May 13, 2016

Dear Mr. Kang:

On behalf of the American Bar Association (“ABA”) Section of Public Contract Law (“Section”), I am submitting comments on the proposed rule cited above (“Proposed Rule”). The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees include members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the ABA’s Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors.

1 Heather K. Weiner, a member of the Section’s Council, did not review these comments nor did she participate in the Section’s consideration of these comments. Ms. Weiner further abstained from the voting to approve and send this letter. Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Anthony Palladino, a member of the Section’s Council, also did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.

2 Government officials participate in the Section in a non-governmental capacity. These comments do not purport to reflect the views of any governmental agency, government official, or government attorney in his or her official capacity.
Governors of the ABA and, therefore, should not be construed as representing the policy of the ABA.³

I. INTRODUCTION

The Government Accountability Office (“GAO”) Proposed Rule proposes to revise 4 C.F.R. Part 21, pursuant to the Consolidated Appropriations Act for 2014, Public Law 113-76, § 1501, 128 Stat. 5 (Jan. 14, 2014), to “establish and operate an electronic filing and document dissemination system, ‘under which, in accordance with procedures prescribed by the Comptroller General -- (A) a person filing a protest under this subchapter may file the protest through electronic means; and (B) all documents and information required with respect to the protest may be disseminated and made available to the parties to the protest through electronic means.’” 81 Fed. Reg. at 22197. The Section agrees that both the Government and industry benefit from the creation of the Electronic Protest Docketing System (“EPDS”) for protest parties to file and receive documents, with the exception of protests containing classified information. This development is welcomed by the industry as a means to streamline the bid protest process. Although the GAO is not required by law to seek comments before issuing a final rule, the Section applauds the GAO for providing an opportunity for consideration of comments.

The Section believes that the following aspects of the Rule proposed by GAO raise concerns or may require further clarification:

(1) the filing fee of $350;⁴

(2) the necessity of redacting every document filed in connection with a protest;

(3) the requirement of providing all protest communications to the agency and other participating parties;

(4) GAO communications with the parties; and

(5) the rollout of the EPDS.

First, although the Proposed Rule does not include requirements relating to the filing fee, the preamble does briefly discuss it. That discussion, however, leaves many questions unanswered. For example, when is such a filing fee required? Once for a given procurement? Once for each protester?

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³ This letter is available in pdf format at http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html under the topics “Bid Protests.”

⁴ Although this is not part of the rule changes, because the fee will be provided in regulations separate from 4 C.F.R. Part 21, we address the fee herein as discussed in the Proposed Rule.
Second, the Section believes the next two changes identified above – redaction of documents and providing communications to all parties – are burdensome and unnecessary, as currently drafted. The proposed approach of filing a redacted version of every document filed in connection with a protest within five (5) days of the initial filing of the protected version, proposed Rule §21.4(b), is unwieldy and will significantly increase the cost to the parties and the administrative burden on GAO’s already over-taxed staff. Further, the requirement to provide copies of all “protest communications,” proposed Rule §21.3(a), appears overly broad, as many “protest communications” are not suitable for sharing with all parties. For example, protester and intervenor alike may want to have communications with the agency that are confidential communications not suitable for sharing with all of the parties.

Third, the Section requests further clarification regarding the mode of GAO communications with the parties upon implementation of the EPDS.

Finally, the Section is concerned about the potential for problems during the rollout of the EPDS, particularly given the tight protest timelines and the strict GAO timeliness rules.

For reasons discussed below, the Section recommends that the GAO amend the Proposed Rule to address the concerns discussed in these Comments.

II. COMMENTS

A. The Section Recommends that GAO Promulgate Guidelines Outlining When the Filing Fee is Required.

In the preamble of the Proposed Rule, the GAO states that it “anticipates requiring persons filing a protest to pay a fee to file a protest through EPDS, which . . . . will be the sole means for filing a bid protest at GAO.” 81 Fed. Reg. at 22197. Indeed, the Consolidated Appropriations Act for 2014 authorizes GAO to “require each person who files a protest to pay a fee to support the establishment and operation of the electronic system.” Pub. L. No. 113-76, § 1501, 128 Stat. 5, 434. Further, the Proposed Rule states that “GAO anticipates the bid protest filing fee will be $350.” Id. The Proposed Rule explains:

GAO derived the fee using actual costs GAO has incurred to develop the system, estimates of future costs for hosting and maintaining the system (adjusted for inflation), estimates of future annual bid protest filings as determined by considering historical filings of the past five fiscal years, and a recovery period for development costs of approximately six years. System establishment costs include payments made by GAO under an interagency agreement for development of the system, as well as GAO’s internal costs incurred for system development. Costs to maintain the system include estimated payments for post-development hosting and support of the electronic protest filing system, as well as estimates of GAO’s internal costs associated with maintaining the system after it has been deployed.
Id. As a result, it appears that the proposed $350 fee will remain in place for approximately six years, subject to a review “every two years to ensure that it is properly calibrated to recover the costs of establishing and maintaining the system.” Id.

The Proposed Rule nonetheless provides little guidance regarding the proposed filing fee, such as when such a filing fee is required. For example, the Proposed Rule does not discuss whether the fee is a one-time filing fee, i.e., required only for the initial filing, or whether the fee is assessed for each supplemental protest filing. Also, where there is a new protest after corrective action, the Proposed Rule does not discuss whether a party must pay an additional filing fee. Furthermore, the Proposed Rule does not address which party, in the situation where there are multiple protesters to a solicitation or award, pays the filing fee or if all parties pay the fee. Likewise, although the implication is clearly to the contrary, the Proposed Rule is silent on whether an intervenor in a protest must also pay a filing fee. To be fair, the Proposed Rule provides that “[a]dditional guidance regarding procedures for payment of the fee will be provided by GAO, separate from the regulations in 4 CFR part 21.” As such, the Section recommends that GAO publish this “[a]dditional guidance” publicly so that the Section, as well as others, may have the opportunity to review it and provide comments.


The GAO proposes to add a new paragraph (b) at 4 C.F.R. § 21.4 in the Proposed Rule, providing “that when parties file documents that are covered by a protective order, the parties must provide copies of the proposed redacted versions of the document to the other parties.” 81 Fed. Reg. at 22199. Additionally, the Proposed Rule provides “that the party that files the protected document must file in EPDS within 5 days[,] a final, agreed-to redacted version of the document.” Id. While the Section appreciates the GAO’s desire for a more transparent system, this proposed approach will not only be excessively burdensome on the parties and the GAO, but is also unnecessary and contrary to current practice at GAO.

The GAO is statutorily required to provide an inexpensive protest forum. See 31 U.S.C. § 3554(a)(1). Creating a rule that requires the parties to prepare an agreed-upon redacted version of all protected documents that are filed in connection with a protest within five days of the original filing would be overly burdensome. For example, often an agency produces thousands of pages of protected documents in its Agency Report in response to a protest. It is unlikely the agency has the resources simply to prepare redacted versions of those documents, much less negotiate redacted versions of them within five days. Although “the exhibits to the agency report or other documents may be proposed for redaction in their entirety,” the other parties to a protest may not agree with such an approach and challenge the proposed “redaction in the entirety.” Either way, the redactions of the Agency Report exhibits would be at issue. Even if they are not, the agency still may not have the resources to turn immediately to negotiating redactions to its legal memorandum or contracting officer statement.

Moreover, after the Agency Report is produced, neither the protester nor the intervenor has time to review such proposed redactions within a five-day period. As GAO knows,
comments and any supplemental protest grounds must be filed within 10 days of receipt of the Agency Report. A five-day deadline to process redactions during the same 10-day period for review of a potentially voluminous record, the drafting of comments, and identification of potential supplemental protest grounds is unduly burdensome and could disproportionately prejudice the protesting party.

Likewise, because the number of redacted documents filed with GAO would increase, the quantum of redaction disputes would likely increase by an order of magnitude, thereby distracting significant resources, including both the parties and the GAO, away from the task at hand: assessing the merits of the protest issues. For example, it is not out of the question that some counsel may use the new requirement to harass the opposing party or parties with redaction issues, thus tying up agency counsel, when the agency counsel should be focusing on preparing the agency report, or other counsel, when they are preparing comments and supplemental protests.

Furthermore, there is no need to redact every protest document. For example, parties frequently choose to forego redactions, particularly of more minor documents like those related to document production disputes, to save costs. The GAO’s decisions also are public records, and they are redacted for public use. There is no need to publish protest-specific redacted documents in the public domain, when the redacted decisions are available. These decisions include all of the information necessary to guide agencies and the public to GAO’s view of procurement policy issues.

Finally, such an approach appears likely to increase the risk of inadvertent disclosure of protected information. Often procurements involve protected information of third parties who are not parties to the protest, such as other offerors. Pursuant to the proposed approach, it would be left to the parties to the protest to protect the information of those third parties. In that regard, the parties to the protest may not have an appreciation for what a non-party considers proprietary. Indeed, a competitor could use this process to obtain the confidential information of his non-party competitors. Thus, the Section is concerned that the proposed process, particularly given the five-day deadline, would have inadequate safeguards against the release of protected material.

In short, the increased resources required to redact all documents within five days, both in terms of dollars and disruption, would significantly increase the costs associated with GAO protest process. This is directly inconsistent with GAO’s statutory mandate to provide for an inexpensive protest forum. See 31 U.S.C. § 3554(a)(1); see also 81 Fed. Reg. at 22199.

Accordingly, the Section recommends that GAO revise this aspect of the Proposed Rule to require the preparation of redacted versions of protest pleadings only, specifically protests and supplemental protests, agency legal memorandum and contacting officer statements of fact, and comments. Other documents, such as emails, motions, document production disputes, agency record documents, and exhibits to pleadings need only be identified as protected or public. Furthermore, we believe that five days is not a feasible deadline; the Section therefore
recommends that GAO revise the Proposed Rule to permit the parties up until 15 days after the close of the record to file an agreed-upon redacted version of the protest filings referenced above.

C. The Requirement for Disclosure of “All Communications” Is Overly Broad, and Should be Revised.

In addition, the Proposed Rule proposes to revise 4 C.F.R. § 21.3(a) to require “that parties to a protest must provide copies of all communications with the agency or other parties to the protest to the other participating parties either through EPDS or email.” 81 Fed. Reg. at 22198. As written, this Proposed Rule is overly broad, would be burdensome on all parties and would seriously undermine the parties’ ability to prosecute or defend a protest. Although the Section appreciates the GAO’s aspiration for a more transparent protest process, there are many “protest communications” that are not suitable for sharing with all parties. For example, often the intervenor and the Government have discussions related to the defense of a protest that are privileged, joint-defense communications not appropriate for sharing with all parties. Likewise, the protester and the agency may have similar confidential communications concerning the possibility of corrective action or settlement. Indeed, although motions and pleadings made to a court are often posted publicly in systems like PACER, the parties are not required to share “all communications” related to litigation with their adversaries. Accordingly, the Section strongly recommends that GAO revise the Proposed Rule from requiring sharing of “all communications” to sharing “all protest filings and all other communications with GAO” in a protest. The rule would then read that all protest filings must be provided to all parties either through EPDS or otherwise.

D. Communications with GAO

The Proposed Rule is unclear as to how GAO proposes to communicate with the parties after the rollout of the EPDS. In particular, it is not clear whether GAO intends to communicate with the parties through email or the EPDS for protest docketing information, scheduling orders, rulings on motions, and similar communications. The Section requests that GAO clarify the mode of communication it plans to use with the parties to a protest.

E. Rollout of the Electronic Protest Docketing System

The Proposed Rule appears to contemplate the issuance of the Final Rule and the immediate implementation of the EPDS. Given the tight protest timelines and the strict GAO timeliness rules, the Section recommends that GAO pursue a staged rollout to avoid the potential adverse impact on protesters that are unfamiliar with the system, yet have time critical protest submissions that they must get filed. Technical glitches and potential “load” issues are not unforeseeable. The Section recommends, therefore, that GAO consider operating the current system and the EPDS in parallel for some period of time while practitioners (and non-practitioners) develop a level of comfort with the system and from the procedural and technical perspective, “all of the kinks get worked out.” This could be accomplished by leaving the current rules in place for some overlapping period.
II. CONCLUSION

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

David G. Ehrhart
Chair, Section of Public Contract Law

cc:
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