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NATIONAL LAW REVIEW

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## GAO Debuts New Protest Procedures Effective May 1, 2018

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Thursday, April 19, 2018

On April 2, 2018, GAO issued a [final rule](#) revising its existing regulations to implement a number of changes to its bid protest process. The new rule becomes effective on May 1, 2018.

Several of these changes implement requirements in Section 1501 of the Consolidated Appropriations Act for FY2014 ("Act"), which directed GAO to institute an electronic filing system and authorized GAO to charge a filing fee to cover the cost of that electronic filing system. But the revisions are not limited to those two issues.

Here are the highlights:

- **[Electronic Protest Docketing System, or](#)**

**"EPDS":** The new rule formally launches EPDS as GAO's electronic filing and document dissemination system for bid protests. As of May 1, EPDS will be the exclusive way to file a protest and protest-related documents at GAO, with two exceptions: (1) documents containing classified information and (2) documents that cannot be filed through EPDS because of size or format. Protesters are still required to provide a copy of the initial protest to the contracting officer outside of the EPDS system, however.

GAO has already begun to roll out EPDS in select protests through a pilot program. The system is similar to the CM/ECF system used by the federal courts, except that EPDS restricts access to parties only, even for redacted or non-protected documents.

- **\$350 Filing Fee:** As authorized by the Act, the new rule implements a \$350 filing fee for new protests. GAO has been explicit that the fee is designed to cover the cost of EPDS and is *not* intended to discourage or reduce protests. At least at this point, there is no fee for anything other than the initial protest filing.

- **Deadline for Late-Breaking Pre-Award Protests:** The new rule clarifies a prior ambiguity in the regulations about the timing for late-breaking pre-award protests. As GAO explained in responding to comments, "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 period for filing other protest claims was 'tolled' because a required debriefing had been requested." This revision reflects existing GAO policy as set out in [Protect the Force, Inc.-Reconsideration](#) and [Armorworks Enterprises, LLC](#).

- **CICA Stay Override:** Under the new rule, the agency must notify GAO when the agency overrides the requirement to withhold award or suspend contract performance under the Competition in Contracting Act, and file either the determination and finding or a statement by the official who approved the determination and finding that explains the statutory basis for the override. This provision codifies GAO's general practice in recent years, and ensures that a protester is aware of any override.

- **Protests of Non-Procurement Instruments:** The new rule confirms that, while (with certain exceptions) GAO generally does not review protests of non-procurement instruments, it does review protests asserting that an agency is improperly using a non-procurement instrument to procure goods or services.

- **Deadline for Five-Day Letter:** GAO's existing regulations state that the agency must file a letter



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describing the intended scope of its document production “[a]t least 5 days prior to the filing of the [agency] report.” The new rule adds that, if that deadline falls on a weekend or federal holiday, the agency must file the five-day letter on the last business day that *precedes* the weekend or holiday. The intent of the change is to ensure that disagreements over the scope of production are addressed sooner rather than later.

- **Redaction of Documents After Initial Protest:** Under the new rule, when a party files a document in EPDS that is designated as protected, it must — if requested by another party — provide a proposed redacted version of the document within two days to the other parties. Only the final, agreed-upon redacted version need be filed on EPDS.

- **Reimbursement of Costs:** The new rule clarifies the timing and briefing process for requests for recommendation for reimbursement of costs and requests for recommendation on the amount of costs — including making agency responses and protester comments mandatory, and noting that “GAO will attempt to resolve” such requests “within 100 days after the request is filed.”

Michelle Willauer also contributed to the piece.

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