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Title VII of Senate Bill 1264 would, for the first time, provide specific statutory authority for GAO's bid protest function. Title VII of S. 1264 reflects GAO's current formal procedures and practices with regard to bid protests. However, the definitions of "protest" and "executive agency" would give GAO jurisdiction over Postal Service protests and would remove from GAO jurisdiction protests involving procurements by the Government Printing Office, the Library of Congress, the District of Columbia, and the courts. There are some differences between current practices and the provisions of title VII, including: a contract could be awarded while a bid protest on the procurement was pending before GAO only if authorized by the head of the contracting agency, but this authority apparently could be delegated without limitation; the Comptroller General would be authorized to declare, rather than recommend as at present, that a contract should be terminated for the convenience of the Government; the Comptroller General's decision on a bid protest would be binding on all interested parties, including the executive agency or agencies involved; and the Comptroller General would be permitted to authorize formal discovery proceedings and to issue subpoenas for the production of books and records and the attendance of witnesses for taking evidence. These provisions should be modified to reflect the GAO policy of interfering as little as possible in the procurement procedures. (SC)

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Statement of

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General Counsel

before the

Committee on Governmental Affairs  
Subcommittee on Federal Spending  
Practices and Open Government  
United States Senate

on

Title VII of S. 1264--To Provide Policies, Methods,  
Criteria for the Acquisition of Property and  
Services by Executive Agencies

Mr. Chairman and Members of the Committee:

I am pleased to honor your request for testimony on  
Title VII of S. 1264 which would for the first time provide  
specific statutory authority for GAO's bid protest function.

I. Background

Before giving you the position of the GAO on the  
legislation, I think it would be useful to provide some  
background. A bid protest is a challenge to the rejection  
of a bid or proposal or to the award or proposed award of a  
contract. Our bid protest procedures, published at 4 C.F.R.  
20 (copy attached), permit an interested party to contest

such an action by an agency of the Federal Government whose accounts are subject to settlement by the GAO. The Comptroller General's decision is on the legality of the action under applicable law and regulations.

The Comptroller General has been acting on bid protests for more than 50 years. Exercise of the authority derives from 31 U.S.C. 71 which places in GAO the responsibility for settlement and adjustment of public accounts and 31 U.S.C. 74 which makes GAO's certification of balances of public accounts final and conclusive on the executive branch of the Government. One of the factors is whether the contract was awarded in accordance with applicable law. Initially, agency accountable officers sought GAO rulings on the propriety of payments in advance of disbursements in order to guard against the possibility that GAO might later take exceptions in their accounts.

Advance decisions were later issued at the request of contracting officers prior to contract award. This development was recognition that preventing an improper award is fairer to all parties than taking exception to a payment on an improper award. Later the propriety of an award was considered by GAO at the request of a bidder as well as the contracting officer or his superior. This procedure is similar to that followed by the Comptroller General in rendering advance decisions regarding all other questions posed to GAO.

## II. Current Acceptance

Usefulness of the opportunity for this kind of review is now well recognized in the procurement community. Each year more dissatisfied bidders take advantage of the procedure for an independent review of a procurement action they think improper. For the fiscal year July 1974 through June 1975, GAO processed 1,093 such cases. In the fiscal year July 1975 through June 1976, the figure had increased to 1,346 and for the first 6 months--October 1976 through March 1977--of the current fiscal year the figure is 840 cases, or an annual rate of 1,680.

The steadily increasing number of protests reflects the acceptance of the process in the private sector and the need for a review of the procurement issues by an impartial body. In general, we also receive excellent cooperation from the procuring agencies. It is my distinct impression that executive agency representatives involved in the procurement process are pleased to have the GAO deciding bid protests. The Congress has long been aware of GAO's bid protest activities and has continuously appropriated funds for them. Members of Congress have over the years forwarded a substantial number of bid protests to GAO for resolution.

As you know, Mr. Chairman, the Commission on Government Procurement also considered bid protests--or as the Commission called them, award protests. The Commission recommended that GAO continue as an "award protest-resolving forum." It also

made certain subsidiary recommendations in this area. We have been implementing those pertaining to GAO.

The Court of Appeals for the District of Columbia in 1970 (Scanwell v. Thomas, 424 F.2d 859), reversing a prior position of the Federal courts, held that an unsuccessful bidder on a Federal procurement could have his protest reviewed by the courts. For a time the relationship between the GAO and the courts with respect to bid protests was uncertain. However, the situation was clarified the next year by the same Court. In Steinhal v. Seamans, 455 F.2d 1289 (1971), the Court, while specifically noting that it was not called upon formally to determine the legal authority of the GAO to issue decisions on bid protests, acknowledged our unique experience in Government procurement and our tradition of care and objectivity including freedom from prior involvement in the matter at hand.

A companion case, Wheelabrator v. Chafee, 455 F.2d 1306 (1971), referred to the doctrine of "primary jurisdiction" under which the Court could enjoin action to permit an agency with "special competence" to rule on the merits of the case. In the area of bid protests the Court recognized the GAO as the agency having such special competence. The Court concluded that the issuance of a preliminary injunction by the Court pending disposition of the protest by the GAO could provide a "felicitous blending" of remedies and a mutual reenforcement

of forums. This remains the general standard applied today. It is quite common for a Court to make known its interest in having a GAO decision on the matter before rendering judgment on a case before it.

### III. The Justice Department Position

Notwithstanding the generally good relations with the procurement community inside and outside the Government, the Congress and the courts, we have had a problem with acceptance of the traditional GAO role in bid protests by the Justice Department and with the Office of Federal Procurement Policy (OFPP).

The former Administrator of OFPP had proposed revisions to the Armed Services Procurement Regulation and the Federal Procurement Regulations which, in our judgment, would render bid protest decisions of the GAO largely meaningless. He proposed that the procuring activity would be free to accept, reject, or ignore GAO rulings. Such a position in our opinion is inconsistent with current regulations and practice, court opinions, the prevailing views of the procurement community both within and outside the Government, and the findings and recommendations of the Commission on Government Procurement.

In a letter of March 17, 1977, to the Acting Administrator of OFPP the Attorney General subscribed to the position stated by former Attorney General John Mitchell in his letter of

June 14, 1971. They asserted that the authority to withhold contract awards and to reject bids is reposed solely in the executive branch and that the role of the GAO, as an arm of the legislative branch, should be limited in these matters to giving advice on a "purely voluntary non-binding basis." The March 17th letter, adds that any construction of 31 U.S.C. 74 which would bind the executive to award or terminate a contract or reject a bid "at the direction of a legislative officer, would raise serious constitutional questions," that only executive officers may perform such functions and that the Comptroller General is not such an executive officer because although appointed by the President, he is not subject to removal by him. Finally, the letter indicates that the Attorney General is aware of no judicial opinions to the effect that a bid protest decision of the Comptroller General is binding on the executive branch and that the Commission on Government Procurement's reading of the cases in arriving at the recommendation to continue the GAO as a protest resolving forum goes beyond the courts' holdings.

The Comptroller General's role in bid protests is succinctly stated in Brookfield Construction Co. v. Stewart, 234 F. Supp. 94 (1964), affirmed 339 F.2d 753 (1964), where the late Judge Holtzoff pointed out that in deciding a bid protest the Comptroller General is in essence issuing an

advance decision indicating how he would look upon payments in derogation thereof reflected in a public account which he would be called upon to certify. The Court added:

"\* \* \* As a practical matter, no disbursing officer would make any such payments in the face of this ruling. To be sure, it would still be open to the plaintiffs to bring suit against the United States in the Court of Claims for any amount claimed to be due under the agreement. It was proper and prudent, however, for the Architect of the Capitol, acting under the direction and supervision of the House Office Building Commission, to decline to enter into a contract under such circumstances, because it would be undesirable and inexpedient to take a step that might tie up a large Government building project in litigation. As a matter of fact, in light of the ruling of the Comptroller General the plaintiffs would be buying a lawsuit if the contract were awarded to them."

We do not direct an award in deciding a bid protest. We regard our function as determining whether a proper award may be or has been made in a given case. We may, where we find that a contract has been awarded in a manner which does not comport with applicable law, recommend a termination for convenience of the Government. We do not assert any authority to direct termination of a contract. In general the cooperation from the contracting agencies with respect to such recommendations is excellent. All of our recommendations are reported to this Committee and the Appropriations Committee and to the counterpart committees in the House of Representatives under the Legislative Reorganization Act of 1970. The contracting

agency is required to respond to the same committees. Under 31 U.S.C. 71, we also award bid preparation expenses to bidders who would have received contracts but for the arbitrary or capricious action of the contracting agency.

However, we do not concede that our decisions are purely advisory. Whether a decision is advisory depends on whether sanctions are available for enforcement. The sanction is to take exception to payments made under an improperly awarded contract. However, it can only be applied after the work is performed and payment made.

To give contracting officers an impression that our decisions are merely advisory does a disservice to the contracting parties as well as to the accountable officer who would be directly affected by an account exception. In Schoonmaker v. Resor, 445 F.2d 726 (1971) the Court of Appeals for the District of Columbia took pains to point out that a bid protest decision of the Comptroller General to which the contracting agency had acceded, although initially taking a contrary view, was not arbitrary or capricious. The clear inference is that our bid protest decision should be followed if it is not arbitrary or capricious. In support of this view, the Court continued:

"An accession by a contracting officer to the General Accounting Office, at least where the opinion as to which the accession is made is itself reasonable, may be in the public interest if for no other reason than that it eliminates the insufferable uncertainties faced by all parties where there is conflict between the General Accounting Officer [sic] and a procuring Agency."

The foregoing quote is inconsistent with the viewpoint that our decisions are merely advisory.

The same position is supported by a careful reading of the language of the Court of Claims in Reiner v. U.S., 163 Ct. Cl. 381 (1963), certiorari denied 377 U.S. 931. That case involved a determination by the Comptroller General that a contract award by the Department of the Army was null and void. In deference to the Comptroller General's decision, the contracting officer, even though he did not agree with that decision, terminated the contract for convenience. In response to plaintiff's contention that its contract had been breached, the Court stated (pages 390-391):

"Here, termination would have been invoked in deference to the Comptroller General's declaration that the contract should be cancelled. The contracting officer did not agree with that opinion, but it is the usual policy, if not the obligation, of the procuring departments to accommodate themselves to positions formally taken by the General Accounting Office with respect to competitive bidding. That Office, as we have pointed out, has special concern with, and supervision over, that aspect of procurement. It would be entirely justifiable for the contracting officer to follow the general policy of acceding to the views of the Accounting Office in this area even though he had another position on the particular issue of legality

or propriety. He would not be allowing the Comptroller General to dictate the termination of the contract but, rather, would be using termination as a means of minimizing a conflict with another arm of Government properly concerned with the contractual problem. It cannot be contrary to 'the best interests of the Government'-- the controlling standard of the termination clause-- to end a contract which the Comptroller General has branded as incorrectly advertised."

While the case does not state that the contracting officer was required to follow the Comptroller General's decision, it clearly states that doing so cannot be contrary to the Government's interest.

These cases and others indicate a reliance by the courts on the Comptroller General's determination with respect to a bid protest (see District Moving and Storage, Inc. v. Cyrus Vance, Secretary of State et al., Civil Action No. 77-992, District Court for D.C., July 5, 1977).

In Steinthal and Wheelabrator, which I mentioned, the Court, while specifically disclaiming any need or intent to determine the scope of GAO's bid protest jurisdiction, went on to indicate the desirability of including GAO in the process. In fact, it noted with disapprobation the lower court's failure to await or consider a GAO ruling on the matter. Schoonmaker and Steinthal (see page 1305) state that a GAO bid protest decision will be sustained unless the court finds it arbitrary or capricious. The courts have made clear that they do not regard themselves bound by our decisions (and we, of course,

have never contended that they should be). At the same time the courts clearly accord them greater deference than may be justified by the inherent value of a decision in a given case. This alone militates against a position which leads a contracting officer or his organization to conclude that he should regard our decision as merely advisory and may with impunity reject or ignore all or any part of it with which he may disagree.

The courts have obviously never contemplated that all or most bid protests should be subjected to judicial review. To do so would flood many courts with highly technical issues and impose unwarranted financial burdens on small protesters or those seeking relatively low priced contracts. Clearly, therefore, the courts must consider that the ultimate tribunal in the vast majority of bid protest cases will be the GAO, and the Wheelabrator case so implies. Can it be assumed that the courts give greater weight to GAO decisions than they consider would be appropriate for contracting officer to give? We think not.

#### IV. Provisions of Title VII

We understand that Title VII was included in S. 1264 at the recommendation of the Public Contract Section of the American Bar Association. To a large extent the title reflects our current formal procedures (see attachment) and practices.

However, the definitions of protest and executive agency would give us jurisdiction over Postal Service protests, which we do not presently assert since we do not certify the balances in Post Service accounts, and would remove from our jurisdiction protests involving procurements by the Government Printing Office, the Library of Congress, the District of Columbia and the courts. You may wish to consider changing the definition to include the latter.

There are also some differences between current practice and the provisions of Title VII. Section 702(b) of the title would permit award of a contract while a bid protest on the procurement is pending before the GAO only if authorized by the head of the contracting agency. Under section 601 this authority could apparently be delegated without limitation. The Commission on Government Procurement recommended (recommendation No. 16) that the authority be reposed at a level no lower than assistant secretary or equivalent. The Comptroller General was, of course, a party to the Commission recommendation and we recommend that section 702(b) be amended to conform to the Commission's recommendations.

The last sentence of section 702(c) would authorize the Comptroller General to declare that a contract should be terminated for the convenience of the Government. Currently, where it is considered appropriate, we "recommend" such terminations. This is consistent with the Commission's

recommendation No. 17 which states that "GAO should continue to recommend termination for convenience of the Government of improperly awarded contracts in appropriate circumstances." The record of compliance by the agencies is very good. Therefore, the practical result would not be different if section 702(b) were enacted. However, from a legal standpoint, the difference would be significant since the whole theory of enforcement through the means of account settlement would be changed to provide for direct termination authority. We think such a provision is not required in light of the cooperation obtained from the contracting agencies, our reporting recommendations to congressional committees under the Legislative Reorganization Act and the required responses by the contracting agencies, and our practice to award bid preparation expenses to parties who have been denied contracts arbitrarily or capriciously.

We believe that the bid protest function should be performed effectively but with minimum interference with the procurement process. We question the desirability of having an agency not a party to a contract "directing" an action so inherently a part of contract administration as termination for convenience. Therefore, we recommend that the last sentence of section 702(c) be deleted.

Section 703(b) would make the Comptroller General's decision on a bid protest binding on all interested parties including the executive agency or agencies involved. We assume the language was not intended to preclude judicial review for the non-governmental parties. Again, for the reasons already stated in our discussion of section 702(c) we think the provision would change the present underlying enforcement method and question the desirability of including that part of section 702(c) which speaks to the binding effect of bid protest decisions. As an alternative we suggest language requiring the executive agencies to give due regard to the decisions of the Comptroller General recognizing his authority to settle and adjust the accounts of the Government under 31 U.S.C. 71 and 74.

Section 703(c)(4) would permit the Comptroller General to authorize formal discovery proceedings and to issue subpoenas for the production of books and records and the attendance of witnesses for taking evidence.

We have requested subpoena authority in other legislation and for other purposes. In this situation, however, the purpose would apparently be to provide access to records to protesters or other interested parties which would not be available under the Freedom of Information Act. We have no difficulty in obtaining all of the information necessary to decide protest cases. It is true that in certain situations, parties may not

be able to obtain from the contracting agency all of the information they think desirable or necessary. However, in appropriate cases access may be obtained under the Freedom of Information Act. It has been our position that the right of access is a matter to be resolved between the party claiming access and the agency whose documents are involved pursuant to the act and its implementing regulations. We feel the present procedure is more desirable. Further, the section seems to contemplate a much more formal type of procedure including the testimony of witnesses. We have no such procedure today and its adoption would be contrary to the need recognized by the Commission on Government Procurement to further the prompt handling of disputes by maintaining "informality and flexibility" and to the desirability of "inexpensive, informal and expeditious resolution of protests" expressed in section 701. Therefore, we do not favor this provision.

We believe that the enactment of Title VII would give additional congressional recognition to the role of the Comptroller General in the bid protest area and hopefully put to rest the controversy between the Department of Justice and the GAO which has been going on for a number of years. We therefore favor enactment of Title VII with the modifications discussed. Our recommended version of Title VII is attached as an appendix to this statement.

Recommended Title VII  
(Bracketing shows deletions,  
underscoring additions)

Sec. 701. In accordance with the authority of the Budget and Accounting Act of 1921 (chapter 18, title III, section 304, 42 Stat. 24, 31 U.S.C. 44) and this title, protests shall be decided in the General Accounting Office. To the fullest extent possible, the Comptroller General shall provide for the inexpensive, informal, and expeditious resolution of protests.

JURISDICTION

Sec. 702. (a) The Comptroller General shall have authority to decide any protest submitted by an interested party in accordance with rules and regulations he shall issue pursuant to section 704.

(b) No contract shall be awarded after the contracting activity has received notice of a protest to the Comptroller General while the matter is pending before him: Provided, however, That the head of an executive agency may authorize the award of a contract notwithstanding such protest, upon a written finding that the interest of the United States will not permit awaiting the decision of the Comptroller General: And provided further, That the Comptroller is advised prior to the award of such finding. The power to authorize award while a protest is pending before the Comptroller General shall not be delegable below the assistant secretary level.

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(c) With respect to any solicitation, proposed award, or award of contract protested to him in accordance with this title, The Comptroller General is authorized to declare that such solicitation, proposed award, or award does not comport with law or regulation. [If award has been made prior to such declaration the Comptroller General may further declare that the contract shall be terminated for the convenience of the Government.]

#### PROCEEDINGS

Sec. 703. (a) Proceedings shall be informal to the fullest extent possible.

(b) Each decision of the Comptroller General shall be signed by him or his delegee and shall be given due regard by [shall be binding upon all interested parties including] the executive agency or agencies involved recognizing the authority of the Comptroller General to settle the accounts of the Government under 31 U.S.C. 71 and 74. A copy of the decision shall be furnished to the interested parties and the executive agency or agencies involved.

(c) (1) All decisions shall be rendered promptly, consistent with the need to develop a complete record, in accordance with regulations to be issued by the Comptroller General pursuant to section 704 of this title.

(2) There shall be no ex parte proceedings before the Comptroller General except that this section shall not be deemed to preclude informal contacts with the parties for procedural purposes.

(3) A conference shall be permitted before decision; however, no transcripts shall be required. Transcripts may be permitted at the Comptroller General's discretion or at the request of the interested party, provided the Comptroller General and each other interested party shall be furnished a copy. Costs of such transcripts and services shall be borne by the requesting party.

[(4) The Comptroller General shall, for good cause shown, authorize formal discovery proceedings and may sign and issue subpoenas requiring the production of books and records and attendance of witnesses for the taking of evidence. In case of refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of a United States district court, the court, upon application of the Comptroller General, shall have jurisdiction to issue the person an order requiring him to appear before the Comptroller General or his designee to produce the books and records, or to give testimony, or both. Any person who fails to obey the order of the court may be punished by the court as a contempt thereof.]

(d) The Comptroller General is authorized to dismiss any protest he determines to be frivolous or which, on its face, does not state a valid basis for protest.

(e) Where the Comptroller General has declared that solicitation, proposed award, or award of a contract does not comport with law or regulation, he may further declare the entitlement of an appropriate party to bid and proposal preparation costs. In such cases the Comptroller General may remand

the matter to the executive agency involved for an initial determination as to the amount of such costs. Declarations of entitlement to monetary awards shall be paid promptly by the executive agency concerned out of funds available for the purpose of the procurement or sale.

(f) The Comptroller General, where he deems appropriate, shall make recommendations for improving the procurement process.

#### GENERAL PROVISIONS

Sec. 704. The Comptroller General shall perform such acts, make such rules and regulations, and issue such orders, not inconsistent with this title, as may be necessary in the execution of the protest decision function. He may delegate his authority to other officers or employees of the General Accounting Office.

# rules and regulations

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each month.

## Title 4—Accounts

### CHAPTER I—GENERAL ACCOUNTING OFFICE

#### SUBCHAPTER A—GENERAL PROCEDURES

#### PART 20—BID PROTEST PROCEDURES

In deciding protests against procurement actions by agencies of the Federal Government, the General Accounting Office recognizes that the expeditious handling of bid protests is indispensable to the orderly process of Government procurement and to the protection of protesters and other parties. Detailed procedures providing for consideration of bid protests are necessary to insure equality of treatment for all parties. These bid protest procedures apply to both formally advertised and negotiated procurements and sales. They are intended to provide fair consideration of bid protests in a timely manner.

These procedures supersede the "Interim Bid Protest Procedures and Standards" promulgated on December 23, 1971, and effective as of February 7, 1972. The experience obtained under those procedures during the past 3 years provides the basis for the revisions made. These new procedures also reflect the requirements expected to be set forth in the regulations applicable to the various Federal contracting agencies. This approach is intended to provide a comprehensive regulatory scheme for processing bid protests.

Based on our experience with the Interim procedures, the requirement for a 5-day period for filing bid protests with the General Accounting Office should be changed. We are now establishing a 10-day period. Our experience also indicates that the requirement for issuing decisions within 20 days of receipt of all necessary information should be replaced and we are substituting a goal of 25 days.

Other changes include clarification of provisions dealing with bid protest conferences and the effect of judicial proceedings and the addition of a provision applicable to requests for reconsideration of bid protest decisions.

The procedures apply to bid protests received by the General Accounting Office on or after June 2, 1975.

Part 20, including the part heading, is revised as follows:

Sec.	
20.0	Definitions.
20.1	Filing of protest.
20.2	Time for filing.
20.3	Notice of protest, submission of agency report and time for submission of comments on report.
20.4	Withholding of award.
20.5	Furnishing of information on protests.

Sec.	
20.6	Time for submission of additional information.
20.7	Conference on protest.
20.8	Time for decision by Comptroller General.
20.9	Request for reconsideration.
20.10	Effect of judicial proceedings.

**AUTHORITY:** Sec. 311, 42 Stat. 25, as amended (31 U.S.C. 52). Interpret or apply sec. 305, 42 Stat. 24 (31 U.S.C. 71); sec. 304, 42 Stat. 24, as amended (31 U.S.C. 74).

#### § 20.0 Definitions.

(a) All "days" referred to in this part are deemed to be "working days" of the Federal Government. The term "file" or "submit" in all sections except § 20.2 and § 20.9(b) refers to the date of transmission.

(b) "Adverse agency action" is any action or inaction on the part of a contracting agency which is prejudicial to the position taken in a protest filed with an agency. It may include but is not limited to: a decision on the merits of the protest; a procurement action such as the award of a contract or the rejection of a bid despite the pendency of a protest; or contracting agency acquiescence in and active support of continued and substantial contract performance.

#### § 20.1 Filing of protest.

(a) An interested party may protest to the General Accounting Office the award or the proposed award of a formally advertised or negotiated contract of procurement or sale by or for an agency of the Federal Government whose accounts are subject to settlement by the General Accounting Office.

(b) Such protests must be in writing and addressed to the General Counsel, General Accounting Office, Washington, D.C. 20548. To expedite handling within the General Accounting Office, the address should include: "Attn: Bid Protest Control Unit."

(c) The initial protest filed with the General Accounting Office shall (1) include the name and address of the protester, (2) identify the contracting activity and the number of the solicitation and/or contract, (3) contain a statement of the grounds for protest, and (4) specifically request a ruling by the Comptroller General. A copy of the protest shall also be filed concurrently with the contracting officer and the communication to the General Accounting Office should so indicate. The grounds for protest filed with the General Accounting Office must be fully supported to the extent feasible. See § 20.2(d) with respect to time for filing any additional statement required in support of an initial protest.

(d) No formal briefs or other technical forms of pleading or motion are re-

quired, but a protest and other submissions should be concise, logically arranged, and direct.

#### § 20.2 Time for filing.

(a) Protesters are urged to seek resolution of their complaints initially with the contracting agency. If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action will be considered provided the initial protest to the agency was filed in accordance with the time limits prescribed in paragraph (b) of this section, unless the contracting agency imposes a more stringent time for filing, in which case the agency's time for filing will control. In any case, a protest will be considered if filed with the General Accounting Office within the time limits prescribed in paragraph (b).

(b) (1) Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals shall be filed prior to bid opening or the closing date for receipt of initial proposals. In the case of negotiated procurements, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated therein must be protested not later than the next closing date for receipt of proposals following the incorporation.

(2) In cases other than those covered in subparagraph (b) bid protests shall be filed not later than 10 days after the basis for protest is known or should have been known, whichever is earlier.

(3) The term "filed" as used in this section means receipt in the contracting agency or in the General Accounting Office as the case may be. Protesters are cautioned that protests should be transmitted or delivered in the manner which will assure earliest receipt. Except as provided in paragraph (c) of this section, any protest received in the General Accounting Office after the time limits prescribed in this section shall not be considered unless it was sent by registered or certified mail not later than the fifth day, or by mailgram not later than the third day, prior to the final date for filing a protest as specified herein. The only acceptable evidence to establish the date of mailing shall be the U.S. Postal Service postmark on the wrapper or on the original receipt from the U.S. Postal Service. The only acceptable evidence to establish the date of transmission by mailgram shall be the automatic date indication appearing on the mailgram.

If the postmark in the case of mail or the automatic date indication in the case of a mailgram is illegible, the protest shall be deemed to have been filed late.

(c) The Comptroller General, for good cause shown, or where he determines that a protest raises issues significant to procurement practices or procedures, may consider any protest which is not filed timely.

(d) If an additional statement in support of the initial protest is required by the General Accounting Office, one copy shall be mailed or otherwise furnished to the General Counsel, General Accounting Office, and a copy shall be mailed or otherwise furnished to the contracting officer, not later than 5 days after receipt of notification from the General Accounting Office of the need for such additional statement.

§ 20.3 Notice of protest, submission of agency report and time for filing of comments on report.

(a) The General Accounting Office shall notify the contracting agency by telephone and in writing within one day of the receipt of a protest, requesting the agency to give notice of the protest to the contractor if award has been made or, if no award has been made, to all bidders or proposers who appear to have a substantial and reasonable prospect of receiving an award if the protest is denied. The agency shall be requested to furnish in accordance with applicable procurement regulations copies of the protest documents to such parties with instructions to communicate further directly with the General Accounting Office.

(b) Material submitted by a protester will not be withheld from any interested party outside the Government or from any Government agency which may be involved in the protest except to the extent that the withholding of information is permitted or required by law or regulation. If the protester considers that the protest contains material which should be withheld, a statement advising of this fact must be affixed to the front page of the protest document and the allegedly proprietary information must be so identified wherever it appears.

(c) The Office of General Counsel shall request the agency to submit a complete report on the protest to the General Accounting Office as expeditiously as possible (generally within 25 working days) in accordance with applicable procurement regulations, and to furnish a copy of the report to the protester and other interested parties.

(d) Comments on the agency report shall be filed with the Office of General Counsel within 10 days after receipt of the report, with a copy to the agency office which furnished the report and to other interested parties. Any rebuttal a protester or interested parties may care to make shall be filed with the Office of General Counsel, General Accounting Office, within 5 days after receipt of the comments to which rebuttal is directed, with a copy to the agency office which furnished the report, the protester, and

interested parties, as the case may be. Unsolicited agency rebuttals shall be considered if filed within 5 days after receipt by the Agency of the comments to which rebuttal is directed.

(e) The failure of a protester or any interested party to comply with the time limits stated in this section may result in resolution of the protest without consideration of the comments untimely filed.

§ 20.4 Withholding of award.

When a protest has been filed before award the agency will not make an award prior to resolution of the protest except as provided in the applicable procurement regulations. In the event the agency determines that award is to be made during the pendency of a protest, the agency will notify the Comptroller General.

§ 20.5 Furnishing of information on protests.

The Office of General Counsel, General Accounting Office, shall, upon request, make available to any interested party information bearing on the substance of the protest which has been submitted by interested parties or agencies, except to the extent that withholding of information is permitted or required by law or regulation. Any comments thereon shall be submitted within a maximum of 10 days.

§ 20.6 Time for submission of additional information.

Any additional information requested by the Office of General Counsel, General Accounting Office, from the protester or interested parties shall be submitted no later than 5 days after the receipt of such request. If it is necessary to obtain additional information from the agency, the General Accounting Office will request that such information be furnished as expeditiously as possible.

§ 20.7 Conference.

(a) A conference on the merits of the protest with members of the Office of General Counsel, General Accounting Office, may be held at the request of the protester, any other interested party, or an agency official. Request for a conference should be made prior to the expiration of the time period allowed for filing comments on the agency report (see § 20.3(d)). Except in unusual circumstances, requests for a conference received after such time will not be honored.

(b) Conferences normally will be held prior to expiration of the period allowed for filing comments on the agency report. All interested parties shall be invited to attend the conference. Ordinarily, only one conference will be held on a bid protest.

(c) Any written comments to be submitted and as deemed appropriate by the General Accounting Office as a result of the conference must be received in the General Accounting Office within 5 days of the date on which the conference was held.

§ 20.8 Time for decision by Comptroller General.

The Comptroller General establishes a goal of 25 days for issuing a decision on a protest after receipt of all information submitted by all parties and the conclusion of any conference.

§ 20.9 Request for reconsideration.

(a) Reconsideration of a decision of the Comptroller General may be requested by the protester, any interested party who submitted comments during consideration of the protest, and any agency involved in the protest. The request for reconsideration shall contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.

(b) Request for reconsideration of a decision of the Comptroller General shall be filed not later than 10 days after the basis for reconsideration is known or should have been known, whichever is earlier. The term "filed" as used in this section means receipt in the General Accounting Office.

(c) A request for reconsideration shall be subject to these bid protest procedures consistent with the need for prompt resolution of the matter.

§ 20.10 Effect of judicial proceedings.

The Comptroller General may refuse to decide any protest where the matter involved is the subject of litigation before a court of competent jurisdiction or has been decided on the merits by such a court. The foregoing shall not apply where the court requests, expects, or otherwise expresses interest in the Comptroller General's decision.

[SEAL]

ELMER B. STAATS,  
Comptroller General  
of the United States.

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