

NIH POLICY MANUAL

6033-2 Stay Provisions for Protests

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

Release Date: 8/21/2008

1. Explanation of Material Transmitted: This NIH Manual Chapter outlines the circumstances in which a contract may be awarded or performance continued, notwithstanding a protest made by an interested party to the Government Accountability Office (GAO) or to the agency. This Chapter has been updated to be consistent with current HHSAR and FAR requirements and to include required sections on Records Retention and Management Controls.

2. Filing Instructions:

Remove: NIH Manual Chapter 6033-2/26033-2, dated 11/15/96

Insert: NIH Manual Chapter 6033-2, 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/>
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A. Purpose:

This NIH Manual Chapter provides guidance on implementing the "stay" provisions of the Competition in Contracting Act (CICA) of 1984 and the Federal Acquisition Streamlining Act (FASA) of 1994, which provide for suspension of award or performance while a protest is pending at the Government Accountability Office (GAO) or with the agency.

B. Background:

1. The CICA allows an agency to award a contract while a protest filed directly with GAO is pending or to continue performance notwithstanding a protest when, in either situation, the Head of the Contracting Activity (HCA)(not delegable) makes a determination in support of the contracting officer's recommendation. FASA and Executive Order 12979, Agency Procurement Protests, established similar requirements for preaward and postaward stay provisions in the case of protests filed directly with the agency.
2. FAR 33.103(f), Protests to the Agency, sets forth the circumstances when award may be made or contract performance continued notwithstanding a protest lodged with the agency. FAR 33.104(b) and (c) set forth the circumstances when award may be made or contract performance continued notwithstanding a protest lodged with the GAO.
3. CICA stay provisions apply in instances when the agency receives notice of a protest from the GAO within ten calendar days after contract award or within five calendar days, whichever is later, after a debriefing date offered to the protester for any debriefing that is required by FAR 15.505 or 15.506, whichever is later.
4. In accordance with HHSAR 333.104(b)(1) and (c)(2), the determination to award a contract or continue performance notwithstanding a GAO protest shall be executed by the HCA (not delegable) and approved by the Deputy Assistant Secretary for Acquisition Management and Policy (DASAMP), OS, DHHS. For protests filed directly with the agency, the approving official is the HCA.

C. References:

1. Competition in Contracting Act (CICA) of 1984 - Public Law 98-369
2. Federal Acquisition Streamlining Act (FASA) of 1994 - Public Law 103-355
3. Executive Order 12979, Agency Procurement Protests, October 26, 1995
4. FAR 33.1, Protests
5. HHSAR 333.1, Protests
6. FAR 15.505, Preaward Debriefings of Offerors
7. FAR 15.506, Postaward Debriefings of Offerors
8. NIH Manual Chapter [6033-1](#), Contracting Officer's Statement of Facts and Circumstances in the Matter of a Protest to the Government Accountability Office (GAO)
9. NIH Manual Chapter 1743, Keeping and Destroying Records

D. Procedures:

1. Written Determination and Findings (D&F)

In order to make a contract award or continue contract performance when a protest filed directly with the agency or GAO is pending, the contracting officer (CO) shall prepare and sign a D&F, setting forth the reasons why an award should be made or contract performance continued. See Item 2. below and [Appendix 1](#) for guidance regarding document routing and approval.

a. Protests to GAO

If the CO has determined that the criteria specified below applies, the CO shall prepare a D&F providing background information necessary to understand the acquisition, grounds of the protest, and a determination for the decision to proceed with award, or to continue contract performance notwithstanding the protest.

(1) Protests Before Award [See FAR 33.104(b)(1)(i) and (ii)]

State in the determination the: (a) urgent and compelling circumstances which significantly affect the interest of the United States that will not permit awaiting the decision of GAO, and (b) that award is likely to occur within 30 calendar days of the written finding (this may be estimated from projected award dates or acquisition plan milestone dates). See [Appendix 2](#).

(2) Protests After Award [See FAR 33.104(c)(1) and (c)(2)(i) or (ii)]

In the case of a protest filed with the GAO after award, the determination must include a finding that: (a) contract performance will be in the best interests of the United States, or (b) urgent and compelling circumstances that significantly affect the interest of the United States will not permit waiting for the GAO's decision.

If the situation warrants a finding supportive of (a) above, list the reasons why continuation of performance is in the best interests of the United States. Provide a clear justification why a break in performance would be detrimental to the Government's best interests. Cite specifics, if possible. Provide a clear justification as to why these circumstances will not permit waiting for the decision of the GAO. The GAO will issue a protest decision within 100 calendar days from the date of filing of the protest with the GAO. See [Appendix 3](#).

b. Protests to the Agency

As with GAO protests, the CO must determine that circumstances warrant proceeding with award or continuation of performance, justifying such determination in writing and providing background information necessary to understand the acquisition.

(1) Protests Before Award [See FAR 33.103(f)(1)]

State in the determination (a) urgent and compelling circumstances necessitating award, or (b) that award is in the best interest of the Government.

(2) Protests After Award [See FAR 33.103(f)(3)]

Continuation of performance must be justified by a written D&F on the basis of urgent and compelling reasons, or that such continuation would be in the best interest of the Government.

2. Routing and Approval of Written Determination and Findings (D&F)

- a. The CICA allows an agency upon receipt of a GAO protest to make a contract award or continue performance provided that these determinations are authorized by the HCA. HHSAR 333.104(b)(1) and (c)(2) requires that this determination be executed by the HCA. This authority is not redelegable. In addition, the HHSAR requires that the Deputy Assistant Secretary for Acquisition Management and Policy (DASAMP), OS, DHHS, approve the written determination to make an award or continue performance.
- b. Executive Order 12979, Agency Procurement Protests, which establishes policy on agency procurement protests, allows the CO to make a contract award or continue performance provided that the CO's determination is approved at a level above the CO or by another official pursuant to agency procedures. For protests received prior to award, the DHHS procedures have vested this authority in the contracting officer after obtaining the concurrence of the contracting activity's protest control officer and the Office of General Counsel – General Law Division (OGC-GLD). For protests received after award, the DHHS procedures have vested this authority in the HCA. The CO's prepared and signed determination shall be routed through the IC's Director, Office of Acquisitions and the NIH Protest Control Officer (PCO) to the HCA for approval.
- c. In the case of GAO protests, a finding prepared and signed by the CO shall be routed through the IC's Director, Office of Acquisitions, the NIH PCO and the HCA along with a written request for approval (determination) to make an award or continue performance, to the DASAMP, OS, DHHS. The written request for approval must contain all relevant documentation as attachments to the request. This request will be signed by the HCA with an approval line for the DASAMP, OS, DHHS. These documents, consisting of an original plus one copy, will be forwarded by the NIH PCO to OGC-GLD. Should OGC-GLD concur, it will forward the request to DASAMP, OS, DHHS for approval.

- d. If the request to make an award or continue performance notwithstanding the protest is approved by the DASAMP, OGC-GLD shall notify GAO. Whether the request is approved or not, OGC-GLD shall notify the NIH PCO of the decision, who in turn shall immediately notify the CO.

If the request is approved, the CO can proceed with the award or continue with contract performance upon receipt of notification.

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 Chapter outlines the circumstances in which a contract may be awarded or performance continued, notwithstanding a protest made by an interested party to the GAO or to the agency.

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 Board conducts reviews and uses them to ensure that the procedures followed are in compliance with the law and regulations. 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 Approval Route Slip (to be used for agency protest received after award as well as for GAO protest):

CONTRACTING OFFICER (IDENTIFY OFFICE OF ACQUISITIONS)	DATE	ADDRESS/PHONE
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CONTRACTING OFFICER'S SUPERVISOR (IDENTIFY OFFICE OF ACQUISITIONS)	DATE	ADDRESS/PHONE
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DIRECTOR (IDENTIFY OFFICE OF ACQUISITIONS)	DATE	ADDRESS/PHONE
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Sherley Mizzell NIH PCO, DAPE, OAMP	DATE	<u>6100/6C01</u> <u>496-6014</u> ADDRESS/PHONE
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Diane J. Frasier HEAD OF CONTRACTING ACTIVITY AND DIRECTOR, OFFICE OF ACQUISITION AND LOGISTICS MANAGEMENT, OM/NIH	DATE	<u>6100/6D01C</u> <u>496-4422</u> ADDRESS/PHONE
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FOR GAO PROTESTS INCLUDE

Martin J. Brown DEPUTY ASSISTANT SECRETARY FOR ACQUISITION MANAGEMENT AND POLICY, OS, DHHS	DATE	<u>HHH/328E</u> <u>(202) 690-8554</u> ADDRESS/PHONE
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Appendix 2. Protest Filed with the GAO Before Award:

DATE:

TO: Martin J. Brown
Deputy Assistant Secretary for Acquisition Management and Policy

FROM: Head of the Contracting Activity and Director, Office of Acquisition and Logistics Management, OM, NIH

SUBJECT: Protest before Award, (Name of Protester)

Solicitation _____

Entitled " _____ "

(GAO Protest No. B - _____)

I concur in the contracting officer's determination and findings (attached) to proceed with award of the subject solicitation, notwithstanding the protest filed with the Government Accountability Office (GAO). In accordance with FAR 33.104(b)(1)(i) and (ii), urgent and compelling circumstances which significantly affect the interests of the United States will not permit awaiting the decision of the GAO and award is likely to occur within 30 days of the contracting officer's written finding.

Delay in award would (e.g., ... seriously jeopardize the Institute's program, which is a major part of the National Institutes of Health's response to the National AIDS epidemic.)

Diane J. Frasier

Attachment

APPROVED:

Martin J. Brown
Deputy Assistant Secretary
for Acquisition Management and Policy

Date

Appendix 3. Protest Filed with the GAO After Award:

DATE:

TO: Martin J. Brown
Deputy Assistant Secretary for Acquisition Management and Policy

FROM: Head of the Contracting Activity and Director, Office of Acquisition and Logistics Management, OM, NIH

SUBJECT: Protest after Award, (Name of Protester)

RFP _____

Entitled " _____ "

(GAO Protest No. B - _____)

I concur in the contracting officer's determination as stated in the attached Determination and Findings to continue with performance notwithstanding a protest filed with the Government Accountability Office (GAO). In accordance with FAR 33.104(c)(2), (complete as applicable: (i) contract performance will be in the best interests of the United States; or (ii) urgent and compelling circumstances, etc.) The GAO notified OGC-GLD of (Name of Protester) protest on (Date), subsequent to the award of the contract to _____.

Example of basis for continuance of performance:

(Inherent to this requirement is the maintenance and inoculation of animals. Some of the animals have been used to produce antibodies for long periods of time and are irreplaceable. Any delays of this work would seriously compromise ongoing studies at the NIH and cause major disruptions in ongoing research programs.)

For the reasons stated herein and in the attachment supporting this memorandum, it is my recommendation that performance of this contract be permitted to continue.

Diane J. Frasier

Attachment

APPROVED:

Martin J. Brown
Deputy Assistant Secretary for
Acquisition Management and Policy

Date