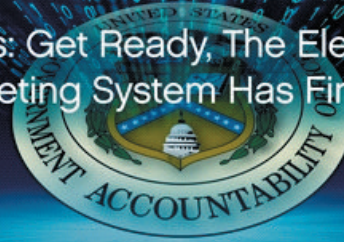


GAO Protests: Get Ready, The Electronic Protest Docketing System Has Finally Arrived



IN SHORT

The Situation: In a significant development, GAO issued a final rule that it will require companies to file all nonclassified bid protests on its new Electronic Protest Docketing System, starting May 1, 2018. The final rule also amended the timeliness provisions in the Bid Protest Regulations regarding solicitation challenges.

The Result: After years of filing bid protests through GAO's email system, as of May 1, 2018, nonclassified bid protests will be accepted for filing only through EPDS accompanied by a mandatory \$350 filing fee. Entities intending to file a bid protest or a request to intervene must have an active EPDS user account.

Looking Ahead: To prepare for future bid protests, government contractors should register on the new docketing system and establish protocols for filing future bid protests on EPDS.

On April 2, 2018, the U.S. Government Accountability Office ("GAO") issued a final rule informing practitioners that GAO's Electronic Protest Docketing System ("EPDS") will go live on May 1, 2018. Beginning on that date, all protests (except protests involving classified information) must be filed through EPDS. Protesters also must pay a \$350 filing fee to file a new GAO protest (supplemental protests and related requests do not require a filing fee payment). If a protester is successful, the filing fee may be considered a "cost of filing and pursuing the protest" that is reimbursable under 4 C.F.R. § 21.8(d)(1).

EPDS will simplify and likely improve several aspects of the protest process—agencies will receive near immediate notification from GAO of the protest, triggering the Competition in Contracting Act's automatic stay of performance (or of award, depending on the circumstances). Bid protest communications will also be simplified—rather than sending emails with numerous addressees, parties will make just one electronic filing. Also, EPDS should make filing and reviewing Agency Report documents more secure and easier, as it will eliminate the need to send numerous emails in order to avoid email system file size limitations.

Although EPDS bears some similarities to the Public Access to Court Electronic Records ("PACER") system, such as the requirement to maintain log-in information, there are important differences. Most striking, unlike PACER, EPDS does not provide public access to any protest records; only the parties to a protest will be able to access documents on EPDS. Further, documents on EPDS will become unavailable for download 60 days after the protest is closed. EPDS will allow for a single Attorney of Record, referred to as the "Primary Representative," who will file the initial protest or request to intervene, with the option to add up to four "secondary representatives" for each party. The "secondary representatives" must be registered EPDS users.



The U.S. Government Accountability Office's Electronic Protest Docketing System will simplify and likely improve several aspects of the protest process.



The ability to use GAO's [bid protest docket search function](#) to locate protests using a solicitation number will remain unchanged. For intervenors, this is an important function because submitting a request to intervene on EPDS will now require the user to know the B-number assigned to the protest in which he or she wishes to intervene.

EPDS should also assist all parties in complying with protective orders. Because bid protests often, if not always, involve sensitive, confidential, and proprietary information, GAO created specific mechanisms in EPDS to manage documents containing such information. Before submitting a filing, users will be asked if it contains information that is proprietary, confidential, or otherwise not releasable to the public. If the answer is "Yes," only the party that made the filing, GAO, authorized agency representatives, and individuals admitted to the protective order will be able to access the filing. Users without access to the document may see on the case docket that a protected filing has been made but will not be able to access it.

GAO's final rule also contains a few changes to the Bid Protest Regulations that are unrelated to EPDS. For example, the rule modifies the timeliness provisions of 4 C.F.R. § 21.2 to clarify that, where a basis for challenging a solicitation becomes known after the solicitation's closing date, but the solicitation does not establish a new closing date, the protest must be filed within 10 days of when the protester knew or

should have known of that basis—regardless of whether the time for filing other protest claims is "tolled" by a request for a required debriefing. GAO had previously addressed the timeliness of such protests in its decisions in [Protect the Force, Inc.—Reconsideration](#), and [Armorworks Enterprises, LLC](#), but this is now codified in the revised Bid Protest Regulations.

The final rule contains another change to the Bid Protest Regulations that contract awardees may find frustrating: The regulations now specifically state, "GAO generally does not issue a protective order where an intervenor retains counsel, but the protester does not." Until now, GAO's regulations had not formally addressed such situations; individual GAO attorneys' practices in such situations varied, with some attorneys issuing protective orders in such situations. For an intervenor represented by outside counsel attempting to defend the contract award, it will be frustrating to be unable to fully participate in the protest process due to an inability to access important protest documents. In such situations, the protester's decision not to retain counsel may well prove to have an adverse impact not only on the protester but also on the intervenor, even if the intervenor has retained counsel.

FIVE KEY TAKEAWAYS

1. Individuals who anticipate participating in protests at GAO should register for an EPDS account now to avoid delays when trying to file a protest or intervene in a protest. Registration can typically be accomplished in as little as 10 minutes. You can [register for an account](#) and [access the EPDS user manual](#) on the GAO website.
2. Beginning May 1, 2018, all protests (except classified protests) must be filed through EPDS, and a \$350 filing fee must be paid before the protest will be filed.
3. Parties must designate one "Primary Representative," who will file the initial protest or request to intervene, and may add up to four "secondary representatives." All identified representatives will receive email notifications when new documents are filed.
4. Where a basis for challenging a solicitation becomes known after the solicitation's closing date, but the solicitation does not establish a new closing date, the protest must be filed within 10 days of when the protester knew or should have known of that basis of protest; the debriefing exception to the timeliness rules does *not* apply for such protests.
5. Intervenors should be aware that GAO's regulations now specifically state that "GAO generally does not issue a protective order where an intervenor retains counsel, but the protester does not." GAO's statement that it "generally" will not issue a protective order does leave open the possibility that, in extraordinary situations, a protective order may be issued even if the protester is not represented by counsel. However, intervenors are now on notice that, in most cases, their ability to access source selection sensitive or proprietary information will be limited if the protester is not represented by counsel.

CONTACTS



Fernand A. Lavalley
Washington



Cherie J. Owen
Washington



Robin Overby
Washington

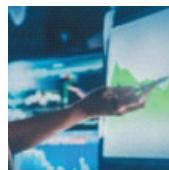
YOU MIGHT BE INTERESTED IN: [Go To All Recommendations >>](#)



[Enhanced Debriefing Rules in the NDAA Offer Protesters Several Practical Advantages](#)



[Judge Cites Escobar Materiality Standard, Vacates \\$350 Million False Claims Act Judgment](#)



[GAO's Bid Protest Report to Congress for 2017 Shows Record High Effectiveness Rate](#)

SUBSCRIBE

SUBSCRIBE TO RSS



Jones Day is a global law firm with more than 2,500 lawyers on five continents. We are One Firm WorldwideSM.

Disclaimer: Jones Day's publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our website at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.

© 2018 Jones Day. All rights reserved. 51 Louisiana Avenue, N.W., Washington D.C. 20001-2113