decision to the contractor by certified mail, return receipt requested, or by any other method that provides evidence of receipt. This requirement ~~shall apply~~ applies to decisions on claims initiated by or against the contractor.

(c) The contracting officer ~~shall~~ must issue the decision within the following statutory time limitations:

(1) For claims of \$100,000 or less, 60 days after receiving a written request from the contractor that a decision be ~~rendered~~ given within that period, or within a reasonable time after receipt of the claim if the contractor does not make such a request.

(2) For claims over \$100,000, 60 days after receiving a certified claim; provided, however, that if a decision will not be issued within 60 days, the contracting officer ~~shall~~must notify the contractor, within that period, of the time within which a decision will be issued.

(d) The contracting officer ~~shall~~must issue a decision within a reasonable time, taking into account-

(1) The size and complexity of the claim;

(2) The adequacy of the contractor's supporting data; and

(3) Any other relevant factors.

(e) The contracting officer ~~shall have~~has no obligation to render a final decision on any claim exceeding \$100,000 ~~which~~that contains a defective certification, if within 60 days after ~~receipt~~of receiving the claim, the contracting officer notifies the contractor, in writing, of the reasons why any attempted certification was found to be defective.

(f) In the event of undue delay by the contracting officer in ~~rendering~~providing a decision on a claim, the contractor may request the tribunal concerned to direct the contracting officer to issue a decision in a specified time period ~~determined by that~~ the tribunal decides.

(g) Any failure of the contracting officer to issue a decision within the required time periods will be deemed a decision by the contracting officer denying the claim and will authorize the contractor to file an appeal or suit on the claim.

(h) The amount determined payable under the decision, less any portion already paid, should be paid, if otherwise proper, without awaiting contractor action concerning appeal. Such payment ~~shall~~must be without prejudice to the rights of either party.

~~33.212 Contracting officer's duties upon appeal.~~

~~To the extent permitted by any agency procedures controlling contacts with agency BCA personnel, the contracting officer shall provide data, documentation, information, and support as may be required by the agency BCA for use on a pending appeal from the contracting officer's decision.~~

~~33.213~~205-7 Obligation to continue performance.

~~(a) In general, before~~(a)(1) Before the passage of the Disputes statute, the obligation to continue performance applied only to claims arising under a contract. However, the Disputes statute, at 41 U.S.C. 7103(g), authorizes agencies to require a contractor to continue contract performance ~~in accordance with~~according to the contracting officer's decision pending a final resolution of any claim arising under, or relating to, the contract. ~~(2)(i) A claim arising under a contract is a claim that can be resolved under a contract clause, other than the clause at 52.233-1, Disputes, that provides for the relief sought by the claimant;~~ However, relief for such a claim can also be sought under the clause at 52.233-1.

(ii) A claim relating to a contract is a claim that cannot be resolved under a contract clause other than the clause at 52.233-1. This distinction is recognized by the clause with its ~~Alternate~~Alternate I (see 33.~~215~~205-9).

(b) In all contracts that include the clause at 52.233-1, ~~Disputes~~, with its ~~Alternate~~Alternate I, in the event of a dispute ~~not arising under, but~~ relating to, the contract, the contracting officer ~~shall~~must consider providing, through appropriate agency procedures, financing of the continued performance; ~~provided,~~ that the Government's interest is properly secured.

33.~~214~~205-8 Alternative dispute resolution (ADR).

(a)(1) Agencies are encouraged to use ADR procedures as much as possible. Certain factors, however, may make the use of ADR inappropriate (see 5 U.S.C. 572(b)).

(2) Except for arbitration conducted according to the Administrative Dispute Resolution Act (ADRA), (5 U.S.C. 571, et seq.), agencies have authority that is separate from that provided by the ADRA to use ADR procedures to resolve issues in controversy. Agencies may also choose to proceed under the authority and requirements of the ADRA.

(b) The objective of using ADR procedures is to increase the opportunity ~~for~~to relatively ~~inexpensive~~quickly and ~~expeditious resolution of issues~~cheaply resolve an issue in controversy. Essential elements of ADR include—

(1) ~~Existence of~~ An issue in controversy;

(2) ~~A voluntary election by~~ Both parties choose to participate in the ADR process;

(3) ~~An agreement~~ Both parties agree on alternative procedures and terms ~~to be used in lieu~~ instead of formal litigation; and

~~(4) Participation in the process by~~ (4) Officials of both parties who have the authority to resolve the issue in controversy choose to participate in the process.

(b)(1) If the contracting officer rejects a contractor's request for ADR proceedings, the contracting officer ~~shall provide~~must give the contractor a written explanation citing one or more of the conditions in 5 U.S.C. 572(b) or such other specific reasons that ADR procedures are inappropriate ~~for the resolution of the dispute. In any case where a contractor rejects a request of an agency for ADR proceedings, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request~~to resolve the dispute.

~~(e)~~ (2) If a contractor rejects a request for ADR see 52.233-1(g).

(d) ADR procedures may be used at any time that the contracting officer has authority to resolve the issue in controversy. If a claim has been submitted, ADR procedures may ~~be applied~~apply to all or a portion of the claim. When ADR procedures are used ~~subsequent to the issuance of~~ after a contracting ~~officer's~~ officer has issued their final decision, ~~their~~ the contracting officer's use of ADR procedures does not alter any of the time limitations or procedural requirements for filing

an appeal of the contracting officer's final decision ~~and~~. The use of ADR procedures does not constitute a reconsideration of the final decision.

(~~d~~e) When appropriate, a neutral person may be used to ~~facilitate resolution of~~ help resolve the issue in controversy using the procedures ~~chosen by~~ the parties chose.

(~~e~~f) The confidentiality of ADR proceedings ~~shall~~ must be protected consistent with 5 U.S.C. 574.

(~~f~~g)(1) A solicitation ~~shall~~ must not require arbitration as a condition of award, unless arbitration is otherwise required by law. ~~Contracting officers should have flexibility to select the appropriate ADR procedure to resolve the issues in controversy as they arise.~~

(2) An agreement to use arbitration ~~shall~~ must be in writing and ~~shall~~ must specify a maximum award that ~~may be issued by~~ the arbitrator may issue, as well as any other conditions limiting the range of possible outcomes.

(~~g~~h) Binding arbitration, as an ADR procedure, may be agreed to only as specified in agency guidelines. Such guidelines ~~shall~~ must provide advice on the appropriate use of binding arbitration and when an agency has authority to settle an issue in controversy through binding arbitration.

33.~~215~~205-9 Contract clauses.

(a) Insert the clause at 52.233-1, Disputes, in solicitations and contracts, unless the conditions in 33.~~203~~202(b) apply. If it is determined under agency procedures that continued performance is necessary pending resolution of any claim arising under or relating to the contract, the contracting officer ~~shall~~ must use the clause with its ~~Alternate I~~ Alternate I.

(b) Insert the clause at 52.233-4 in all solicitations and contracts.