

DIVISION 10: GOVERNMENT CONTRACTS  
AND LITIGATION

Laurence Schor  
Chairperson  
463-2978

John I. Coldren, III  
325-9636

Vincent A. Labella  
523-0402



Raymond S.E. Pushkar  
789-7551

Matthew S. Simchak  
785-5153

Jean-Pierre Swennen  
452-5821

*The District of Columbia Bar*

1426 H STREET, N.W., EIGHTH FLOOR WASHINGTON, D.C. 20005  
(202) 638-1500

Lawyer Referral and Information Service 638-1509

October 11, 1984

Ms. Lynne M. Lester  
Manager, Divisions Office  
The District of Columbia Bar  
1426 H Street, N.W.  
Eighth Floor  
Washington, D.C. 20005-2184

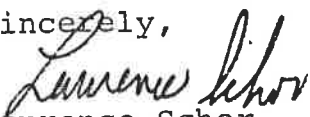
Re: Comments by Division 10 on Proposed Changes  
to the GSBICA Rules of Procedure to Govern  
Protests Involving ADP Procurements

Dear Lynne:

Pursuant to Section 13(a) of the Division Guidelines, I am enclosing the proposed statement of the Steering Committee of Division 10 on the above-captioned rules. Also enclosed is the required one page summary of the Division comments. You will note that the mandatory disclaimer required by the Guidelines is set forth on the first page of the comments.

Division 10 submitted the comments in order to clarify and improve the proposed rules. We are asking for your review on an emergency basis because the comments must be submitted by the close of business October 15, 1984. It is important that our comments be considered. The complexity of the proposed rules, copy attached, the fact that the Steering Committee sought comments from non-Steering Committee members and the business schedule of the Steering Committee members precluded an earlier submission to you.

Sincerely,

  
Laurence Schor  
Chairman, Division 10

Enclosure

TO THE BOARD OF GOVERNORS AND  
DIVISION CHAIRPERSONS

Summary of the Statement on Behalf of Division  
10, Government Contracts and Litigation, Regarding  
the Proposed Amendments to the Rules of  
Procedure of the General Services Administration  
Board of Contract Appeals to Govern Proceedings  
in Protests Involving Automatic Data Processing  
Procurements.

---

The comments of Division 10 recommending certain clarifications and modifications to the proposed rules is enclosed. The modifications seek primarily to clarify the distinction between protests under which parties challenge a procurement and appeals taken by individual contractors who have already been awarded contracts for the provision of products or services to the Government. The comments also deal with which parties should be able to participate in protests and the terms under which that participation should be restricted, the time limits and content of pleadings and the availability of certain summary proceedings. We recommended against summary proceedings under the short time frame available for protest resolution. We also suggested that representatives of the multiple forums permitted to accept bid protest actions meet and clarify who among them will have priority. We recommended that the GSBCA take priority over the General Accounting Office.

DIVISION 10: GOVERNMENT CONTRACTS  
AND LITIGATION

Laurence Schor  
Chairperson  
463-2978

John I. Coldren, III  
325-9636

Vincent A. Labella  
523-0402



Raymond S.E. Pushkar  
789-7551

Matthew S. Simchak  
785-5153

Jean-Pierre Swennen  
452-5821

*The District of Columbia Bar*

1426 H STREET, N.W., EIGHTH FLOOR WASHINGTON, D.C. 20005  
(202) 638-1500

Lawyer Referral and Information Service 638-1509

October 11, 1984

HAND DELIVERED

The Honorable Leonard J. Suchanek  
Chairman  
General Services Administration  
Board of Contract Appeals  
Washington, D.C. 20405

Re: Proposed Amendments to the GSBICA Rules  
of Procedure to Govern Protests

Dear Judge Suchanek:

Thank you for the opportunity to provide comments on the proposed rules under which the GSBICA plans to handle ADP protests.<sup>1/</sup> We are enclosing the separate comments of Irwin H. Lerner, Esquire, regional counsel for IBM who furnished these comments to the undersigned. These comments are furnished for your information and use as you see fit.

The primary concern of the Division Steering Committee personnel who participated in the review of the amendments to the GSBICA Rules is that the rules are combined with those rules pertaining solely to appeals under existing contracts. We strongly recommend that those rules pertaining to protests be published separately from the Board's appellate rules. Although we recognize that there may be duplication, we suggest that confusion will be avoided. (for example, Rule 1(e) speaks to suspension of a procurement but

---

<sup>1/</sup>The views expressed herein represent only those of Division 10, Government Contracts and Litigation, of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors.

The Hon. Leonard J. Suchanek  
October 11, 1984  
Page Two

suspension only applies to a protest situation), excuses for untimely filing may be eliminated or greatly reduced (the shorter time periods for protests are intertwined with the longer periods permitted for appeals) and pro se protestors, whose general familiarity with the GSBICA Rules is not great, will be protected. As a matter of practicality, all potential counsel to parties involved in protests before the GSBICA will go through the exercise of dividing the Rules into those applicable to protests and those appropriate for appeals. Moreover, the Board can best decide the full scope of those Rules it wishes to include within the protest procedure by producing a separate set of Rules applicable to protests.

We are also concerned about the relationship between GSA and GAO since parties may file protests in both forums. There should be some agreement between GSA and GAO regarding consolidation of actions if protests arising from the same project are, in fact, filed in both forums. Since the statute grants enforceability to GSBICA decisions and the GAO decisions are only advisory, we are of the opinion that the GSA proceeding should ordinarily take precedence. We suggest further that the current GAO practice of rendering advisory opinions to the U.S. Claims Court and the U.S. District Court be followed in GSBICA protests where appropriate.

Should the Board opt not to separate the Rules as we recommend, we urge that Rule 4 be divided into sections dealing separately with appeals and protests.

Rule 5 and other applicable Rules dealing with intervention must be carefully analyzed. We endorse the comment at Page 2, Paragraph 6, by Mr. Lerner except for his suggested modification of the current reference to (b) (3). We agree that the current reference is appropriate.

We also adopt Mr. Lerner's Comment No. 8 on Page 2 of his letter dealing with Rule 5(b) (3) (A). Contractors frequently approach Contracting Officers to resolve alleged solicitation defects prior to filing a formal protest. A separate time limit should run from a Contracting Officer's Decision denying a contractor's pre-protest request.

Rule 5(a) (3) (C) permits intervention by a permissive intervenor by motion timely filed. No provision is made

to permit a party who is already in the protest to object to the motion by the intended permissive intervenor. Under Rule 8(f) a party to a protest may respond to a written motion only as permitted or directed by the Board. Because of the affect of the presence of another party in the protest on the timing and potential cost of all proceedings, parties already involved in the protest must be given the opportunity to object to the joinder of another party. A three (3) day limit for objections could be imposed.

Rule 5(b)(3)(B) should be modified to make it consistent with GAO and permit a protestor to protest within ten working days of a contract award. We submit that the ten working day period is also consistent with the statute authorizing the GSBICA to act.

We interpret the proposed Rule amendments to permit the parties to submit their cases for decision on the record. We suggest that a party permitted to join the proceeding as an "other permissive intervenor" should not be empowered to require a hearing if the primary parties to the protest do not wish to have one.

Rule 5(b)(4)(B) is too restrictive in our opinion. We suggest that the time period for intervening be changed to four working days.

Rule 7, the primary Rule dealing with the content of pleadings, appears to require the submission of affidavits. (Rule 7(b)(2)(E). This same requirement appears to be contained in Rule 5(a)(3)(A). We suggest that affidavits should not be required and that the parties should determine whether or not documentary evidence alone is sufficient to present their case. The practicality of obtaining affidavits under the time limits for protest action contained within the proposed Rules could create difficulties forcing numerous requests for extensions of time.

Rule 7(b)(2) currently requires the protestor to serve the Contracting Officer on the same day that the complaint is filed with the Board. If the Contracting Officer is in a different city than the GSBICA, we suggest that this requirement is unwieldy. We recommend that the Contracting Officer be served within one day of the filing of the complaint.

The Hon. Leonard J. Suchanek  
October 11, 1984  
Page Four

Rule 7(c)(2) requires the respondent to furnish its "findings" in the matter. The term "findings" is indefinite and should be further defined to state precisely what it is the Board wants to receive; i.e., the reason why a suspension of the procurement should not occur.

Rule 19(a)(2) should be clarified to specifically permit a suspension hearing after award of contract. The statute authorizing the GSBICA to act permits suspension after award and we suggest that the current language of the Rule is not sufficiently clear to inform parties that a post-award suspension is allowed.

We note that the proposed amendments to the Rules include the summary judgment procedure. We recommend that there be no summary judgment procedure if any party to the proceeding wants a hearing. The short time frames coupled with the requirement of the Board to issue a decision within 45 working days with pleadings and a hearing on the merits would seem to preclude summary judgments.

We note that there is no proposed restriction on the use of hearing examiners in procurement matters which exceed \$50,000. We have previously recommended that there be such a limitation on the participation of hearing examiners and we restate our recommendation at this time.

Those of us who have reviewed the proposed amendments to the Board's Rules are aware of the work effort extended by the Board in a relatively short time frame. We are also cognizant of the fact that much experience will be gained by the Board and those parties participating in protests before the Board within the first six months of the commencement of protest hearings. We suggest that the Board schedule a conference with representatives of Division 10 and other interested parties within six months of January 1985 to review and discuss any needed rule changes identified through experience.

Sincerely,

Laurence Schor  
For The Division 10 Steering Committee

cc: Div. 10 Steering Com. Mem.  
D.C. Bar