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LAW FIRM NEWS

May 2008

Our Regular Reminder

This is a reminder to all our union clients of the various services available from our law firm. Most of our retainer agreements provide for unlimited legal advice, on-site visits and filing and processing of unfair labor practice charges. Please contact us if you would like to have one of us do training, meet with employees, or review a case for arbitration, MSPB or EEOC. We are also just a phone call or an e-mail away if you need help or feedback on any legal issue connected with federal sector employment. In addition, we provide representation to Union members in MSPB appeals, EEO complaints and labor arbitration for reduced or flat fees if there is a chance we can obtain attorney's fees from the agency if we win. You can learn more about our law firm, and check out our very own proposal for real civil service reform legislation ("*The Modern System, MS.1.*") online at <http://minahan.wld.com>.

Tiffany: 2 / Fed. Gov't: 0

In her second solo hearing as a new attorney, Tiffany Malin won again! This time, it was at the VA in Phoenix, so she's won cases in two time zones.

The case involved an arbitration over the suspension of an employee for charges of AWOL and failure to follow established leave procedures. The employee suffers from a chronic intestinal disorder which forces her to use a lot of leave. Management put her on "sick leave certification" and required her to provide a doctor's note within 2 days of every absence. Union President Randy Brumm at AFGE Local 2382 pointed out that OPM amended its sick leave regulations in 2006 to provide all federal employees with at least 15 days to provide a doctor's note and the grievant satisfied this requirement. We also argued that a federal agency shouldn't discipline an employee for AWOL because of a chronic condition she can't control (her supervisor said he was trying to "correct" her behavior). Arbitrator John Kagel agreed in an award dated April 14, 2008, and set aside the suspension in its entirety, ordering the VA to expunge it from her records and make her whole for all lost pay and benefits. *VA Medical Center, Phoenix, Arizona and AFGE Local 2382, FMCS No. 07-59354.*

Arbitrator Mitigates Removal Based on “Nitpicking” Accusations


Barrie Shapiro gave the Air Force something to remember him by as he sails into the sunset in Panama: another win for “the firm.” The case involved the removal of a GS-9 employee at Buckley AFB near Denver, whose real “mistake” was getting on her supervisor’s bad side in a personality dispute. The Air Force threw a “laundry list” of accusations at her about her “attitude,” her “demeanor” and her “inattention to job duties.” Arbitrator Joseph Weeks sustained only two minor accusations and ordered the Air Force to reinstate her, saying it was obvious that the deciding official completely disregarded the facts and the motivations of the employee’s supervisor in upholding the employee’s removal. *Buckley AFB and Association of Civilian Technicians*, FMCS No. 07-0823 (April 4, 2008).


Official Time for “Telecommuting”

It took a few years, but the FLRA finally disowned a ridiculous decision it made in 2004 that Union representatives cannot use official time for representational work under an agency’s “telecommuting” program. We gave our “fair and balanced” opinion of that decision in our November 2006 client newsletter. In *USDA Food Safety and Inspection Service*, 62 FLRA 364 (2008), the FLRA distinguished its 2004 decision in an escape act Houdini would admire, saying that the law it relied upon in that case did not *prohibit* official time for telecommuting it just didn’t *require* it, meaning that, as we put it in our November 2006 newsletter, “official time for telecommuting can be acquired the old-fashioned way, through collective bargaining or past practice.”

Stupid Regulations

We should probably use the proper legal term: *officio non compos mentis*. Here’s hoping that all of these new regulations don’t last more than a year, with a new administration taking office in 9 months.

 *FLRA’s new regulations on ULP charges (February 21, 2008)*. We’ve said plenty about these regulations already in our January 3, February 21 and April 21 client bulletins. FLRA now wants the equivalent of a federal court pre-trial order, with exhibits, filed with all new ULP charges. Some FLRA offices say they will dismiss every ULP charge not accompanied by this information for “non-cooperation.”

 *OPM’s new “suitability” regulations (April 15, 2008)*. OPM took its 1999 revisions of the suitability regulations and made them even worse. Under these regulations, an employee fired at the direction of OPM for making false statements in his application for federal employment gets no more than an “advisory opinion” if he appeals to the MSPB and wins. According to the regulations, if the MSPB sustains one or more of OPM’s charges, it must affirm OPM’s suitability determination. If the MSPB sustains fewer than all the charges (how is this different than sustaining one or more of the charges??) it must return the case to OPM for another decision, which then cannot be appealed to the MSPB. Isn’t sustaining none of the charges the same as sustaining “fewer than all of the charges”? What happens if the MSPB does that? OPM doesn’t say? How did

Stupid Decisions

OPM get the power to fire federal employees without following the federal statutes in 5 USC Chapter 75? OPM doesn't say.

- MSPB's new regulations on "mandatory disclosures" (April 3, 2008). Taking the Colleen Duffy-Kiko "roadblocks to due process" approach, the MSPB just amended its regulations to require "mandatory disclosures" by both an agency and an appellant within 10 days of the issuance of an "acknowledgement order" in all newly-filed MSPB appeals. Both the agency and the appellant must provide a copy of or a description of all documents that may support its "claims or defenses" (how does an agency raise defenses to its own action that the employee is appealing?) and the name, phone number and address of every person "likely to have discoverable information" that may support its "claims or defenses." The MSPB deserves credit, though, for not showing its usual pro-employer bias. These new requirements are equally unfair and equally useless to all parties.

Smart Regulations

(The proper legal term is *officio correctamundo*) The General Accounting Office on March 21, 2008, issued new regulations implementing the new law passed by Congress in January 2008 permitting federal employees and their Union representatives to appeal A-76 contracting out decisions. A copy of these regulations, and GAO's explanations of them, is attached to this newsletter.

Are we taking this too far? (The proper legal term is *curiam boneheadus*).

- A secretary for a county sheriff sued her boss for violating her constitutional rights by firing her after he found out his wife asked the secretary to investigate whether the sheriff was having an affair. The Sixth Circuit ruled that the sheriff's threats to burn the secretary's house down, set her dog on fire and kill her family did not "shock the conscience" to such a degree that they amounted to a violation of her constitutional rights. *Nuchols v. Berrong*, No. 06-6132 (6th Cir., March 6, 2008).
- Remember the news story a while back about the federal judge in Oklahoma who was investigated for focusing an unusual amount of effort and attention on a part of himself during a sexual harassment trial? Well, the judge fired his court reporter and his bailiff, both women, after one of them testified about his behavior. Both of them sued for sex discrimination. Another federal judge in Oklahoma, Terrence Kern, dismissed both lawsuits, saying there was no evidence they were fired because of their gender. Judge Kern pointed out that the other judge was doing what he was doing in the courtroom with both men and women present. *Foster v. Thompson*, No. 05-CV-305 (N.D. Okla., March 4, 2008).
- The Eighth Circuit upheld a lower court's decision to dismiss a lawsuit by a female employee who was disciplined for reporting that a female

supervisor made a sexist remark. Even though the law protects employees from reprisal for opposing unlawful discrimination, the Court said the employee could not possibly have believed the supervisor's remark was unlawful. Instead, said the Court, the supervisor's sexist remark was "a single, relatively tame comment." How a layperson is supposed to distinguish a sexist remark that is a Title VII violation which she can report without fear of reprisal, from a sexist remark that is not a Title VII violation and which she can be disciplined for reporting, the Court did not say. The Court also did not say how decisions like this discourage employees generally from making good faith reports of wrongdoing, but it didn't have to.

Paid Time for Workers Comp. Exam

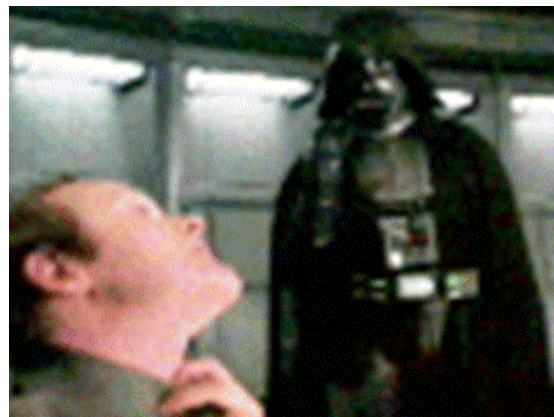
The decision in *Howser v. ABB, Inc.*, 13 WH Cases 2nd 705 (8th Cir. 2008), involved a claim by an FLSA non-exempt employee for overtime pay for time spent at a doctor's office for a re-evaluation of her medical condition on a workers compensation claim. The employer pointed out that it did not schedule the appointment and that it was arranged by a separate company that administers the employer's workers compensation claims. The Eighth Circuit said this was irrelevant because the administrator was acting as the "agent" of the employer. The Court also ruled that even though the employee took unpaid leave for the medical exam, this was not a waiver of her statutory right to be paid for this time as "hours worked" under the FLSA.

Workplace Surveillance by Employer

We get asked regularly about when it is legal or illegal for an employer to monitor or "spy on" employees in the workplace. Public employers are bound by the Fourth Amendment's prohibition on unreasonable searches and seizures of their employees, but what is "unreasonable" has been debated in many court decisions. The decision in *Bernhard v. City of Ontario*, 27 IER Cases 495 (9th Cir. 2008), involved a police department that conducted video surveillance of the police officers' locker room. The Ninth Circuit ruled that the officers stated a legitimate claim under the Fourth Amendment that should be allowed to proceed to a jury trial. The Court noted that the camera was installed without the officers knowing it and that the officers had a "reasonable expectation of privacy" in the locker room even though other officers were also present.

Client Quiz

Who should play the part of Darth Vader and who should play the part of the skeptical commander?



"I find your lack of faith disturbing."

Proposed Rules

Federal Register

Vol. 73, No. 56

Friday, March 21, 2008

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

GOVERNMENT ACCOUNTABILITY OFFICE

4 CFR Part 21

Government Accountability Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts

AGENCY: Government Accountability Office.

ACTION: Proposed rule.

SUMMARY: The Government Accountability Office (GAO) is proposing to amend its Bid Protest Regulations, promulgated in accordance with the Competition in Contracting Act of 1984 (CICA), to implement the requirements in sec. 326 of the National Defense Authorization Act for Fiscal Year 2008, enacted on January 28, 2008, and to make certain administrative changes. Regarding sec. 326 of the National Defense Authorization Act for Fiscal Year 2008, the proposed amendments to GAO's Bid Protest Regulations implement the legislation's provisions related to the bid protest process concerning Office of Management and Budget (OMB) Circular A-76, as revised on May 29, 2003. In this regard, the legislation expands the protest rights of Federal employees in an A-76 competition to grant "any one individual" who represents the majority of affected employees the status of an "interested party" to file a protest at GAO or the status of an intervenor to participate in a protest filed at GAO, to remove the current restriction limiting protests of A-76 competitions to those competitions affecting 65 or more full-time equivalent employees of a Federal agency, and to allow a protest of a decision to convert a function performed by Federal employees to private sector performance without a competition. At this time, GAO believes that these proposed revisions are the only regulatory changes necessary to implement the statutory requirements expanding the protest rights of Federal

employees in an A-76 competition. Regarding administrative changes, the proposed amendments to GAO's Bid Protest Regulations are to reflect current practice and to streamline the bid protest process. GAO welcomes comments on these proposed revisions.

DATES: Comments must be submitted on or before April 21, 2008.

ADDRESSES: Comments may be submitted by e-mail at bidprotestregs@gao.gov or by facsimile at 202-512-9749. Due to delivery delays, submission by regular mail is discouraged. Comments may be sent by Federal Express or United Parcel Service addressed to: Ralph O. White, Assistant General Counsel, Government Accountability Office, 441 G Street, NW., Washington, DC 20548. GAO intends to make all comments filed available to the public, including names and other identifying information. Information in a submission that the sender does not believe should be released should be clearly marked.

FOR FURTHER INFORMATION CONTACT: Michael R. Golden (Managing Associate General Counsel), Ralph O. White (Assistant General Counsel) or Jonathan L. Kang (Senior Attorney), 202-512-3315.

SUPPLEMENTARY INFORMATION:

Comments Invited

GAO is not subject to the Administrative Procedures Act and accordingly is not required by law to seek comments before issuing a final rule. However, GAO has decided to invite interested persons to participate in this rulemaking by submitting written comments regarding the proposed revisions. Application of the Administrative Procedures Act to GAO is not to be inferred from this invitation for comments.

GAO will consider all comments received on or before the closing date for comments. GAO may change the proposed revisions based on the comments received.

Background

GAO determined to undertake these revisions to GAO's Bid Protest Regulations as the result of statutory changes in GAO's bid protest jurisdiction in the Department of Homeland Security Appropriations Act, 2008 (enacted as Division E of the Consolidated Appropriation Act, 2008,

Pub. L. 110-161, 121 Stat. 1844, on December 26, 2007), and the National Defense Authorization Act for Fiscal Year 2008. Section 568 of the Department of Homeland Security Appropriations Act, 2008, made the Transportation Security Administration (TSA) subject to the Federal Acquisition Regulation such that, as of the June 23, 2008 effective date, GAO has protest jurisdiction over TSA procurements. Section 326 of the National Defense Authorization Act for Fiscal Year 2008 expands the protest rights of Federal employees in an A-76 competition or non-competitive decision to convert a function performed by Federal employees to private sector performance. Section 843 of the National Defense Authorization Act for Fiscal Year 2008 amends GAO's jurisdiction under 10 U.S.C. 2304c(e) and 41 U.S.C. 253j(e) to authorize GAO to hear protests of the award or proposed award of certain task and delivery orders under certain indefinite-delivery/indefinite-quantity contracts.

After careful consideration, GAO concluded that no change in GAO's Bid Protest Regulations is necessary in order to effectuate the provisions of sec. 568 of the Department of Homeland Security Appropriations Act, 2008, with respect to TSA procurements, or to effectuate the provisions of sec. 843 of the National Defense Authorization Act for Fiscal Year 2008, with respect to task or delivery orders. The proposed revisions to GAO's Bid Protest Regulations to implement sec. 326 of the National Defense Authorization Act for Fiscal Year 2008 and to make certain administrative changes are set forth below:

Interested Party

In accordance with sec. 326 of the National Defense Authorization Act for 2008, GAO proposes to revise paragraph (a)(2) and to add new paragraphs (a)(2)(A) and (a)(2)(B) to 4 CFR 21.0, to expand the definition of an interested party to include, in any public-private competition conducted under OMB Circular A-76 regarding performance of an activity or function of a Federal agency, or any decision to convert a function performed by Federal employees to private sector performance without a competition under OMB Circular A-76, the official who submitted the agency tender in any such

competition and any one individual designated as the representative of the majority of affected Federal employees, and to delete the current restrictions on protests of competitions concerning fewer than 65 full time equivalent employees of a Federal agency.

Intervenor

In accordance with sec. 326 of the National Defense Authorization Act for 2008, GAO proposes to revise paragraph (b)(2) of 4 CFR 21.0, to expand the definition of an intervenor to include, in any public-private competition conducted under OMB Circular A-76 regarding performance of an activity or function of a Federal agency, or any decision to convert a function performed by Federal employees to private sector performance without a competition under OMB Circular A-76, any one individual designated as the representative of the majority of affected Federal employees, and to delete the current restrictions on protests of competitions concerning fewer than 65 full time equivalent employees of a Federal agency.

Contracting Agency

For administrative purposes, GAO proposes to delete the definition of "contracting agency" at paragraph (d) of 4 CFR 21.0, and to replace the term "contracting agency" with the term "agency" throughout 4 CFR 21. GAO also proposes to revise paragraph (c) of 4 CFR 21.0 to clarify that the definition of "federal agency" also applies to the general term "agency." It is the opinion of GAO that these administrative changes will clarify and simplify GAO's Bid Protest Regulations.

Filing of Documents

It has been GAO's experience that bid protest documents are occasionally directed to GAO departments unrelated to GAO's bid protest process. To clarify how a document is "filed" under GAO's Bid Protest Regulations, GAO proposes to revise paragraph (g) of 4 CFR 21.0, newly redesignated as paragraph (f), to provide GAO's designated facsimile transmission number and email address for bid protests, and to advise parties to check GAO's Web site to ensure that the contact information is current. GAO also proposes to remove a provision in 4 CFR 21.0 regarding electronic filing to conform with current practice and to coordinate with changes to paragraph (b) of 4 CFR 21.4, which are discussed below.

Disclosure of Protest Materials

The GAO bid protest process is covered by the GAO disclosure of

materials regulations in 4 CFR part 81, subject to the restrictions of our protective order process. To ensure that the practice of the GAO bid protest process is consistent with the GAO disclosure of materials regulations and to advise that the GAO will not generally provide filed materials to the public while a protest is pending, GAO proposes to revise paragraph (g) of 4 CFR 21.1 to reflect that GAO will disclose protest materials submitted by any party after issuing a decision on the protest, in accordance with GAO's rules at 4 CFR part 81 and the protective order process.

Document Requests to Agencies

In cases in which the protester has filed a request for specific documents, GAO's Bid Protest Regulations currently require that the agency provide, at least 5 days prior to the filing of its report, a list of the documents or portions of documents which the agency has released to the protester or intends to produce in its report and of the documents or portions of documents requested that it intends to withhold, and the reasons for the proposed withholding. It is GAO's experience that the index of documents provided by agencies is often not sufficient to answer specific document requests and does not identify what is being withheld and why. In order to clarify what GAO requires from agencies in response to specific document requests, GAO proposes to revise paragraph (c) of 4 CFR 21.3 to require that an agency's response to a document request identify, at a minimum, whether requested documents exist, which of the documents or portions of documents the agency intends to produce, which of the documents or portions of documents the agency intends to withhold, and the basis for withholding any of the requested documents. GAO understands that this proposed revision may be perceived by agencies as an additional requirement; however, the language of the proposed revision tracks closely to the original intent of GAO in 4 CFR 21.3(c).

Document Requests to Other Parties

GAO's Bid Protest Regulations currently limit document requests to those made by the protester to the agency, and in certain circumstances, by the agency to the protester. Due to GAO's statutory requirement to complete bid protests within 100 days, and in the interest of fairness, there may be circumstances in which documents held by a party that are not in the possession of the agency are necessary for the swift resolution of a bid protest.

To permit parties to make document requests of another party, GAO proposes to revise paragraph (d) of 4 CFR 21.3, to state that, in appropriate circumstances, one party may request that another party produce documents that are not in the agency's possession and not currently in the record. GAO does not expect these requests to arise often, and retains the discretion to determine the appropriateness of granting such requests.

Additional Statements

To reflect GAO practice, GAO proposes to revise paragraph (j) of 4 CFR 21.3 to clarify that parties must seek GAO's prior approval before submitting additional statements and that GAO reserves the right to disregard statements that are submitted without prior approval.

Electronic Transmissions

The current admonition in paragraph (b) of 4 CFR 21.4 against the electronic transmission of documents in bid protests subject to a protective order is inconsistent with GAO's protective order admission notice, which permits the electronic transmission of documents unless a party has objected. To reconcile GAO's Bid Protest Regulations with current practice, GAO proposes to delete the last sentence of paragraph (b) of 4 CFR 21.4 to remove the admonition against the electronic transmission of documents in bid protests subject to a protective order.

Sanctions

In the protest of *Network Security Technologies, Inc.*, B-290741.2, November 13, 2002, 2002 CPD ¶ 193, GAO gave notice that the dismissal of a protest was a potential sanction for the violation of a GAO protective order. In the protest of *PWC Logistics Services Co. KSC(c)*, B-310559, January 11, 2008, 2008 CPD ¶ 25, GAO employed that sanction for the first time, dismissing the protest as the direct result of the protester's counsel's violation of the GAO protective order in the protest. GAO views its authority to impose dismissal and other sanctions as inherent to its authority to issue and administer protective orders. To clearly advise that dismissal of a protest is a potential sanction for violation of a GAO protective order, GAO proposes to revise paragraph (d) of 4 CFR 21.4 to reflect that dismissal is among the sanctions that GAO will consider in response to violation of a GAO protective order, as is prohibition from participation in the remainder of a protest as an intervenor, which is another sanction GAO has used in the

past to address a protective order violation.

Small Business Administration

Standard industrial classification codes have been replaced by the North American Industry Classification System standards. For administrative purposes, GAO proposes to revise paragraph (b) of 4 CFR 21.5 to replace the term "standard industrial classification" with the term "North American Industry Classification System."

Statutory Stays

31 U.S.C. 3553(c) and (d) address agencies' requirements to withhold contract award or suspend contract performance when a protest is filed at GAO. Although a protest to GAO is the triggering event under these statutory authorities, the authorities provide no role for GAO in this process. GAO proposes to revise 4 CFR 21.6, to clarify that GAO has no role in administering the statutory requirements to withhold contract award or suspend contract performance.

Notification to Agency

GAO is required under 31 U.S.C. 3554(d) to provide notice to the parties in a protest. GAO proposes to simplify the list of agency contacts in paragraph (a) of 4 CFR 21.12 to reflect GAO's current practice in meeting its statutory obligations.

Reconsideration

Certain grounds for requesting reconsideration of a protest decision, such as the repetition of arguments previously made, do not merit reconsideration by GAO. Requests for reconsideration are required to be filed within 10 days of the issuance of a protest decision. GAO can see no reason to reconsider arguments so recently considered here, and will therefore dismiss requests for reconsideration based on such arguments without development or further consideration. To clarify the requirements of a request for reconsideration and to emphasize that repetitive arguments will be summarily dismissed, GAO proposes to revise paragraph (c) of 4 CFR 21.14, to state that a request for reconsideration must show that the prior decision contains errors of fact or law, or must present information not previously considered that warrants reversal or modification of the prior decision, and to state that GAO will not consider requests based on the repetition of arguments previously raised.

Additionally, GAO proposes to delete language in paragraph (c) of 4 CFR 21.14

regarding agencies' obligation to withhold award and suspend performance in the event of a request for reconsideration because, as discussed above, GAO has no role in this process. By deleting this provision, however, GAO does not express any view regarding agencies' obligations under 31 U.S.C. 3553(c) and (d).

List of Subjects in 4 CFR Part 21

Administrative practice and procedure, Appeals, Bid protest regulations, Government contracts.

For the reasons set out in the preamble, Title 4, Chapter I, Subchapter B, Part 21 of the Code of Federal Regulations is proposed to be amended as follows:

PART 21—BID PROTEST REGULATIONS

1. The authority citation for part 21 continues to read as follows:

Authority: 31 U.S.C. 3551–3556.

2. In part 21, remove the words "a contracting agency" and "the contracting agency" wherever they appear and add in their place the words "an agency" or "the agency," respectively.

3. Amend § 21.0 by revising paragraphs (a)(2), (b)(2), and (c); removing paragraph (d); and redesignating paragraph (e) as paragraph (d), redesignating paragraph (f) as paragraph (e), redesignating paragraph (g) as paragraph (f) and revising it, and redesignating paragraph (h) as paragraph (g).

The revisions read as follows:

§ 21.0 Definitions.

(a)(1) * * *

(2) In a public-private competition conducted under Office of Management and Budget Circular A–76 regarding performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under OMB Circular A–76, *interested party* also means

(A) the official responsible for submitting the Federal agency tender, and

(B) any one individual, designated as an agent by a majority of the employees performing that activity or function, who represents the affected employees.

(b)(1) * * *

(2) If an interested party files a protest in connection with a public-private competition conducted under OMB Circular A–76 regarding an activity or function of a Federal agency, the official responsible for submitting the Federal

agency tender, or the agent representing the Federal employees as described in paragraph (a)(2)(B) of this section, or both, may also be *intervenors*.

(c) *Federal agency* or *agency* means any executive department or independent establishment in the executive branch, including any wholly owned government corporation, and any establishment in the legislative or judicial branch, except the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his direction.

* * * * *

(f) A document is *filed* on a particular day when it is received by GAO by 5:30 p.m., eastern time, on that day. Protests and other documents may be filed by hand delivery, mail, commercial carrier, facsimile transmission (202–512–9749), or e-mail (protests@gao.gov). Please check GAO's Web site (<http://www.gao.gov/legal/bidprotest.html>) for current filing information. Hand delivery and other means of delivery may not be practicable during certain periods due, for example, to security concerns or equipment failures. The filing party bears the risk that the delivery method chosen will not result in timely receipt at GAO.

* * * * *

4. Amend § 21.1 by revising paragraph (g) to read as follows:

§ 21.1 Filing a protest.

* * * * *

(g) Unless precluded by law, GAO will not withhold material submitted by a protester from any party outside the government after issuing a decision on the protest, in accordance with GAO's rules at 4 CFR part 81. If the protester believes that the protest contains information which should be withheld, a statement advising of this fact must be on the front page of the submission. This information must be identified wherever it appears, and the protester must file a redacted copy of the protest which omits the information with GAO and the agency within 1 day after the filing of its protest with GAO.

* * * * *

5. Amend § 21.3 by revising paragraphs (c), (d), and (j) to read as follows:

§ 21.3 Notice of protest, submission of agency report, and time for filing of comments on report.

* * * * *

(c) The contracting agency shall file a report on the protest with GAO within 30 days after the telephone notice of the protest from GAO. The report provided to the parties need not contain documents which the agency has

previously furnished or otherwise made available to the parties in response to the protest. At least 5 days prior to the filing of the report, in cases in which the protester has filed a request for specific documents, the agency shall respond to the request for documents in writing. The agency's response shall, at a minimum, identify whether the requested documents exist, which of the requested documents or portions thereof the agency intends to withhold, and the basis for not producing any of the requested documents or portions thereof. Any objection to the scope of the agency's proposed disclosure or nondisclosure of documents must be filed with GAO and the other parties within 2 days of receipt of this list.

(d) The report shall include the contracting officer's statement of the relevant facts, including a best estimate of the contract value, a memorandum of law, and a list and a copy of all relevant documents, or portions of documents, not previously produced, including, as appropriate: the protest; the bid or proposal submitted by the protester; the bid or proposal of the firm which is being considered for award, or whose bid or proposal is being protested; all evaluation documents; the solicitation, including the specifications; the abstract of bids or offers; and any other relevant documents. In appropriate cases, a party may request that another party produce relevant documents, or portions of documents, that are not in the agency's possession.

* * * * *

(j) GAO may request or permit the submission of additional statements by the parties and by other parties participating in the protest as may be necessary for the fair resolution of the protest. The agency and other parties must receive GAO's approval before submitting any additional statements. GAO reserves the right to disregard material submitted without prior approval.

6. Amend § 21.4 by revising paragraphs (b) and (d) to read as follows:

§ 21.4 Protective orders.

* * * * *

(b) If no protective order has been issued, the agency may withhold from the parties those portions of its report that would ordinarily be subject to a protective order. GAO will review in camera all information not released to the parties.

* * * * *

(d) Any violation of the terms of a protective order may result in the

imposition of such sanctions as GAO deems appropriate, including referral to appropriate bar associations or other disciplinary bodies, restricting the individual's practice before GAO, prohibition from participation in the remainder of the protest, or dismissal of the protest.

7. Amend § 21.5 by revising paragraph (b)(1) to read as follows:

§ 21.5 Protest issues not for consideration.

* * * * *

(b) *Small Business Administration issues.* (1) Small business size standards and North American Industry Classification System (NAICS) standards. Challenges of established size standards or the size status of particular firms, and challenges of the selected NAICS code may be reviewed solely by the Small Business Administration. 15 U.S.C. 637(b)(6).

* * * * *

8. Revise § 21.6 to read as follows:

§ 21.6 Withholding of award and suspension of contract performance.

Where a protest is filed with GAO, the contracting agency may be required to withhold award and to suspend contract performance. The requirements for the withholding of award and the suspension of contract performance are set forth in 31 U.S.C. 3553(c) and (d); GAO does not administer the requirements to stay award or suspend contract performance under CICA at 31 U.S.C. 3553(c) and (d).

9. Amend § 21.12 by revising paragraph (a) to read as follows:

§ 21.12 Distribution of decisions.

(a) Unless it contains protected information, a copy of a decision shall be provided to the protester, any intervenors, and the agency involved; a copy shall also be made available to the public. A copy of a decision containing protected information shall be provided only to the agency and to individuals admitted to any protective order issued in the protest. A public version omitting the protected information shall be prepared wherever possible.

* * * * *

10. Amend § 21.14 by revising paragraph (c) to read as follows:

§ 21.14 Request for reconsideration.

* * * * *

(c) GAO will summarily dismiss any request for reconsideration that fails to state a valid basis for reconsideration or is untimely. To obtain reconsideration, the requesting party must show that our prior decision contains errors of either fact or law, or must present information

not previously considered that warrants reversal or modification of our decision; GAO will not consider a request for reconsideration based on repetition of arguments previously raised.

Gary L. Kepplinger,

General Counsel, United States Government Accountability Office.

[FR Doc. E8-5621 Filed 3-20-08; 8:45 am]

BILLING CODE 1610-02-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 54

[REG-110136-07]

RIN 1545-BG48

Notice Requirements for Certain Pension Plan Amendments Significantly Reducing the Rate of Future Benefit Accrual

AGENCY: Internal Revenue Service (IRS), Department of the Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations that would provide guidance relating to the application of section 4980F of the Internal Revenue Code to a plan amendment that is permitted to reduce benefits accrued before the plan amendment's applicable amendment date. These regulations would also reflect certain amendments made to section 4980F by the Pension Protection Act of 2006, Public Law 109-280 (120 Stat. 780). These proposed regulations would affect sponsors, administrators, participants, and beneficiaries of pension plans. This document also provides a notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by June 19, 2008. Outlines of topics to be discussed at the public hearing scheduled for July 10, 2008, at 10 a.m. must be received by June 20, 2008.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-110136-07), Room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington DC, 20044. Submissions may be hand-delivered Monday through Friday, between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-110136-07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC, 20224 or sent via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS REG-