

NIH POLICY MANUAL

6033-1 Contracting Officer's Statement of Facts and Circumstances in the Matter of a Protest to the Government Accountability Office (GAO)

Issuing Office: OM/OALM/OAMP/DAPE 301-496-6014

Release Date: 8/21/2008

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1. **Explanation of Material Transmitted:** This NIH Manual Chapter outlines a suggested format and content of a Contracting Officer's Statement of Facts and Circumstances in the Matter of a Protest to GAO, and provides a sample protest review and approval route slip. This Chapter has been updated to be consistent with current HHSAR requirements and to include required sections on Records Retention and Management Controls.

2. **Filing Instructions:**

Remove: NIH Manual Chapter 6033-1, Contracting Officer's Statement of Facts and Circumstances in the Matter of a Protest, dated 9/10/96

Insert: NIH Manual Chapter 6033-1, Contracting Officer's Statement of Facts and Circumstances in the Matter of a Protest, dated 8/21/2008

PLEASE NOTE: For information on:

- Content of this chapter, contact the issuing office listed above.
- NIH Manual System, contact the Division of Management Support, Office of Management Assessment, OM, on 301-496-2832
- On-line information, enter this URL:
<http://www1.od.nih.gov/oma/manualchapters/>

A. Purpose:

This Manual Issuance suggests format and content of the "Contracting Officer's (CO's) Statement of Facts and Circumstances in the Matter of a Protest to GAO," and provides a Sample Protest Review and Approval Routeslip (Appendix 1).

B. Background:

FAR Part 33 and HHSAR Part 333 prescribe overall procedures for the handling of protests. Specifically, FAR Subpart 33.104(a)(3) and HHSAR Subpart 333.104(a)(3) set forth the requirements for preparation of the “CO’s Statement of Facts and Circumstances” when a protest, before or after award, has been lodged with the Government Accountability Office (GAO).

C. References:

1. FAR 33.104 – Protests to GAO
2. HHSAR 333.104 - Protests to GAO
3. NIH Manual Chapter 6033-2, Stay Provisions for Protests
4. NIH Manual Chapter 1743, Keeping and Destroying Records

D. Procedures:

To assist COs in writing the “CO’s Statement of Facts and Circumstances in the Matter of a Protest to GAO,” a recommended format, indicating the information to be supplied, is provided in Appendix 2. The CO shall prepare protest files in accordance with guidance provided in HHSAR 333.104. Each file should contain a Table of Contents, listing the enclosed documentation. Files should be assembled in accordance with HHSAR 333.104(a)(3)(O). Documentation considered proprietary, confidential, or source-selection sensitive, as well as other information whose release could result in a competitive advantage to one or more offerors, shall be identified as protected information. The GAO may issue a protective order controlling the treatment of the protected information.

The submission of protests files shall be as follows (See also Section E. Records Retention and Disposal for all records management schedules):

Four (4) copies of the complete protest file are to be sent directly to the Departmental Protest Control Officer (DPCO). Additionally, one (1) copy shall be provided to the NIH Protest Control Officer (PCO) at the following address:

Division of Acquisition Policy & Evaluation,
OAMP/OALM/OM/OD/NIH/HHS
6100 Executive Blvd., Room 6C01
Rockville, MD 20852

The DPCO function resides in the Office of the General Counsel – General Law Division (OGC-GLD). OGC-GLD will coordinate file dissemination to the GAO. The four (4) copies shall be addressed to:

Office of the General Counsel – General Law Division
Departmental Protest Control Officer
200 Independence Avenue, SW
Room 713-F
Washington, DC 20201
Phone: 202-619-0150

The sets should be marked “Immediate Action – GAO Protest B – (insert applicable case number).”

Protest files containing the documentation specified in FAR Subpart 33.104(a)(3) and HHSAR Subpart 333.104(a)(3), with the exception of the CO’s Statement of Facts and Circumstances, are due to OGC-GLD and the NIH PCO within five (5) calendar days from receipt of the protest with the GAO unless an alternative arrangement has been reached with OGC-GLD. The CO’s Statement of Facts and Circumstances is due fourteen (14) calendar days from receipt of the protest. OGC-GLD will submit this material, plus the Agency’s protest report, to the GAO within 30 calendar days as prescribed in FAR Subpart 33.104(a)(3)(i)..

E. Records Retention and Disposal

Records Retention and Disposal: All records (e-mail and non-e-mail) pertaining to this chapter must be retained and disposed of under the authority of [NIH Manual Chapter 1743](#), "Keeping and Destroying Records, Appendix 1, *NIH Records Control Schedule*, Section 2600 Procurement, Property and Supply Management, Item 2600-A-4 Routine Procurement Files and all other items in this section that apply.

NIH e-mail messages. NIH e-mail messages (messages, including attachments, that are created on NIH computer systems or transmitted over NIH networks) that are evidence of the activities of the agency or have informational value are considered Federal records. *These records must be maintained in accordance with current NIH Records Management guidelines. Contact your IC Records Officer for additional information.*

All e-mail messages are considered Government property, and if requested for a legitimate Government purpose, must be provided to the requester. Employees' supervisors, the NIH staff conducting official reviews or investigations, and the Office of the Inspector General may request access to or copies of the e-mail messages.

E-mail messages must also be provided to the Congressional Oversight Committees, if requested, and are subject to the Freedom of Information Act requests. Since most e-mail systems have back-up files that are retained for significant periods of time, e-mail messages and attachments are likely to be retrievable from a back-up file after they have been deleted from an individual's computer. The back-up files are subject to the same requests as the original messages.

Litigation Hold: In the event litigation is reasonably anticipated, all records relevant to the subject of the litigation (or potential litigation) must be retained. This includes a GAO protest. A litigation hold for described documents or Electronically Stored Information (ESI) overrides any records retention schedule or any other agency policy that may otherwise call for the transfer, disposal, or destruction of the relevant documents or ESI until the litigation hold has been removed.

F. Management Controls: This Manual Issuance provides a suggested format and content of the “Contracting Officer’s (CO’s) Statement of Facts and Circumstances in the Matter of a Protest to GAO”, as well as a Sample Protest Review and Approval Routeslip (Appendix 1).

1. **The Office Responsible for Reviewing Management Controls Relative to this Chapter:** The Division of Acquisition Policy and Evaluation (DAPE), Office of Acquisition Management and Policy (OAMP).
2. **Frequency of Reviews:** Ongoing
3. **Method of Review:** The NIH PCO reviews the format to ensure that it provides the necessary information to assist OGC-GLD in resolving GAO protest. Reviews are conducted in accordance with the FAR, the HHSAR, the NIH Manual Chapters, and other applicable policies and guidance.
4. **Review Reports:** OAMP sends review of suggested format to the appropriate Director, Office of Acquisition and Logistics Management (OALM), for either immediate corrective action or remedial action within 30 days.

Appendix 1. Protest Review and Route Slip:

CONTRACTING OFFICER
(IDENTIFY OFFICE OF
ACQUISITIONS)

DATE/ADDRESS/PHONE

CONTRACTING OFFICER'S SUPERVISOR
(IDENTIFY OFFICE OF
ACQUISITIONS)

DATE/ADDRESS/PHONE

DIRECTOR
(IDENTIFY OFFICE OF
ACQUISITIONS)

DATE/ADDRESS/PHONE

SHERLEY M. MIZZELL
NIH PCO, DAPE, OAMP

/6100/6C01/301-496-6014
DATE/ADDRESS/PHONE

Appendix 2. Recommended Format for Contracting Officer's Statement of Facts and Circumstances in the Matter of a Protest to GAO:

GAO CASE B - _____

1. Background

State briefly the overall purpose of the acquisition and provide a brief history of any technical/administrative aspect relevant to the protest. Include an estimate of the contract value.

2. Chronology of Events

List the events in chronological order leading up to and including the protest. This section may include, as applicable: Acquisition Plan (AP) receipt date; date of FedBizOpps posting; Solicitation/IFB release date; proposal/bid due date; date of competitive range determination; date negotiations began and were concluded; date of source selection determination; anticipated/actual award date; dates of debriefing and the date the protest was received. Explain at which point in the acquisition cycle the protest was received. Discuss any aspects of these events, such as offeror/bidder responsiveness or responsibility issues, number of proposals/bids received, bid submission and bid opening information, competitive range issues, competitive range determination, negotiation issues and source selection determination which are relevant to understanding the protest.

3. Statement of Facts and Circumstances

Discuss individually the allegations made by the protestor and respond individually to each allegation with the rationale, both favorable and unfavorable, supporting the CO's position. Separate the allegations into technical/business/administrative allegations if appropriate. Provide any additional evidence or documentation deemed necessary to determine the validity of the protest.

4. Summary of Recommendations and Conclusions

Summarize your recommendations to support the position taken. Do not repeat each individual allegation listed in paragraph 3 above.