Subpart 5133.1 - Protests

Parent topic: Part 5133 - Protests, Disputes, and Appeals

5133.102 General.

(a)(1) See 5104.802(f)(i)(2) for the requirement to notify DASA(P).(2) Contracting officers and their legal counsel are encouraged to use the Government Accountability Office's (GAO's) flexible alternative procedures, including alternative dispute resolution, when appropriate in defending a GAO protest.

(b)(i) The Assistant Secretary of the Army (Acquisition, Logistics and Technology) may make agency head determinations regarding actions described in FAR 33.102(b)(1) through (b)(3). See Appendix GG for further delegation.

(ii) Actions taken must be consistent with 10 U.S.C. 3308(b), 31 U.S.C. 3554, and FAR part 33.

(iii) For award of costs, Contracting officers must attempt to reach an agreement on the amounts the Government will pay to a protester or an interested party. If the Contracting officer and the protester or interested party do not reach agreement, persons exercising authority as cited in paragraph (b)(i) of this section may make the agency determination on the amount the Government will pay, at the request of the protester or an interested party.

(iv) Officials must consult legal counsel in exercising this authority.

5133.103 Protests to the agency.

(d)(3) As soon as practicable, the Contracting officer must consult with the legal office concerning the protest. Protests received at a level higher than the Contracting officer should be referred to the contracting office for resolution. Concurrent with this referral, the office that initially received the protest must inform the protester, identifying the contracting office that will handle the protest and giving the point of contact within that office.

(4) Handle requests for independent review of a protest at a level above the Contracting officer as follows:

(i) For Contracting officers under the jurisdiction of the United States Army Materiel Command (AMC), in accordance with AMC established procedures.

(ii) For Contracting officers under the jurisdiction of the United States Army Corps of Engineers (USACE), in accordance with the USACE established procedures.

(iii) For Contracting officers in all other contracting activities, in accordance with activity established procedures. If contracting personnel will conduct the independent review, the HCA will appoint a review authority. See Appendix GG for further delegation. The HCA or delegated designee, may also appoint individuals assigned outside contracting channels as a review authority (e.g., attorneys, chief of staff, installation commanders).

5133.103-90 Annual agency bid protest report.

HCAs must prepare an annual report of agency bid protests and send it to the addressee in AFARS 5101.290(b)(2)(ii)(B) not later than 30 calendar days following the end of the fiscal year. The analysis must include –

(a) The number of protests received during the reporting period, to include their disposition;

(b) An assessment of the causes of the most frequently recurring issues, including a description of all corrective actions taken to include the award of protest costs;

(c) The distribution of protests by subordinate contracting offices; and

(d) Any additional information considered necessary to a full understanding of the efficiency and effectiveness of the activity's agency protest procedures.

5133.104 Protests to GAO.

(a) *General procedure.* The Contracting officer must take the action required of the "agency" in FAR 33.104.

(3)(i)(*1*) Contracting offices must use the following reporting procedures; the SCO may require the contracting offices to send the report through the SCO's office:

(*i*) Contracting offices reporting to AMC must send the report directly to the addressee in AFARS 5101.290(b)(7).

(*ii*) Contracting offices reporting directly to the USACE must send the report directly to the following address:

U.S. Army Corps of Engineers

Attn: CECC-C

441 G St., N.W.

Washington, DC 20314-1000.

(*iii*) All other Army contracting offices must send the report via courier or express mail service to:

U.S. Legal Services Agency, ATTN: JALS-KFLD

Contract Litigation & Intellectual Property Division (KLIP)

9275 Gunston Road, Suite 2100

Fort Belvoir, VA 22060-5546.

(*iv*) The Contracting officer must send the report not later than 20 days after the GAO notifies the agency by telephone that a protest has been filed. If the GAO decides to use the express option and the Contracting officer concludes that the report cannot be furnished in time, he/she must notify the appropriate office in (*i*)-(*iii*) at once so that it may request an extension from GAO.

(*2*) Before forwarding the report to the GAO Comptroller General, the addressees in paragraphs (a)(3)(i)(*1*)(*i*)-(*iii*) of this section must review the report and recommend any changes required to ensure the report is accurate, complete, and legally sufficient.

(b) *Protests before award.* See Appendix GG.

(1)(A) The Contracting officer must prepare a determination and findings (D&F) for HCA approval when it is necessary to request authorization to award a contract notwithstanding a protest. This authority is non-delegable. The D&F must clearly address –

(*1*) Whether significant adverse consequences will necessarily occur if the stay is not overridden;

(*2*) Whether reasonable alternatives to the override exist that would adequately address the circumstances presented;

(*3*) How the potential costs of proceeding with the override, including the costs associated with the potential that GAO might sustain the protest, compare to the benefits associated with the approach being considered for addressing the agency's needs; and

(*4*) The impact of the override on competition and the integrity of the procurement system.

(B) A written notification to theOffice of the Deputy Assistant Secretary of the Army (Procurement) is required, no less than one day before any HCA override is approved. The Contracting officer shall send notification documentation as outlined in subparagraph (b)(1)(A) to the address listed at AFARS 5101.290(b)(2)(ii)(B). (See Override of Competition in Contracting Act (CICA) Stays: A Guidebook.

(C) Within three days after the contracting office receives notification of the protest, the HCAmay endorse the request for approval and electronically transmit the request and the D&F to the appropriate office in paragraphs (a)(3)(i)(*1*)(*i*)-(*iii*) of this section. That office shall immediately distribute the request and the D&F to the addressee in AFARS 5101.290(b)(1).

(c) *Protests after award.* See Appendix GG.

(2) Process the finding as required at paragraph (b) of this section. The D&F must clearly address the areas identified in paragraph (b)(1)(A). The HCA, on a non-delegable basis, must approve the D&F before the Contracting officer authorizes continuing performance. Furthermore, a written notification to the DASA(P) is required, no less than one day before any HCA override is granted. The Contracting officer shall send notification documentation as outlined in subparagraph (b)(1)(A) to the address listed at AFARS 5101.290(b)(2)(ii)(B). Process the request for approval as required in paragraph (b).

(g) *Notice to GAO*. The head of the contracting activity shall report to GAO as described at FAR 33.104(g). See Appendix GG for further delegation. Send the report to the addressee in AFARS 5101.290(b)(1) not later than 45 days after receipt of the recommendations.

5133.170 Briefing requirement for protested acquisitions valued at $1 billion or more.

5133.170-90 Procedures.

(a) Within 10 days of receipt of a protest, provide an initial, written notification of the protest via email to the Office of the DASA(P) at the address at AFARS 5101.290(b)(2)(ii)(B) and furnish a copy to the SCO, field attorney and trial attorney. The initial notification shall be in the form of a briefing and shall include the following items:

(1) Buying activity and Contracting officer with telephone number and email address.

(2) Protester and counsel.

(3) Protest number and date filed.

(4) Protest forum (GAO or Court of Federal Claims).

(5) Description of the protested acquisition, estimated dollar value and whether it is a pre- or post-award protest.

(6) Summary of protest allegations.

(7) Status of the stay or stop work order.

(8) Anticipated date of protest resolution.

(9) Any other information deemed appropriate.

(10) Attach a copy of the protest.

(b) After the Contracting officer formulates the agency response, he/she may provide more detailed information relating to the position that the agency will take before filing the agency report in the protest action.

(c) If required, the Contracting officer shall schedule a formal briefing on the protest with the DASA(P) or the Defense Pricing, Contracting, and Acquisition Policy subsequent to the submission of the follow-up information.

5133.190 Reporting and analysis of bid protests.

5133.190-1 Bid protest action report.

Within 15 calendar days following notification of resolution of a GAO protest, the Contracting officer must send a bid protest action report in the format in AFARS 5153.303-6 (double spaced between item numbers) to the following addressees:

(a) AMC contracting activities send the report to the addressee in AFARS 5101.290(b)(7).

(b) USACE contracting activities send the report to the addressee in AFARS 5133.104(a)(3)(i)(*1*)(*ii*).

(c) All other contracting activities send the report to the addressee in AFARS 5133.104(a)(3)(i)(*1*)(*iii*).

5133.190-2 Quarterly bid protest analysis report.

(a) AMC, USACE and the Contract and Fiscal Law Division, U.S. Army Legal Services Agency must prepare a quarterly bid protest analysis report for GAO protests using the format in AFARS 5153.303-7 (double space between item numbers) and send with the bid protest action reports to the addressee in AFARS 5101.290(b)(2)(ii)(B) not later than 30 calendar days following the end of the quarter. The analysis will include the number of protests in which a flexible alternative procedure was used, in accordance with 4 C.F.R. 21.10, and will also include an assessment of the causes of the most frequently recurring issues and recommendations for appropriate corrective action. Reconcile the numbers submitted with the most current data available from the GAO.

(b) The ODASA(P) will prepare a consolidated quarterly report not later than 45 calendar days following the end of each quarter.