



Department of Energy
Acquisition Regulation

No. 95-13
Date November 15, 1995

ACQUISITION LETTER

AUTHORITY

This Acquisition Letter (AL) is issued by the Procurement Executive pursuant to a delegation from the Secretary and under the authority of the Department of Energy Acquisition Regulation (DEAR) subsections 901.301-70 and 901-301.71.

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CONTENTS

CITATION

DEAR 933.104
DEAR 933.106
DEAR 952.233-4

TITLE

Protests to GAO
Solicitation Provisions
Protest File

- I. **Purpose.** This AL is to inform Heads of Contracting Activity (HCA) concerning implementation of procedures for providing access to protest files by actual or prospective offerors after a protest has been filed with the General Accounting Office (GAO).
- II. **Background.** Section 1065 of the Federal Acquisition Streamlining Act of 1994, Public Law 103-355, amended the Federal Property and Administrative Services Act of 1949 to require agencies to provide actual or prospective offerors with reasonable access to a protest file upon request after a GAO protest has been filed. FAR 33.104(a)(3) was revised by FAC 90-32 to define the contents of the protest file and to require that access to the file be provided within a reasonable time after the agency report on the protest is submitted to the GAO.
- III. **Guidance.** The attached procedures should be utilized in the event of a GAO protest in which an actual or prospective offeror requests that a protest file be established. In order to provide notice to offerors about the availability of the protest file and the fact that their submissions may be included in the protest file, a new solicitation clause has been created. DEAR 952.233-4. Contracting Officers shall include the new clause in all new or amended solicitations.
- IV. **Effective Date.** This Acquisition Letter is effective immediately. All protests filed at GAO on or after October 1, 1995 will be handled in accordance with the new procedures.
- V. **Expiration Date.** This Acquisition Letter will remain in effect until superseded or canceled.

**PROCEDURES FOR CREATING AND PROVIDING REASONABLE ACCESS TO PROTEST FILES
IN GAO PROTESTS IN ACCORDANCE WITH
FAR 33.104(a)(3)**

I. BACKGROUND.

The Federal Acquisition Streamlining Act of 1995 requires that agencies make a Protest File available to actual or prospective offerors after a procurement has been protested to the General Accounting Office (GAO). The goal of this provision is to avoid protests by permitting potential protesters to review the information they would hope to receive through a protest and to enable them to make more informed decisions about whether to file a protest. FAR 33.104(a)(3) describes the documents to be included in the Protest File. The following procedures will assist the contracting officer in complying with the Protest File access requirements. Any questions concerning release of particular documents or application of these procedures should be referred to the DOE attorney who is representing DOE in the GAO protest, because these requirements are interrelated with the defense of bid protests.

II. ESTABLISHMENT OF A PROTEST FILE.

A Protest File need not be created until it is requested by an actual or prospective offeror. Requests from prospective offerors should be honored only where a protest has been filed prior to the date and time set for receipt of proposals or offers. Depending on the need to evaluate and possibly redact documents, the protest file should be prepared between three days and two weeks after (a) the agency report is filed with the GAO, or (b) the first request for access to the protest file is received by the Department, whichever is later. This delay permits a party to claim material contained in the Agency Report should not be made public, in which case the material should not be included in the Protest File until resolved by the parties or GAO. A new solicitation provision (Attachment 2) notifies all actual or prospective offerors that they have a right to access to the Protest File in accordance with FAR 33.104(a)(3) and informs them that documents submitted in their offer or proposal may be released as part of the Protest File without further notice to the offeror unless the material contains restrictive markings.

III. CONTENTS OF PROTEST FILE.

The Protest File is to consist of the documents provided in the Agency Report, except for the documents listed at FAR 33.104(a)(3)(iii)(B) - (D). The Protest File shall be redacted as described below in order to protect proprietary information and other information that DOE should or must withhold.

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Attachment 1

attorney representing DOE in the protest. Original documents should not be included in the Protest File. After a protest is decided, the Protest File should be maintained with the file copy of the Agency Report in case there are post-protest requests under the Freedom of Information Act for the Protest File.

Counsel for an actual or prospective offeror are also permitted to view the Protest File either in place of or in addition to such a qualified offeror. In order to gain such access the attorney must (a) accompany the actual or prospective offeror, with the qualified offeror orally confirming the attorney's representation; (b) provide a letter from a such a qualified offeror confirming the attorney's representation; (c) provide a letter representing he or she is acting on behalf of an actual or prospective offeror with a copy to the client; or (d) provide any other representation or documentation satisfying the contracting officer that the attorney represents an actual or prospective offeror. The contracting officer should use the procedures for providing copies of material in response to a Freedom of Information Act request in allowing actual or prospective offerors to copy any portion or all of the Protest File.

Where a Freedom of Information request for a copy of all or any portion of the Protest file is submitted by an entity other than an actual or prospective offeror, the Department will follow its Freedom of Information Act regulations, 10 CFR 1004.

I. Revise DEAR 933.106 to add the following sentence:

The contracting officer shall include the provision at 952.233-4 in solicitations above the simplified acquisition threshold.

II. ADD DEAR 952.233-4

Contracting officers shall include the following clause in solicitations in accordance with 933.106.

NOTICE OF PROTEST FILE AVAILABILITY

- (a) If a protest of this procurement is filed with the General Accounting Office (GAO) in accordance with 4 C.F.R. Part 21, any actual or prospective offeror may request the Department of Energy to provide it with reasonable access to the protest file pursuant to FAR 33.104(a)(3)(ii), implementing section 1065 of Pub.L. 103-355. Such request must be in writing and addressed to the Contracting Officer for this procurement.
- (b) Any offeror who submits information or documents to the Department for the purpose of competing in this procurement is hereby notified that information or documents it submits may be included in the protest file that will be available to actual or prospective offerors in accordance with the requirements of FAR 33.104(a)(3)(ii). The Department will be required to make such documents available unless they are exempt from disclosure pursuant to the Freedom of Information Act. Therefore, offerors should mark any documents as to which they would assert that an exemption applies. See 10 CFR 1004.