

AGENCY LEVEL PROTEST PROCEDURES

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DEPARTMENT OF COMMERCE

48 CFR Part 1333

[Docket No. 990127035-9035-01]

RIN 0605-AA15

Commerce Acquisition Regulation; Agency Protest Procedures

AGENCY: Department of Commerce.

ACTION: Final rule.

SUMMARY: The Department of Commerce amends the Commerce Acquisition

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Regulation (CAR) to implement the requirements of Executive Order 12979 and the Federal Acquisition Regulation (FAR) Part 33, Section 103, to include ``Agency Protest Procedures-Level Above the Contracting Officer.'' The Department of Commerce has an urgent need to publish its final rule stating the policy governing protests at the level above the Contracting Officer. These rules are currently being used by all Department of Commerce contracting activities. Accordingly, they provide uniform policy and procedures governing the filing and disposition of all pre award and post award agency protests of contracting actions at the level above the Contracting Officer. It should be emphasized, however, that the current rules and procedures pertaining to ordinary agency protests filed directly with the Contracting Officer remain in effect. These provisions include establishment of the protest decision authority for all Agency protests filed at the level above the Contracting Officer, the election of forum, the procedures for filing such protests, the minimal filing contents for a valid protest of this type, procedures for the protest disposition, the effects of protest filing on contract awards, and potential remedies available for resolution of these protests. These rules have been designed to create an additional avenue for resolving third party grievances in connection with the acquisition process and to avoid resolving these types of disputes through formal judicial processes.

EFFECTIVE DATE: This final rule is effective May 6, 1999.

FOR FURTHER INFORMATION CONTACT: Ms. Lisa Jandovitz, Director, Policy, Office of Acquisition Management, 202-482-0202.

SUPPLEMENTARY INFORMATION: This rule implements the requirements of Executive Order No. 12979 and Federal Acquisition Regulation (FAR 33.103). On October 25, 1995, President Clinton signed Executive Order No. 12979 which directs heads of executive agencies to develop administrative procedures for resolving protests to awards of procurement contracts within their agencies at a level above the Contracting Officer. Authority to administer procurement-related directives has been delegated within the Department of Commerce through the Chief Financial Officer and Assistant Secretary for Administration to the Director for Acquisition Management (Procurement Executive). The Department's goal is to encourage protesters to resolve their protests at the agency level, help build confidence in the Government's acquisition system, and reduce the number or frequency of protests to the General Accounting Office and other external fora. Prior to submission of an agency protest, all parties shall use their best efforts to resolve concerns raised by an interested party at the Contracting Officer level through open and frank discussions. If concerns cannot be resolved, protesters may use these procedures when a resolution is requested from the agency at a level above the Contracting Officer. An agency protest is one that may be filed with either the Contracting Officer or the Protest Decision Authority but not both. When a protester decides to file a protest at the agency level with ``the Protest Decision Authority'', as that term is defined in these regulations, the guidelines set forth in these established agency level protest procedures above the Contracting Officer apply. These procedures are in addition to the existing protest procedures contained in FAR Part 33.102.

Under these regulations, ``day'' is considered to be a calendar day. In computing a period of time for the purpose of these procedures, 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 Washington, DC offices of the Department of Commerce are closed for all or part of the last day, the period extends to the next day on which the Department is open for business.

Protesters using these procedures may protest to the ``Protest Decision Authority'' who will make the final decision for the Department. Protests shall be addressed to: (Name, title of the individual, and address of the individual listed in the solicitation).

Regulatory Flexibility Act

A Regulatory Flexibility Analysis is not required for this rule because it is being issued without prior notice and opportunity for comment. This rule pertains to a matter relating to public property, loans, grants, benefits, or contracts, 5 U.S.C. 553(a)(2), and does not constitute a significant revision to the CAR (48 CFR 1.501-3(a)).

Paperwork Reduction Act

This final rule contains information collection requirements which have been cleared by the Office of Management and Budget pursuant to the Paperwork Reduction Act (OMB Control No. 9000-0035).

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB control number.

Executive Order 12866

It has been determined that this rule is not significant for purposes of Executive Order 12866.

List of Subjects in 48 CFR Part 1333

Government procurement.

For the purposes set out in the preamble, 48 CFR Part 1333 is amended as follows:

1. The authority for Part 1333 continues to read as follows:

Authority: Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 486(c)), as delegated by the Secretary of Commerce in Department Organization Order 10-5 and Department Administrative Order 108-2.

2. Amend Subpart 1333.1 by adding 1333.101 to read as follows:

1333.101 Definitions.

Agency protest, as used in this subpart, is one that may be filed with either the Contracting Officer or the Protest Decision Authority but not both.

Assistant General Counsel (AGC), as used in this subpart, means the Assistant General Counsel of the Department of Commerce for Finance and Litigation.

Protest Decision Authority, as used in this subpart, is the agency official above the level of the Contracting Officer who has been designated by the Procurement Executive to handle and issue the formal agency decision resolving the protest.

3. Add 1333.102 to read as follows:

1333.102 General.

(a) Protests must be received within ten work days after the basis for protest is known or should have been known unless good cause is shown to extend the time limit. However, protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing time for receipt of initial proposals shall be filed prior to bid opening or the closing time for receipt of initial proposals. Unless the time limit for receiving the protest is extended for good cause, a protest to the contracting activity which is received after the time limit will not be considered. When a timely protest is filed only with the contracting activity, the contracting officer shall take prompt action toward resolution after consulting with the AGC, and notify the protestor in writing of the action taken.

(b) When a protest is filed only with the contracting activity before award, an award shall not be made until the matter is resolved, unless the head of the contracting office makes the determination prescribed in FAR 33.103(f).

(c) When a protest is filed only with the contracting activity after award, the Contracting Officer need not notify the contractor, if the protest can be promptly resolved. If it appears likely that a protest will be filed with the General Accounting Office (GAO), or other administrative forum, the Contracting Officer should promptly notify the contractor in writing and consider suspending contract performance.

4. Revise 1333.103 to read as follows:

1333.103 Protests to the agency.

(a) When a protester decides to file a protest at the agency level with the Protest Decision Authority, the guidelines set forth in these established agency level protest procedures above the Contracting Officer apply. These procedures are in addition to the existing protest procedures contained in the FAR Part 33.102 and 1333.102 of this subpart.

(1) For purposes of this subpart, a day is a calendar day. In computing a period of time for the purpose of these procedures, 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 Washington, DC offices of the Department of Commerce are closed for all or part of the last day, the period extends to the next day on which the Department is open.

(2) Protesters using these procedures may protest to the Protest Decision Authority who will make the final decision for the Department. Protests shall be addressed to: (Name, title of the person and address to be inserted by the Contracting Officer in the solicitation). The outside of the envelope or beginning of the FAX transmission must be marked ``Agency-level Protest''. The protester shall also provide a copy of the protest within 1 day to the responsible Contracting Officer and a copy to: Contract Law Division, Office of the Assistant General Counsel for Finance and Litigation, Department of Commerce, Room H5882, 14th Street and Constitution Avenue, NW, Washington, DC 20230, (FAX Number 202-482-5858).

(3) While a protest is pending at the agency level with the Protest Decision Authority, the protester agrees not to protest to the GAO or any other external fora. If the protester has already filed with the GAO or other external fora, the procedures described here may not be used.

(i) Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or time set for receipt of proposals shall be filed prior to bid opening or the time set for receipt of proposals. If the contract has been awarded, protests must be filed within 10 days after contract award or 5 days after the date the protester was given the opportunity to be debriefed, whichever date is later. In cases other than those covered in the preceding two sentences, protests shall be filed not later than 14 days after the basis of the protest is known or should have been known, whichever is

earlier.

(ii) To be filed on a given day, protests must be received by 4:30 PM current local time. Any protests received after that time will be considered to be filed on the next day. Incomplete submissions will not be considered filed until all information is provided.

(iii) To be complete, protests must contain the following information:

(A) The protester's name, address, telephone number, and fax number.

(B) The solicitation or contract number, name of contracting office and the Contracting Officer.

(C) A detailed statement of all factual and legal grounds for protests, and an explanation of how the protester was prejudiced.

(D) Copies of relevant documents supporting protester's statement.

(E) A request for ruling by the agency.

(F) Statement as to form of relief requested.

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

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

(iv) All protests must be signed by an authorized representative of the protestor.

(b) Within 14 days after the protest is filed, the Contracting Officer will prepare an administrative report that responds to the issues raised by the protester and addresses any other issues, which, even if not raised by the protester, that may have been identified by agency officials as being relevant to the fairness of the procurement process. The Contracting Officer shall forward this administrative report to the Contract Law Division, Office of the Assistant General Counsel for Finance and Litigation.

(1) For good cause shown, the Protest Decision Authority may grant an extension of time for filing the administrative report and for issuing the written decision. When an extension is granted, the Protest Decision Authority will notify the protester and all interested parties within 1 day of the decision to grant the extension.

(2) Unless an extension is granted, the Protest Decision Authority will issue a decision within 35 days of the protest. The protest decision authority's final decision will be binding on the Department of Commerce and not subject to further appeals.

(3) The Protest Decision Authority shall send a written ruling and a summary of the reasons supporting the ruling to the protester, by ``Certified Mail, Return Receipt Requested,`` and shall forward information copies to the applicable contracting office and the Procurement Executive, Office of Acquisition Management.

(c) Effect of protest on award and performance.

(1) When a protest is filed prior to award, a contract may not be awarded unless authorized by the Head of the Contracting Activity (HCA) based on a written finding that:

(i) The supplies or services are urgently required.

(ii) Delivery or performance would be unduly delayed by failure to make the award promptly.

(iii) A prompt award will be in the best interest of the Government.

(2) When a protest is filed within 10 days after contract award, or 5 days after a debriefing date was offered to the protester under a timely debriefing request in accordance with FAR 15.1004, whichever is later, the Contracting Officer shall immediately suspend performance pending the resolution of the protest within the agency, including any

review by an independent higher official, unless continued performance is justified. The HCA may authorize continued contract performance, notwithstanding the protest, based on a written finding that:

(i) Contract performance would be in the best interest of the United States; or

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

(d) The Protest Decision Authority may grant one or more of the following remedies:

(1) Terminate the contract.

(2) Re-compete the requirement.

(3) Issue a new solicitation.

(4) Refrain from exercising options under the contract.

(5) Award a contract consistent with statutes and regulations.

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(6) Amend the solicitation provisions which gave rise to the protest and continue with the procurement.

(7) Such other remedies as the decision-maker may determine are necessary to correct a defect.

Robert A. Welch,

Procurement Executive.

[FR Doc. 99-8282 Filed 4-5-99; 8:45 am]

BILLING CODE 3510-EC-P

SERVICE OF PROTESTS

Agency protests filed with the Contracting Officer shall be sent to the following address:

NIST

Attn: (Name of Contracting Officer)

100 Bureau Dr., Stop 3571

Gaithersburg, MD 20899-3571

If a protest is filed with either the Protest Decision Authority, or with the General Accounting Office (GAO), a complete copy of the protest (including all attachments) shall be served upon both the Contracting Officer and Contract Law Division of the Office of the General Counsel within one day of filing with the Protest Decision Authority or with GAO. Service upon the Contract Law Division shall be made, as follows:

U.S. Department of Commerce

Office of the General Counsel

Contract Law Division--Room 5893

Herbert C. Hoover Building

14th and Constitution Avenue, N.W.

Washington, D.C. 20230.

Attn: Jerry Walz, Esquire
FAX: (202) 482-5858