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**PROGRAM MATERIALS**

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## **Latest Trends in Bid Protests (Government Accountability Office and Court of Federal Claims)**

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## Title 4 –Accounts

### Chapter I –Government Accountability Office

#### Subchapter B –General Procedures

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## PART 21—BID PROTEST REGULATIONS

**Authority:** 31 U.S.C. 3551-3556.

**Source:** 61 FR 39042, July 26, 1996, unless otherwise noted.

**Editorial Note:** Nomenclature changes to part 21 appear at 73 FR 32429, June 9, 2008.

### § 21.0 Definitions.

(a)

- (1) *Interested party* means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.

(2) In a public-private competition conducted under Office of Management and Budget (OMB) 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

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

(ii) 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) **Intervenor** means an awardee if the award has been made or, if no award has been made, all bidders or offerors who appear to have a substantial prospect of receiving an award if the protest is denied.

(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)(ii) 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 the Architect's direction.

(d) **Days** are calendar days. In computing any period of time described in Subchapter V, Chapter 35 of Title 31, United States Code, including those described in this part, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. Similarly, when the Government Accountability Office (GAO), or another Federal agency where a submission is due, is closed for all or part of the last day, the period extends to the next day on which the agency is open.

(e) **Adverse agency action** is any action or inaction by an agency that is prejudicial to the position taken in a protest filed with the agency, including a decision on the merits of a protest; the opening of bids or receipt of proposals, the award of a contract, or the rejection of a bid or proposal despite a pending protest; or contracting agency acquiescence in continued and substantial contract performance.

(f) **Electronic Protest Docketing System (EPDS)** is GAO's web-based electronic docketing system. GAO's website [<https://epds.gao.gov/login>] includes instructions and guidance on the use of EPDS.

(g) A document is *filed* on a particular day when it is received in EPDS by 5:30 p.m., Eastern Time. Delivery of a protest or other document by means other than those set forth in the online EPDS instructions does not constitute a filing. Filing a document in EPDS constitutes notice to all parties of that filing.

(h) **Alternative dispute resolution** encompasses various means of resolving cases expeditiously, without a written decision, including techniques such as outcome prediction and negotiation assistance.

[61 FR 39042, July 26, 1996, as amended at 67 FR 79835, Dec. 31, 2002; 70 FR 19681, Apr. 14, 2005; 73 FR 32429, June 9, 2008; 83 FR 13823, Apr. 2, 2018]

## § 21.1 Filing a protest.

- (a) An interested party may protest 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; an award or proposed award of such a contract; and a termination of such a contract, if the protest alleges that the termination was based on improprieties in the award of the contract.
- (b) Protests must be filed through the EPDS.
- (c) A protest filed with GAO shall:
  - (1) Include the name, street address, email address, and telephone and facsimile numbers of the protester,
  - (2) Be signed by the protester or its representative,
  - (3) Identify the agency and the solicitation and/or contract number,
  - (4) Set forth a detailed statement of the legal and factual grounds of protest including copies of relevant documents,
  - (5) Set forth all information establishing that the protester is an interested party for the purpose of filing a protest,
  - (6) Set forth all information establishing the timeliness of the protest,
  - (7) Specifically request a ruling by the Comptroller General of the United States, and
  - (8) State the form of relief requested.
- (d) In addition, a protest filed with GAO may:
  - (1) Request a protective order,
  - (2) Request specific documents, explaining the relevancy of the documents to the protest grounds, and
  - (3) Request a hearing, explaining the reasons that a hearing is needed to resolve the protest.
- (e) The protester shall furnish a complete copy of the protest, including all attachments, to the individual or location designated by the agency in the solicitation for receipt of protests, or if there is no designation, to the contracting officer. The designated individual or location (or, if applicable, the contracting officer) must receive a complete copy of the protest and all attachments not later than 1 day after the protest is filed with GAO. The protest document must indicate that a complete copy of the protest and all attachments are being furnished within 1 day to the appropriate individual or location.
- (f) No formal briefs or other technical forms of pleading or motion are required. Protest submissions should be concise and logically arranged, and should clearly state legally sufficient grounds of protest. Protests of different procurements should be separately filed.
- (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 within 1 day after the filing of its protest, the protester must file a final redacted copy of the protest which omits the information.

- (h) Protests and other documents containing classified information shall not be filed through the EPDS. Parties who intend to file documents containing classified information should notify GAO in advance to obtain advice regarding procedures for filing and handling the information.
- (i) A protest may be dismissed for failure to comply with any of the requirements of this section, except for the items in paragraph (d) of this section. In addition, a protest shall not be dismissed for failure to comply with paragraph (e) of this section where the contracting officer has actual knowledge of the basis of protest, or the agency, in the preparation of its report, was not prejudiced by the protester's noncompliance.

[61 FR 39042, July 26, 1996, as amended at 67 FR 79835, Dec. 31, 2002; 73 FR 32430, June 9, 2008; 83 FR 13823, Apr. 2, 2018]

## § 21.2 Time for filing.

- (a)
  - (1) Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals. In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation. If no closing time has been established, or if no further submissions are anticipated, any alleged solicitation improprieties must be protested within 10 days of when the alleged impropriety was known or should have been known.
  - (2) Protests other than those covered by paragraph (a)(1) of this section shall be filed not later than 10 days after the basis of protest is known or should have been known (whichever is earlier), with the exception of protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required. In such cases, with respect to any protest basis which is known or should have been known either before or as a result of the debriefing, and which does not involve an alleged solicitation impropriety covered by paragraph (a)(1) of this section, the initial protest shall not be filed before the debriefing date offered to the protester, but shall be filed not later than 10 days after the date on which the debriefing is held.
  - (3) If a timely agency-level protest was previously filed, any subsequent protest to GAO must be filed within 10 days of actual or constructive knowledge of initial adverse agency action, provided the agency-level protest was filed in accordance with paragraphs (a)(1) and (2) of this section, unless the agency imposes a more stringent time for filing, in which case the agency's time for filing will control. In cases where an alleged impropriety in a solicitation is timely protested to an agency, any subsequent protest to GAO will be considered timely if filed within the 10-day period provided by this paragraph, even if filed after bid opening or the closing time for receipt of proposals.
- (b) Protests untimely on their face may be dismissed. A protester shall include in its protest all information establishing the timeliness of the protest; a protester will not be permitted to introduce for the first time in a request for reconsideration information necessary to establish that the protest was timely.
- (c) GAO, for good cause shown, or where it determines that a protest raises issues significant to the procurement system, may consider an untimely protest.

[61 FR 39042, July 26, 1996, as amended at 83 FR 13823, Apr. 2, 2018]

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

- (a) GAO shall notify the agency within 1 day after the filing of a protest, and, unless the protest is dismissed under this part, shall promptly provide a written confirmation to the agency and an acknowledgment to the protester. The agency shall immediately give notice of the protest to the awardee if award has been made or, if no award has been made, to all bidders or offerors who appear to have a substantial prospect of receiving an award. The agency shall provide copies of the protest submissions to those parties, except where disclosure of the information is prohibited by law, with instructions to communicate further directly with GAO. All parties shall provide copies of all communications with GAO to the agency and to other participating parties either through EPDS or by email. GAO's website [<https://epds.gao.gov/login>] includes guidance regarding when to file through EPDS versus communicating by email or other means.
- (b) A agency or intervenor which believes that the protest or specific protest allegations should be dismissed before submission of an agency report should file a request for dismissal as soon as practicable.
- (c) The agency shall file a report on the protest within 30 days after receiving notice of the protest from GAO. The report need not contain documents which the agency has previously provided 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 file a response to the request for documents. If the fifth day prior to the filing of the report falls on a weekend or Federal holiday, the response shall be filed by the last business day that precedes the weekend or holiday. 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 produce, 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 within 2 days of receipt of this response.
- (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 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 file a request that another party produce relevant documents, or portions of documents, that are not in the agency's possession.
- (e) Where a protester or intervenor does not have counsel admitted to a protective order and documents are withheld from the protester or intervenor on that basis, the agency shall file redacted documents that adequately inform the protester and/or intervenor of the basis of the agency's arguments in response to the protest. GAO's website [<https://epds.gao.gov/login>] provides guidance regarding filing documents where no protective order is issued or where a protester or intervenor does not have counsel admitted to a protective order.
- (f) The agency may file a request for an extension of time for the submission of the response to be filed by the agency pursuant to § 21.3(c) or for the submission of the agency report. Extensions will be granted on a case-by-case basis.

- (g) The protester may file a request for additional documents after receipt of the agency report when their existence or relevance first becomes evident. Except when authorized by GAO, any request for additional documents must be filed not later than 2 days after their existence or relevance is known or should have been known, whichever is earlier. The agency shall file the requested documents, or portions of documents, within 2 days or explain why it is not required to produce the documents.
- (h) Upon a request filed by a party, GAO will decide whether the agency must file any withheld documents, or portions of documents, and whether this should be done under a protective order. When withheld documents are provided, the protester's comments on the agency report shall be filed within the original comment filing period unless GAO determines that an extension is appropriate.
- (i)
  - (1) Comments on the agency report shall be filed within 10 days after the agency has filed the report, except where GAO has granted an extension of time, or where GAO has established a shorter period for filing of comments. Extensions will be granted on a case-by-case basis.
  - (2) The protest shall be dismissed unless the protester files comments within the period of time established in § 21.3(i)(1).
  - (3) GAO will dismiss any protest allegation or argument where the agency's report responds to the allegation or argument, but the protester's comments fail to address that response.
- (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.

[61 FR 39042, July 26, 1996, as amended at 67 FR 79835, Dec. 31, 2002; 73 FR 32430, June 9, 2008; 83 FR 13823, Apr. 2, 2018]

## § 21.4 Protective orders.

- (a) At the request of a party or on its own initiative, GAO may issue a protective order controlling the treatment of protected information. Such information may include proprietary, confidential, or source-selection-sensitive material, as well as other information the release of which could result in a competitive advantage to one or more firms. The protective order shall establish procedures for application for access to protected information, identification and safeguarding of that information, and submission of redacted copies of documents omitting protected information. Because a protective order serves to facilitate the pursuit of a protest by a protester through counsel, it is the responsibility of protester's counsel to request that a protective order be issued and to submit timely applications for admission to that order. GAO generally does not issue a protective order where an intervenor retains counsel, but the protester does not.
- (b) Any agency or party filing a document that the agency or party believes to contain protected material shall, if requested by another party, provide to the other parties (unless they are not admitted to the protective order) an initial proposed redacted version of the document within 2 days of the request. Where appropriate, the exhibits to the agency report or other documents may be proposed for redaction in their entirety. The party that authored the document shall file the final redacted version of the document that has been agreed to by all of the parties. Only the final agreed-to version of a redacted document must be

filed. If the parties are unable to reach an agreement regarding redactions, the objecting party may submit the matter to GAO for resolution. Until GAO resolves the matter, the disputed information must be treated as protected.

- (c) If no protective order has been issued, or a protester or intervenor does not have counsel admitted to a protective order, the agency may withhold from the parties those portions of its report that would ordinarily be subject to a protective order, provided that the requirements of § 21.3(e) are met. GAO will review in camera all information not released to the parties.
- (d) After a protective order has been issued, counsel or consultants retained by counsel appearing on behalf of a party may apply for admission under the order by filing an application. The application shall establish that the applicant is not involved in competitive decision-making for any firm that could gain a competitive advantage from access to the protected information and that there will be no significant risk of inadvertent disclosure of protected information. Objections to an applicant's admission shall be filed within 2 days after the application is filed, although GAO may consider objections filed after that time.
- (e) 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.

[61 FR 39042, July 26, 1996, as amended at 67 FR 79835, Dec. 31, 2002; 73 FR 32430, June 9, 2008; 83 FR 13824, Apr. 2, 2018]

## § 21.5 Protest issues not for consideration.

A protest or specific protest allegations may be dismissed any time sufficient information is obtained by GAO warranting dismissal. Where an entire protest is dismissed, no agency report need be filed; where specific protest allegations are dismissed, an agency report shall be filed on the remaining allegations. Among the protest bases that shall be dismissed are the following:

- (a) **Contract administration.** The administration of an existing contract is within the discretion of the agency. Disputes between a contractor and the agency are resolved pursuant to the disputes clause of the contract and the Contract Disputes Act of 1978. 41 U.S.C. 7101-7109.
- (b) **Small Business Administration (SBA) 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 SBA. 15 U.S.C. 637(b)(6).
  - (2) **Small Business Certificate of Competency Program.** Referrals made to the SBA pursuant to sec. 8(b)(7) of the Small Business Act, or the issuance of, or refusal to issue, a certificate of competency under that section will generally not be reviewed by GAO. The exceptions, which GAO will interpret narrowly out of deference to the role of the SBA in this area, are protests that show possible bad faith on the part of government officials, or that present allegations that the SBA failed to follow its own published regulations or failed to consider vital information bearing on the firm's responsibility due to the manner in which the information was presented to or withheld from the SBA by the procuring agency. 15 U.S.C. 637(b)(7).

- (3) **Procurements under sec. 8(a) of the Small Business Act.** Under that section, since contracts are entered into with the SBA at the contracting officer's discretion and on such terms as are agreed upon by the procuring agency and the SBA, the decision to place or not to place a procurement under the 8(a) program is not subject to review absent a showing of possible bad faith on the part of government officials or that regulations may have been violated. 15 U.S.C. 637(a).
- (c) **Affirmative determination of responsibility by the contracting officer.** Because the determination that a bidder or offeror is capable of performing a contract is largely committed to the contracting officer's discretion, GAO will generally not consider a protest challenging such a determination. The exceptions are protests that allege that definitive responsibility criteria in the solicitation were not met and those that identify 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.
- (d) **Procurement integrity.** For any Federal procurement, GAO will not review an alleged violation of subsections (a), (b), (c), or (d) of sec. 27 of the Office of Federal Procurement Policy Act, 41 U.S.C. 2101-2107, as amended by sec. 4304 of the National Defense Authorization Act for Fiscal Year 1996, Public Law 104-106, 110 Stat. 186, February 10, 1996, where the protester failed to report the information it believed constituted evidence of the offense to the Federal agency responsible for the procurement within 14 days after the protester first discovered the possible violation.
- (e) Protests not filed either with GAO or the agency within the time limits set forth in § 21.2.
- (f) Protests that lack a detailed statement of the legal and factual grounds of protest as required by § 21.1(c)(4), or that fail to clearly state legally sufficient grounds of protest as required by § 21.1(f).
- (g) **Procurements by agencies other than Federal agencies as defined by sec. 3 of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. 102.** Protests of procurements or proposed procurements by agencies such as the U.S. Postal Service, the Federal Deposit Insurance Corporation, and nonappropriated fund activities are beyond GAO's bid protest jurisdiction as established in 31 U.S.C. 3551-3556.
- (h) **Subcontract protests.** GAO will not consider a protest of the award or proposed award of a subcontract except where the agency awarding the prime contract has filed a request that subcontract protests be decided pursuant to § 21.13.
- (i) **Suspensions and debarments.** Challenges to the suspension or debarment of contractors will not be reviewed by GAO. Such matters are for review by the agency in accordance with the applicable provisions of the Federal Acquisition Regulation.
- (j) **Competitive range.** GAO will not consider protests asserting that the protester's proposal should not have been included or kept in the competitive range.
- (k) **Decision whether or not to file a protest on behalf of Federal employees.** GAO will not review the decision of an agency tender official to file a protest or not to file a protest in connection with a public-private competition.
- (l) **Protests of orders issued under task or delivery order contracts.** As established in 10 U.S.C. 2304c(e) and 41 U.S.C. 4106(f), GAO does not have jurisdiction to review protests in connection with the issuance or proposed issuance of a task or delivery order except for the circumstances set forth in those statutory provisions.

- (m) *Protests of awards, or solicitations for awards, of agreements other than procurement contracts.* GAO generally does not review protests of awards, or solicitations for awards, of agreements other than procurement contracts, with the exception of awards or agreements as described in § 21.13; GAO does, however, review protests alleging that an agency is improperly using a non-procurement instrument to procure goods or services.

[61 FR 39042, July 26, 1996, as amended at 67 FR 79835, Dec. 31, 2002; 70 FR 19681, Apr. 14, 2005; 73 FR 32430, June 9, 2008; 83 FR 13824, Apr. 2, 2018]

## § 21.6 Withholding of award and suspension of contract performance.

When a protest is filed, the 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 withhold award or suspend contract performance. An agency shall file a notification in instances where it overrides a requirement to withhold award or suspend contract performance, and it shall file either a copy of any issued determination and finding, or a statement by the individual who approved the determination and finding that explains the statutory basis for the override.

[83 FR 13824, Apr. 2, 2018]

## § 21.7 Hearings.

- (a) Upon a request filed by a party or on its own initiative, GAO may conduct a hearing in connection with a protest. The request shall set forth the reasons why a hearing is needed to resolve the protest.
- (b) Prior to the hearing, GAO may hold a pre-hearing conference to discuss and resolve matters such as the procedures to be followed, the issues to be considered, and the witnesses who will testify.
- (c) Hearings generally will be conducted as soon as practicable after receipt by the parties of the agency report and relevant documents. Although hearings ordinarily will be conducted at GAO in Washington, DC, hearings may, at the discretion of GAO, be conducted at other locations, or by telephone or other electronic means.
- (d) All parties participating in the protest shall be invited to attend the hearing. Others may be permitted to attend as observers and may participate as allowed by GAO's hearing official. In order to prevent the improper disclosure of protected information at the hearing, GAO's hearing official may restrict attendance during all or part of the proceeding.
- (e) GAO does not provide for hearing transcripts. If the parties wish to have a hearing transcribed, they may do so at their own expense, so long as a copy of the transcript is provided to GAO at the parties' expense.
- (f) If a witness whose attendance has been requested by GAO fails to attend the hearing or fails to answer a relevant question, GAO may draw an inference unfavorable to the party for whom the witness would have testified.
- (g) If a hearing is held, each party shall file comments with GAO within 5 days after the hearing was held or as specified by GAO. If the protester has not filed comments by the due date, GAO shall dismiss the protest.
- (h) In post-hearing comments, the parties should reference all testimony and admissions in the hearing record that they consider relevant, providing specific citations to the testimony and admissions referenced.

[61 FR 39042, July 26, 1996, as amended at 67 FR 79836, Dec. 31, 2002; 83 FR 13825, Apr. 2, 2018]

## § 21.8 Remedies.

- (a) If GAO determines that a solicitation, cancellation of a solicitation, termination of a contract, proposed award, or award does not comply with statute or regulation, it shall recommend that the agency implement any combination of the following remedies:
  - (1) Refrain from exercising options under the contract;
  - (2) Terminate the contract;
  - (3) Recompete the contract;
  - (4) Issue a new solicitation;
  - (5) Award a contract consistent with statute and regulation; or
  - (6) Such other recommendation(s) as GAO determines necessary to promote compliance.
- (b) In determining the appropriate recommendation(s), GAO shall, except as specified in paragraph (c) of this section, consider all circumstances surrounding the procurement or proposed procurement including the seriousness of the procurement deficiency, the degree of prejudice to other parties or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement, and the impact of the recommendation(s) on the agency's mission.
- (c) If the head of the procuring activity determines that performance of the contract notwithstanding a pending protest is in the government's best interest, GAO shall make its recommendation(s) under paragraph (a) of this section without regard to any cost or disruption from terminating, recompeting, or reawarding the contract.
- (d) If GAO determines that a solicitation, proposed award, or award does not comply with statute or regulation, it may recommend that the agency pay the protester the costs of:
  - (1) Filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees; and
  - (2) Bid and proposal preparation.
- (e) **Recommendation for reimbursement of costs.** If the agency decides to take corrective action in response to a protest, GAO may recommend that the agency pay the protester the reasonable costs of filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees. The protester shall file any request that GAO recommend that costs be paid not later than 15 days after the date on which the protester learned (or should have learned, if that is earlier) that GAO had closed the protest based on the agency's decision to take corrective action. The agency shall file a response within 15 days after the request is filed. The protester shall file comments on the agency response within 10 days of receipt of the response. GAO shall dismiss the request unless the protester files comments within the 10-day period, except where GAO has granted an extension or established a shorter period.
- (f) **Recommendation on the amount of costs.**
  - (1) If GAO recommends that the agency pay the protester the costs of filing and pursuing the protest and/or of bid or proposal preparation, the protester and the agency shall attempt to reach agreement on the amount of costs. The protester shall file its claim for costs, detailing and certifying the time

expended and costs incurred, with the agency within 60 days after receipt of GAO's recommendation that the agency pay the protester its costs. Failure to file the claim within that time may result in forfeiture of the protester's right to recover its costs.

- (2) The agency shall issue a decision on the claim for costs as soon as practicable after the claim is filed.
- (3) If the protester and the agency cannot reach agreement regarding the amount of costs within a reasonable time, the protester may file a request that GAO recommend the amount of costs to be paid, but such request shall be filed within 10 days of when the agency advises the protester that the agency will not participate in further discussions regarding the amount of costs.
- (4) Within 15 days after receipt of the request that GAO recommend the amount of costs to be paid, the agency shall file a response. The protester shall file comments on the agency response within 10 days of receipt of the response. GAO shall dismiss the request unless the protester files comments within the 10-day period, except where GAO has granted an extension or established a shorter period.
- (5) In accordance with 31 U.S.C. 3554(c), GAO may recommend the amount of costs the agency should pay. In such cases, GAO may also recommend that the agency pay the protester the costs of pursuing the claim for costs before GAO.
- (6) Within 60 days after GAO recommends the amount of costs the agency should pay the protester, the agency shall file a notification of the action the agency took in response to the recommendation.

[61 FR 39042, July 26, 1996, as amended at 67 FR 79836, Dec. 31, 2002; 83 FR 13825, Apr. 2, 2018]

### § 21.9 Time for decision by GAO.

- (a) GAO shall issue a decision on a protest within 100 days after it is filed. GAO will attempt to resolve a request for recommendation for reimbursement of protest costs under § 21.8(e), a request for recommendation on the amount of protest costs under § 21.8(f), or a request for reconsideration under § 21.14 within 100 days after the request is filed.
- (b) In protests where GAO uses the express option procedures in § 21.10, GAO shall issue a decision on a protest within 65 days after it is filed.
- (c) GAO, to the maximum extent practicable, shall resolve a timely supplemental protest adding one or more new grounds to an existing protest, or a timely amended protest, within the time limit established in paragraph (a) of this section for decision on the initial protest. If a supplemental or an amended protest cannot be resolved within that time limit, GAO may resolve the supplemental or amended protest using the express option procedures in § 21.10.

[61 FR 39042, July 26, 1996, as amended at 83 FR 13825, Apr. 2, 2018]

### § 21.10 Express options, flexible alternative procedures, accelerated schedules, summary decisions, and status and other conferences.

- (a) Upon a request filed by a party or on its own initiative, GAO may decide a protest using an express option.
- (b) The express option will be adopted at the discretion of GAO and only in those cases suitable for resolution within 65 days.

- (c) Requests for the express option shall be filed not later than 5 days after the protest or supplemental/ amended protest is filed. GAO will promptly notify the parties whether the case will be handled using the express option.
- (d) When the express option is used, the following schedule applies instead of those deadlines in § 21.3 and § 21.7:
  - (1) The agency shall file a complete report within 20 days after it receives notice from GAO that the express option will be used.
  - (2) Comments on the agency report shall be filed within 5 days after receipt of the report.
  - (3) Where circumstances demonstrate that a case is no longer suitable for resolution using the express option, GAO shall establish a new schedule for submissions by the parties.
- (e) GAO, on its own initiative or upon a request filed by the parties, may use flexible alternative procedures to promptly and fairly resolve a protest, including alternative dispute resolution, establishing an accelerated schedule, and/or issuing a summary decision.
- (f) GAO may conduct status and other conferences by telephone or in person with all parties participating in a protest to promote the expeditious development and resolution of the protest.

[61 FR 39042, July 26, 1996, as amended at 67 FR 79836, Dec. 31, 2002; 83 FR 13825, Apr. 2, 2018]

### § 21.11 Effect of judicial proceedings.

- (a) A protester must immediately advise GAO of any court proceeding which involves the subject matter of a pending protest and must file copies of all relevant court documents.
- (b) GAO will dismiss any case where the matter involved is the subject of litigation before, or has been decided on the merits by, a court of competent jurisdiction. GAO may, at the request of a court, issue an advisory opinion on a bid protest issue that is before the court. In these cases, unless a different schedule is established, the times provided in this part for filing the agency report (§ 21.3(c)), filing comments on the report (§ 21.3(i)), holding a hearing and filing comments (§ 21.7), and issuing a decision (§ 21.9) shall apply.

[61 FR 39042, July 26, 1996, as amended at 67 FR 79836, Dec. 31, 2002; 83 FR 13825, Apr. 2, 2018]

### § 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 also shall 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.
- (b) Decisions will be distributed to the parties through the EPDS.

[61 FR 39042, July 26, 1996, as amended at 67 FR 79836, Dec. 31, 2002; 73 FR 32430, June 9, 2008; 83 FR 13825, Apr. 2, 2018]

### § 21.13 Nonstatutory protests.

- (a) GAO will consider protests concerning awards of subcontracts by or for a Federal agency, sales by a Federal agency, or procurements by agencies of the government other than Federal agencies as defined in § 21.0(c) if the agency involved has agreed in writing to have protests decided by GAO.
- (b) The provisions of this part shall apply to nonstatutory protests except for:
  - (1) Section 21.8(d) and (e) pertaining to recommendations for the payment of costs; and
  - (2) Section 21.6 pertaining to the withholding of award and the suspension of contract performance pursuant to 31 U.S.C. 3553(c) and (d).

[61 FR 39042, July 26, 1996, as amended at 83 FR 13825, Apr. 2, 2018]

### § 21.14 Request for reconsideration.

- (a) The protester, any intervenor, and any Federal agency involved in the protest may request reconsideration of a bid protest decision. GAO will not consider a request for reconsideration that does not contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.
- (b) A request for reconsideration of a bid protest decision shall be filed not later than 10 days after the basis for reconsideration is known or should have been known, whichever is earlier.
- (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 GAO's prior decision contains errors of either fact or law, or must present information not previously considered that warrants reversal or modification of the decision; GAO will not consider a request for reconsideration based on repetition of arguments previously raised.

[61 FR 39042, July 26, 1996, as amended at 73 FR 32430, June 9, 2008; 83 FR 13825, Apr. 2, 2018]



B-158766

December 12, 2025

Re: GAO Bid Protest Annual Report to Congress for Fiscal Year 2025

Congressional Committees:

This letter responds to the requirements of the Competition in Contracting Act of 1984, 31 U.S.C. § 3554(e)(2) (CICA), that the Comptroller General report to Congress each instance in which (1) a federal agency did not fully implement a recommendation made by our Office in connection with a bid protest during the prior year, and (2) each instance in which a final decision in a protest was not rendered within 100 days after the date the protest is submitted to the Comptroller General. During fiscal year 2025, we issued final decisions within 100 days for all protests filed with GAO. In this letter we also provide data concerning our overall protest filings for the fiscal year. Finally, this letter also addresses the requirement under CICA that our report “include a summary of the most prevalent grounds for sustaining protests” during the preceding year. 31 U.S.C. § 3554(e)(2).

Agency Failure to Fully Implement Recommendations

For fiscal year 2025, one federal agency declined to implement the recommendations made by our Office in connection with a bid protest. By letter dated June 2, 2025, we reported an occurrence involving the Department of the Air Force: *ATP Gov, LLC*, B-422938, B-422938.2, Dec. 12, 2024, 2024 CPD ¶ 306, which involved a procurement for military satellite terminal assemblies. As explained in our June 2 letter, the protest concerned whether the Air Force made an award to a firm whose product did not meet the material requirements of the solicitation.

The protest revealed that the Air Force announced one standard for evaluating proposals in the solicitation but evaluated the offers it received using a different standard. More specifically, the agency informed offerors that the terminals they proposed were required to meet certain certification requirements at the time of proposal submission but then made an award to an offeror that proposed a terminal assembly that was not certified at the time of proposal submission, and the agency permitted that offeror to seek certification for the terminal assembly after award. In sustaining the protest, we found that the agency’s decision to make an award to a proposal that did not meet the announced requirements of the solicitation was unreasonable and that the agency’s error competitively harmed the protester. As explained in our June 2 letter, we recommended that the agency either reevaluate the proposals it received in accordance with the terms of the solicitation and make an award to an offeror that met the solicitation’s requirements, or, if the agency’s needs were not

reflected by the solicitation, to amend the solicitation and resolicit. We also recommended the agency reimburse the protester the costs of filing and pursuing its protest.

More than one month after we issued our decision, the agency filed a request for modification of our recommended remedy. Specifically, the agency explained that because there was no automatic stay of performance during the protest, the agency permitted the awardee to continue performing the contract. As a result, the agency argued that implementing our recommendation to reevaluate proposals or amend the solicitation would involve unspecified costs and unacceptable delays. As alternative relief, the agency requested that we amend our recommendation to recommend that the protester be reimbursed its reasonable costs incurred to prepare its proposal as well as its reasonable costs incurred in pursuing its protest. However, because the agency's request was filed more than 10 days after the agency knew the basis for its request for reconsideration, we dismissed the agency's request as untimely consistent with our Bid Protest Regulations.

Following our dismissal of the request, the Air Force advised our Office that it did not intend to fully implement our recommendation. Specifically, the agency represented that it would reimburse the protester the costs of filing and pursuing its protest, but that it would not implement our recommendation to reevaluate proposals or amend the solicitation because it would involve substantial costs and delays, which would have unacceptable impacts on national security. The Air Force also advised our Office that it would not reimburse the protester its proposal preparation costs.

Enclosed for your information is a copy of our letter of June 2 reporting the Department of the Air Force's failure to implement our recommendations. As discussed in the letter, while we do not recommend additional legislative action with respect to our recommendation to either reevaluate proposals or amend the solicitation and solicit revised proposals, we do recommend that Congress enact a private bill directing the Air Force to reimburse the protester its reasonable proposal preparation costs, a remedy that the Air Force itself proposed as part of their request to modify our recommended remedy, but which they no longer intend to perform.

### Summary of Overall Protest Filings

During the 2025 fiscal year, we received 1,688 cases: 1,617 protests, 24 cost claims, and 47 requests for reconsideration. We closed 1,737 cases during the fiscal year: 1,676 protests, 20 cost claims, and 41 requests for reconsideration. Of the 1,737 cases closed, 359 were attributable to GAO's bid protest jurisdiction over task orders. Enclosed for your information is a chart comparing bid protest activity for fiscal years 2021-2025.

### Most Prevalent Grounds for Sustaining Protests

Of the protests resolved on the merits during fiscal year 2025, our Office sustained 14 percent of those protests. Our review shows that the most prevalent reasons for

sustaining protests during the 2025 fiscal year were: (1) unreasonable technical evaluation;<sup>1</sup> (2) unreasonable cost or price evaluation;<sup>2</sup> and (3) unreasonable rejection of proposal.<sup>3</sup> It is important to note that a significant number of protests filed with our Office do not reach a decision on the merits because agencies voluntarily take corrective action in response to the protest rather than defend the protest on the merits. Agencies need not, and do not, report any of the myriad reasons they decide to take voluntary corrective action.

I trust this information is useful. If you have any questions, please feel free to reach out to the Managing Associate General Counsels for Procurement Law, Kenneth Patton at 202-512-8205 and Edward Goldstein at 202-512-4483.

Sincerely,



Edda Emmanuelli Perez  
General Counsel

Enclosure

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<sup>1</sup> *E.g.*, *emissary LLC*, B-422388.3, B-422388.4, July 29, 2025, 2025 CPD ¶ 177 (finding the agency's technical evaluation of the awardee's proposal unreasonable, in part, where under the management and staffing approach element, the agency credited the awardee as proposing staff for the required 11-month period, but the awardee only proposed staffing for 9 months).

<sup>2</sup> *E.g.*, *KBR Servs., LLC; Vectrus Systems Corp.*, B-422697 *et al.*, Oct. 4, 2024, 2024 CPD ¶ 203 (finding the agency's cost/price evaluation unreasonable where the awardee's proposal failed to include its subcontractor's cost/price information, as required by the solicitation, and the agency improperly attempted to cure the awardee's proposal by creating the information that the awardee failed to provide by developing a risk-adjusted price using other information in the awardee's proposal).

<sup>3</sup> *E.g.*, *SynergisT JV, LLC*, B-422384.2, B-422384.4, Mar. 11, 2025, 2025 CPD ¶ 83 (finding the agency's decision to reject the protester's quotation for providing labor categories (LCATs) under special item numbers (SINs) other than the SIN under which the solicitation was issued unreasonable where the solicitation did not expressly limit vendors from quoting LCATs under a specific SIN).

*List of Congressional Committees*

The Honorable Susan Collins  
Chair  
The Honorable Patty Murray  
Vice Chair  
Committee on Appropriations  
United States Senate

The Honorable Rand Paul, M.D.  
Chairman  
The Honorable Gary C. Peters  
Ranking Member  
Committee on Homeland Security and Governmental Affairs  
United States Senate

The Honorable Tom Cole  
Chairman  
The Honorable Rosa DeLauro  
Ranking Member  
Committee on Appropriations  
House of Representatives

The Honorable James Comer  
Chairman  
The Honorable Robert Garcia  
Ranking Member  
Committee on Oversight and Government Reform  
House of Representatives

## Bid Protest Statistics for Fiscal Years 2021-2025

	FY2025	FY2024	FY2023	FY2022	FY2021
Cases Filed <sup>1</sup>	1688 (down 6%)	1803 (down 11%) <sup>2</sup>	2025 (increase of 22%)	1658 (down 12%)	1897 (down 12%)
Cases Closed <sup>3</sup>	1737	1706	2041	1655	2017
Merit (Sustain + Deny) Decisions	380	386	608	455	581
Number of Sustains	53	61	188	59	85
Sustain Rate	14%	16%	31%	13%	15%
Effectiveness Rate <sup>4</sup>	52%	52%	57%	51%	48%
ADR <sup>5</sup> (cases used)	53	76	69	74	76
ADR Success Rate <sup>6</sup>	91%	92%	90%	92%	84%
Hearings <sup>7</sup>	.5% (3 cases)	.2% (1 case)	2% (22 cases)	.27% (2 cases)	1% (13 cases)

<sup>1</sup> All entries in this chart are counted in terms of the docket numbers ("B" numbers) assigned by our Office, not the number of procurements challenged. Where a protester files a supplemental protest or multiple parties protest the same procurement action, multiple iterations of the same "B" number are assigned (*i.e.*, .2, .3). Each of these numbers is deemed a separate case for purposes of this chart. Cases include protests, cost claims, and requests for reconsideration.

<sup>2</sup> From the prior fiscal year.

<sup>3</sup> Of the 1,737 cases closed in FY 2025, 359 are attributable to GAO's bid protest jurisdiction over task or delivery orders placed under indefinite-delivery, indefinite-quantity contracts.

<sup>4</sup> Based on a protester obtaining some form of relief from the agency, as reported to GAO, either as a result of voluntary agency corrective action or our Office sustaining the protest. This figure is a percentage of all protests closed this fiscal year.

<sup>5</sup> Alternative Dispute Resolution.

<sup>6</sup> Percentage of cases resolved without a formal GAO decision after ADR.

<sup>7</sup> Percentage of fully developed cases in which GAO conducted a hearing; not all fully developed cases result in a merit decision.



441 G St. N.W.  
Washington, DC 20548

Comptroller General  
of the United States

B-422938, B-422938.2

June 2, 2025

The Honorable Susan Collins  
Chair  
The Honorable Patty Murray  
Vice Chair  
Committee on Appropriations  
United States Senate

The Honorable Rand Paul, M.D.  
Chairman  
The Honorable Gary C. Peters  
Ranking Member  
Committee on Homeland Security and Governmental Affairs  
United States Senate

The Honorable Tom Cole  
Chairman  
The Honorable Rosa DeLauro  
Ranking Member  
Committee on Appropriations  
House of Representatives

The Honorable James Comer  
Chairman  
Ranking Member  
Committee on Oversight and Government Reform  
House of Representatives

Subject: *ATP Gov, LLC*, B-422938, B-422938.2, Dec. 12, 2024, 2024 CPD ¶ 306

This letter is submitted pursuant to 31 U.S.C. § 3554(e)(1), which requires our Office to report any case in which a federal agency fails to fully implement a recommendation from the Comptroller General in a bid protest decision. As required by that statute, this letter includes a review of the procurement addressed in our decision, including the circumstances surrounding the failure of the contracting agency to implement the recommendation made in the decision. In addition, the statute requires that we address whether we recommend that Congress consider legislative action in order to correct an inequity or to preserve the integrity of the procurement process. In this letter we include

a recommendation that Congress take action to correct inequities highlighted by this bid protest.

The subject bid protest decision, *ATP Gov, LLC*, B-422938, B-422938.2, Dec. 12, 2024, 2024 CPD ¶ 306, addressed the actions of the Department of the Air Force in a procurement for military satellite terminal assemblies. The protest issues concerned whether the agency made an award to a firm whose product did not meet the material requirements of the solicitation. As discussed in the decision and in more detail in the attached appendix, the protest revealed that the Department of the Air Force announced one standard for evaluating proposals in the solicitation, but evaluated the offers it received using a different standard. In sum, the agency informed offerors that the terminals they proposed were required to meet certain certification requirements at the time of proposal submission, but then made an award to an offeror that proposed a terminal assembly that had been modified in such a way that it was not certified at the time of proposal submission, and the agency permitted that offeror to seek re-certification for the terminal assembly after award. We sustained the protest because we found that the agency's decision to make an award to a proposal that did not meet the announced requirements of the solicitation was unreasonable. We also found that this error competitively harmed the protester because the protester proposed a more expensive and less desirable terminal assembly because the protester believed that the agency required a terminal assembly that was already certified at the time of proposal submission.

Thus, we recommended that the agency either reevaluate the proposals it received in accordance with the terms of the solicitation and make an award to an offeror that met the solicitation's requirements, or, if the agency's needs were not reflected by the solicitation, to amend the solicitation and resolicit. We also recommended the agency reimburse ATP the costs of filing and pursuing its protest. More than one month after we issued our decision, the agency filed a request for modification of our recommended remedy. Of note, the agency's request explained that the agency did not contend that our decision contained errors of fact or law, but rather only asked us to modify our recommended remedy. Specifically, the agency explained that, because the protester did not file its protest within five days of receiving a debriefing, there was no automatic stay of performance during the protest, and the agency permitted the awardee to continue performing the contract. As a result, the agency argued that implementing our recommendation to reevaluate proposals or amend the solicitation would involve unspecified costs and unacceptable delays. As alternative relief, the agency requested that we amend our recommendation to recommend that the protester be reimbursed its reasonable costs incurred to prepare its proposal as well as its reasonable costs incurred in pursuing its protest. However, because that request was filed more than 10 days after the agency knew the basis for its request for reconsideration, we dismissed the agency's request as untimely consistent with our Bid Protest Regulations.<sup>1</sup>

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<sup>1</sup> Our regulations do not provide us with discretion concerning whether to dismiss untimely requests for reconsideration, and the same rules apply to requests filed by federal agencies as to any other party seeking reconsideration. See *United States Marine Corps--Recon.*, B-417830.2, Mar. 6, 2020, 2020 CPD ¶ 99 at 4 n.1 (concluding

Following our dismissal of the request, the Department of the Air Force has advised our Office that it does not intend to fully implement our recommendation. Specifically, the agency contends that implementing our recommendation to reevaluate proposals or amend the solicitation would involve substantial costs and delays, which would have unacceptable impacts on national security. The agency does not object to paying ATP's costs of filing and pursuing its protest and intends to implement that portion of our recommendation, but no longer proposes to pay the protester's proposal preparation costs.

As detailed in the appendix below, we do not agree with the agency's decision not to fully implement our recommendation. However, we do not recommend additional legislative action with respect to our recommendation to either reevaluate proposals or amend the solicitation and solicit revised proposals. We do note that the Air Force's request for reconsideration previously proposed to reimburse the protester for its proposal preparation costs. In making this proposal, the Air Force noted that this would provide the protester with some relief for the costs it incurred in competing for the agency's requirements that were awarded in a manner inconsistent with the established terms of the solicitation and applicable procurement law and regulation. While the Air Force no longer proposes to reimburse those costs, it has not identified a reason why it cannot, or believes that it no longer should, reimburse them. We therefore recommend that Congress enact a private bill directing the Air Force to also reimburse the protester its reasonable proposal preparation costs.

In addition to the appendix, enclosed for your review are copies of our public decision in the protest and the Department of the Air Force's letter of February 10, 2025. If you, or your staff, have any questions about this letter, please contact me at [emmanuelipereze@gao.gov](mailto:emmanuelipereze@gao.gov) or (202) 512-2853 or either of the following

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that we must dismiss an untimely agency request for reconsideration and cannot consider whether the request presents a significant issue because our regulations include no significant issue exception to our request for reconsideration timeliness rules).

Managing Associate General Counsels: Kenneth Patton at pattonk@gao.gov or (202) 512-8205 or Edward Goldstein at goldsteine@gao.gov or (202) 512-4483.

Sincerely,



Edda Emmanuelli Perez  
General Counsel

Enclosures

1. Appendix
2. *ATP Gov, LLC*, B-422938, B-422938.2, Dec. 12, 2024, 2024 CPD ¶ 306
3. *Department of the Air Force--Req. to Modify Remedy*, B-422938.3, Feb. 5, 2025, 2025 CPD ¶ 46
4. Letter from Department of the Air Force to GAO, Feb. 10, 2025

## APPENDIX

This discussion responds to the Department of the Air Force's decision not to fully implement the recommendations our Office made in sustaining a protest filed by ATP Gov, LLC, challenging the agency's decision to issue a delivery order to iGov Technologies, Inc. In this procurement, the agency sought to purchase portable satellite terminals and related equipment. The protest issues concerned the solicitation's requirement that the terminal assemblies the agency sought to purchase must be Wideband Global Satellite (WGS) certified by the Army Forces Strategic Command.

Specifically, the solicitation issued by the Air Force included numerous mandatory requirements, as well as other requirements that were optional but desirable. There were two relevant mandatory requirements. First, terminals had to provide auto-tracking/auto-acquire functionality. Second, the terminal assembly had to be certified *via* the Army Forces Strategic Command for operation allowing transmission over WGS when integrated with WGS-certified equipment. Significantly, during the question-and-answer period, one prospective offeror asked the agency whether the terminals needed to be WGS certified at the time of proposal submission, and the agency responded "Yes."

The agency received four proposals, including proposals from ATP and iGov. ATP proposed a terminal assembly that had auto-tracking capability and was fully WGS-certified at the time of proposal submission at a total evaluated price of \$300,219,569. By contrast, iGov proposed a base terminal that was WGS-certified at the time of the proposal submission, but that would need to be modified to provide the required auto-tracking capability (and so would require re-certification), at a total evaluated price of \$180,182,031.

To be clear, there is no dispute that iGov's proposed terminal assembly was not fully certified at the time of proposal submission or award, and, in this regard, the agency represents that as of the date of its letter, iGov is making progress with, but has not yet completed, the re-certification process for its terminal assembly. Letter at 2. Moreover, the agency, in its request for modification of our recommended remedy, represented that the agency did not contend that our decision sustaining ATP's protest contained errors of either fact or law. *Department of the Air Force--Req. to Modify Remedy*, B-422938.3, Feb. 5, 2025, 2025 CPD ¶ 46 at 4. Further, the agency has indicated it intends to implement the second portion of our recommendation by reimbursing the protester's costs of filing and pursuing its protest. Letter at 2.

In short, the principal area of disagreement concerns the feasibility and desirability of implementing our recommendation to reevaluate proposals or amend the solicitation. The Air Force contends that ATP, the protester, was the only offeror that proposed a terminal assembly that was WGS-certified at the time of proposal submission, and so a reevaluation of proposals would likely result in an award to ATP. *Department of the Air Force--Req. to Modify Remedy*, *supra* at 3-4. However, the agency argues that ATP's terminal assembly was both more expensive than iGov's terminal, and met fewer of the agency's desired, but optional, requirements. *Id.* Moreover, because iGov has been performing under the issued delivery order for several months, if the agency elected to

make an award to another company, the agency would have to terminate iGov's contract for the convenience of the government which would subject the agency to significant termination for convenience costs. Letter at 1-2. As a result, the Air Force contends that implementing this portion of our recommendation would result in either the procurement of a less capable product at a higher price, or would result in lengthy and unacceptable delays, depending on whether the agency elected to reevaluate or amend the solicitation. *Id.* In either case, the agency contends that the national security impacts would be unacceptable. *Id.*

In general, when developing our recommendations we consider all the circumstances surrounding the procurement, including the seriousness of the procurement deficiency, the degree of prejudice to other parties or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement, and the impact of the recommendation on the contracting agency's mission.<sup>2</sup> 4 C.F.R. § 21.8(b).

The agency however, raised none of the concerns it now raises during the pendency of the protest, and failed to file a timely request for reconsideration explaining its concerns with our recommended remedy. These issues were raised for the first time in the agency's untimely request for modification of our recommended remedy that was filed more than a month after our decision was issued. As explained in the attached decision resolving the agency's request, our Regulations do not permit us to consider untimely requests for reconsideration of our decisions. *Department of the Air Force--Req. to Modify Remedy, supra* at 5. More significantly, the issue of the timeliness of the agency's request is not merely an abstract legal question: by delaying more than a month before requesting that we modify the remedy and permitting continued contract performance in that interval, the agency exacerbated the potential termination for convenience costs and reprocurement delays that the agency now raises as reasons that it is declining to fully implement our recommendation. *Id.*

Moreover, to the extent the agency now contends that it does not intend to make an award to the protester because ATP's proposed terminal assembly is less capable and significantly higher priced than iGov's terminal assembly, we note the agency's concern is a direct result of the procurement error we identified in our decision. Specifically, during the protest, ATP explained that the solicitation's requirement for terminal assemblies to be WGS-certified at the time of proposal constrained ATP's proposed solution. *ATP Gov, LLC*, B-422938, B-422938.2, Dec. 12, 2024, 2024 CPD ¶ 306 at 7. ATP specifically identified a different and more capable terminal that it would have proposed had it known that it could pursue WGS certification post-award. *Id.* That is,

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<sup>2</sup> For example, in some cases where contracts have already been substantially performed before we issue our decision, we have concluded that it is impractical to recommend relief beyond recommending that an agency reimburse a protester's bid or proposal costs in addition to its protest costs. See *In re DOI, Presentations South, Inc. - Request for Reconsideration*, B-229842.3, Aug. 15, 1988, 88-2 CPD ¶ 148. The agency suggested payment of bid and proposal costs as an alternative remedy in its untimely request to modify our recommended remedy, but the agency does not currently propose to reimburse the protester's bid or proposal costs.

the agency could have received more--and more effective--competition if it had solicited for its actual needs, rather than soliciting based on different requirements than those it ultimately accepted at award. For these reasons, we continue to believe that our recommendation is appropriate.

When reporting a case in which an agency fails to fully implement a recommendation by our Office, 31 U.S.C. § 3554(e)(1)(B) also contemplates that our Office will recommend whether Congress should consider further action in order to correct an inequity or to preserve the integrity of the procurement process. That statute lists four varieties of recommendations which we may issue: (i) private relief legislation; (ii) legislative rescission or cancellation of funds; (iii) further investigation by Congress; or (iv) other action. Generally, we have only made such recommendations when the agency's decision not to follow our recommendation suggested a systemic flaw with the agency's processes or brought to light larger questions of interpreting applicable procurement law. While we believe the protester has been left with no effective relief due to the agency's decision, we do not believe the issues highlighted by this bid protest suggest a systemic flaw or touch on larger questions of procurement law. Accordingly, we do not include any recommendation for further Congressional action consistent with options (ii) – (iv) described above.

However, in light of the Air Force declining to reevaluate proposals in a manner consistent with the solicitation or amending the solicitation to adequately reflect the agency's actual requirements and allowing offerors to submit revised proposals consistent with those amended requirements, we recommend Congress enact a private bill directing the Air Force to reimburse the protester for its reasonable proposal preparation costs. As addressed above, our Bid Protest Regulations, implementing the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557, allow for the recovery of proposal preparation costs where a protester has been unreasonably excluded from a competition or where the agency's evaluation or award decision are inconsistent with applicable procurement law or regulation where other remedies enumerated in our regulations are not appropriate.

Typically, our Office will only recommend reimbursement of proposal preparation costs where other remedies, including reevaluation or amending the solicitation, are not feasible. See, e.g., *Moyle Real Estate & Dev. Co.--Costs*, B-404761.4, Mar. 27, 2012, 2012 CPD ¶ 125 (explaining that GAO will generally only recommend proposal preparation and protest costs where a federal lease does not contain a termination for convenience provision); *Energy Compression Research Corp.*, B-243650.2, Nov. 18, 1991, 91-2 CPD ¶ 466 (sustaining protest and recommending only recovery of proposal preparation and protest costs where performance of the protested contract was approximately one-half complete).

As discussed above, the Air Force proposed in its untimely request for modification of our recommendation that a reasonable alternative remedy would be to reimburse the protester for its reasonable proposal preparation costs, but the agency no longer proposes to reimburse those costs. However, the Air Force has not identified any obstacle to it voluntarily electing to reimburse the protester for its proposal preparation costs or a reason why it now believes reimbursement of those costs would be inappropriate. Although this remedy would not allow the protester a fair opportunity to

compete for the government's requirements, it would at least equitably reimburse the protester for the costs incurred in competing for the agency's requirements that were awarded in a manner inconsistent with the established terms of the solicitation and applicable procurement law and regulation.<sup>3</sup>

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<sup>3</sup> Additionally, we note that the protester is precluded from seeking further judicial relief at the U.S. Court of Federal Claims because this protest related to the issuance of a delivery order. See 10 U.S.C. § 3406(f).