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**VIA U.P.S. OVERNIGHT DELIVERY
AND ELECTRONIC MAIL**

John M. Melody, Esq.
Assistant General Counsel
General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

**Re: U.S. General Accounting Office Proposed Rule: Bid Protest
Regulations, 67 Fed. Reg. 61542 (Oct. 1, 2002)**

Dear Mr. Melody:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section's governing Council and substantive committees contain members representing these three segments to ensure that all points of view are considered. In this manner, 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 Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of

2002-2003

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Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.¹

The Section generally supports clarification of the rules of the U.S. General Accounting Office ("GAO") in each of the areas referenced in the Proposed Rule. See 67 Fed. Reg. 61542 (Oct. 1, 2002). The Section requests that the GAO consider the following points:

1. The Filing of Documents by Facsimile and Electronic Means.

The Section urges the GAO to reinstate some means for the hand-delivery of filings. Currently, initial protests must be filed by facsimile or by certain overnight delivery services (Federal Express, UPS, and Airborne Express). These methods of filing can place heavy and sometimes unfair burdens on protesters.

The use of an overnight delivery service imposes a significant burden on protesters by effectively reducing the already short time for filing by one day. For example, after receiving a requested and required debriefing, a protester must file its protest with the GAO within four calendar days after the debriefing to ensure that it obtains a stay of the procurement. See 4 C.F.R. § 21.3 (providing for GAO notice to the agency within one working day). If the protest were filed by overnight delivery service, however, the protester would have only three calendar days to file its protest to ensure such a stay (two calendar days if the fourth day falls on a Saturday, and only one calendar day if the fourth day falls on a Sunday).²

Similarly, the use of facsimile filings places a significant burden on protesters. The GAO's rules place the risk of transmission failure on the protester. Thus, if the GAO's facsimile machines are not operating properly, the machines are busy, or there is some transmission error (*e.g.*, a page is lost in the transmission), the protest may be

¹ Daniel I. Gordon, a Council member of the Public Contract Law Section, did not participate in the Section's consideration of these comments, and he abstained from voting to approve and send this letter.

² The reduced timelines when the fourth day falls on a weekend result from the combined effect of the GAO's one working day notice requirement and the requirement that the agency receive notice from the GAO of the protest filing within five calendar days of the debriefing in order for the automatic stay of the procurement to apply. Thus, if a debriefing were held on a Wednesday, the protest would have to be filed with the GAO by the following Friday in order to ensure timely notice to the agency by the following Monday -- the fifth calendar day after the debriefing. If a protester filed its protest using overnight service, the protest would have to be sent on Thursday, to ensure receipt on Friday. Hence, the protester would have only one day to prepare and to file the protest.

deemed untimely, despite the best efforts of the protester. Moreover, the GAO does not have a published telephone number enabling the protester to promptly call the GAO after completion of the transmission to ensure that the protest was received with all pages legible and attached.

The Proposed Rule adds a new method for filing protests by electronic means. The Section welcomes this additional means for filing protests. Nevertheless, as with facsimile filings, there are potential transmission problems inherent in this method of filing, and the risk of transmission failure is on the filing party. Transmissions can be lost or garbled. In addition, there may be unexpected delays in the transmission and receipt of electronic filings due to computer or transmission line failures. Moreover, as with facsimile filings, the Proposed Rule does not describe any means by which the filer can immediately confirm receipt by the GAO of the filing.

The Section believes that the best solution to this problem is for the GAO to reinstate hand-delivery of protest filings. If this is not possible in the near future, the GAO could remove some of the risk placed on the sender by adopting acceptable, objective means for proof of service.

With respect to both facsimile and electronic filings, the Section suggests that the GAO update its Descriptive Guide to identify and include a telephone number that protesters and other filers of documents can call for immediate confirmation of GAO's receipt of filings and receive some objective means for proof of service.

With respect to electronic filings, the Section suggests that the GAO revise its regulations, update its Descriptive Guide, or both, to identify the specific electronic address to which electronic filings should be sent. In addition, the Section suggests that the GAO, in its Descriptive Guide, provide information on how the electronic filing should be sent, including a description of how the GAO will determine when an electronic filing has been received by the GAO and confirmation that the requirement for "signing" of protests, as set forth at 4 C.F.R. § 21.1(c)(2), can be met by electronic filing. The Section also requests that the GAO establish some form of either automatic or manual acknowledgment of receipt of electronic filings. Various software packages are capable of providing automatic electronic acknowledgements of receipt.

2. Use of ADR in GAO Bid Protests.

The Section supports the GAO's use of alternative dispute resolution ("ADR") in resolving bid protests and agrees with the GAO's clarification of its rules to identify ADR as an expeditious and efficient means for resolving protests.

To further clarify the means by which ADR may be initiated, we suggest adding the following language to the Proposed Rule at Section 21.10(e): “GAO, on its own initiative or upon request by the parties, may use flexible alternative procedures”

3. Comments on the Agency Report.

The Section generally supports the GAO’s proposed revision of its rules with respect to the filing of comments after receipt of the Agency Report. The Section agrees that some protesters, particularly *pro se* protesters, may have forgone their opportunity to submit substantive comments on the Agency Report without understanding the import of their decision.

On the other hand, the Section is concerned that the Proposed Rule may invite additional and perhaps unnecessary arguments as to the sufficiency of the comments to overcome dismissal. For example, it is possible that a protester could raise a significant issue and present supporting evidence of a prejudicial violation of law or regulation in its protest. In response, the Agency Report might fail to rebut or substantively address the allegation. In response to this Agency Report, the protester (particularly a *pro se* protester who would not be entitled to receive certain documents produced with the Agency Report) might have no further substantive comments on the issue. Under these circumstances, the protest issue could be subject to dismissal for failure to file substantive comments, even though the evidence and protest documents support the protester’s position.

To avoid such problems, an alternative to the Proposed Rule would be to provide a warning, either in the regulations or in the Descriptive Guide, cautioning protesters that the GAO rarely sustains a protest without substantive comments by the protester on the Agency Report.

The Section also suggests that the GAO include in its regulations or its Descriptive Guide a warning to protesters to address in comments on the Agency Report all issues raised in the protest. Failure to do so may result in dismissal of the protest or part(s) thereof. The Section also suggests, with respect to the GAO’s granting of an extension of time for filing comments, that the Descriptive Guide warn protesters that any new protest issues or new examples supporting existing protest issues must still be filed within ten days of receipt of the Agency Report (or the date on which the relevant information was learned or should have been learned) notwithstanding the extension of the comment period.

4. **GAO Review of Small Business COC Program.**

The Section supports the GAO's proposed clarification of its rules to conform to GAO practice.

5. **GAO Review of Affirmative Determinations of Responsibility.**

The Section agrees that the GAO should adopt the same standard for reviewing affirmative responsibility determinations as set forth in the United States Court of Appeals for the Federal Circuit's decision in *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324 (Fed. Cir. 2001). It does not make sense for the two protest fora to have different standards for review of this issue.

The Section, however, has concerns regarding the specific language proposed by the GAO. The Proposed Rule states that the GAO will consider protests challenging affirmative determinations of responsibility when the protest identifies "evidence raising serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation" (emphasis added). The phrase used in the *Garufi* opinion is "serious questions." This does not, however, set forth a proof threshold or burden of proof standard. Although we recognize the issue will be worked out on a case-by-case basis, it would be useful for the GAO to clarify either in its rules or Descriptive Guide what is meant by "serious concerns." Examples of evidence that would or would not raise such "serious concerns" in the Descriptive Guide would be helpful.

In addition, the language of the Proposed Rule does not make clear whether the GAO will consider protests where there is a "serious concern" that the contracting officer unreasonably evaluated available information. This would include the situation where the contracting officer may have made an irrational decision based on the information reviewed, as well as the situation where the contracting officer may have unreasonably evaluated irrelevant and/or misleading/inaccurate information in making a decision.

An alternative would be to state that the GAO will consider protests where the "evidence raises serious concerns that, in reaching a particular responsibility determination, the contracting officer (1) unreasonably evaluated available information, (2) unreasonably failed to consider available relevant information, or (3) otherwise violated statute or regulation." We believe that such a revision is needed to ensure consistency between standards of review for the Court of Appeals for the Federal Circuit and the GAO with respect to the review of affirmative determinations of responsibility.

6. Suspension and Debarment Review.

The Section supports the GAO's proposed clarification of its rules to conform to GAO case law and practice.

Given that the purpose of the proposed revisions is to conform the current regulation to current practice, there is another (albeit rare) category of protest issues not currently addressed in the Proposed Rule that GAO has recently announced it would no longer consider – namely, protests seeking proposal preparation costs on the grounds that the protester's proposal should not have been included in the competitive range. Although GAO had previously considered such arguments, it announced in *Champion Business Services, Inc.*, B-290556 (June 25, 2002), that the issue does not fall within its bid protest jurisdiction, because it is not a challenge to: a solicitation or other request by a federal agency for offers for a contract for the procurement of property or services; the cancellation of such a solicitation or other request; award or proposed award of such a contract; or a termination of such a contract, if the protest alleges that the termination was based on improprieties in the award of the contract. In the interest of completeness, we recommend adding a section 21.5(j) to the regulations that identifies this category as an additional protest issue not for consideration. The language could simply be:

- (j) Protests asserting that the protester's proposal should not have been included in the competitive range.

7. Comments Where Hearing is Held.

The Section supports the GAO's proposed clarification of its rules to conform to GAO practice.

8. Filing of Claim for Costs Following Agency Corrective Action

The Section supports the GAO's clarification of the time in which claims for costs must be filed with the procuring agency following corrective action by the agency on a GAO protest. It would be helpful to those who do not practice frequently before the GAO for the GAO in its Descriptive Guide to provide the web site address for its on-line docket for information regarding the status of a GAO protest. This website may provide a means for protesters to independently check the status of their case and determine when the GAO has closed the case based on agency corrective action.

9. **Cases Before Courts of Competent Jurisdiction.**

The Section supports the GAO's proposed clarification of its rules to conform its rules to GAO practice. It is our understanding that the GAO, by its proposed language, does not intend to foreclose a protester from returning to the GAO for costs incurred at the GAO before filing the case in a court of competent jurisdiction. The Section suggests that the GAO, either in its rules or in its Descriptive Guide, clarify this point.

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

Sincerely,



Mary Ellen Coster Williams
Chair, Section of Public Contract Law

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