U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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

Comptroller General
of the United States

Decision

Matter of: Department of the Air Force

File: B-422938.3

Date: February 5, 2025

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Laurel A. Hockey, Esq., Daniel Strouse, Esq., John J. O'Brien, Esq., Pablo Nichols, Esq., Rhina Cardenal, Esq., and Jason W. Moy, Esq., Cordatis LLP, for ATP Gov, LLC, an intervenor.
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Michael Willems, Esq., and Evan D. Wesser, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for modification of remedy is dismissed as untimely when it was filed more than ten days after the filer knew or should have known the basis of its request.

DECISION

The Department of the Air Force requests that our Office modify the recommendation in our decision in *ATP Gov, LLC*, B-422938, B-422938.2, Dec. 12, 2024, 2024 CPD ¶ 306. In that decision, we sustained a protest filed by ATP Gov, LLC, a small business of Elk Grove, Illinois, concluding that the agency erred by issuing a delivery order to iGov Technologies, Inc., a small business of Reston, Virginia, for satellite terminal assemblies because iGov's proposed equipment did not conform to material requirements of the solicitation. We recommended that the agency either reevaluate the proposals it received and make award to an offeror that proposed a terminal assembly that met the solicitation's requirements or revise the solicitation to better reflect the agency's needs. The agency argues that performance of the delivery order to iGov is ongoing and that reevaluating or amending the solicitation would entail unacceptable delays and costs. The agency asks us to modify our recommendation to

recommend that the agency pay ATP's proposal preparation costs in lieu of reevaluating proposals or amending the solicitation.[1]

We dismiss the request because it is untimely.

BACKGROUND

On May 2, 2024, the agency issued fair opportunity proposal request FA872624RB021 for theater deployable small military satellite communications equipment and associated services.[2] Contracting Officer's Statement (COS) at 3. The solicitation contemplated the issuance of a single fixed-price delivery order with delivery of a first integration test terminal due six months after issuance. *Id.*

The solicitation provided numerous "threshold" requirements that were mandatory for award, as well as other "objective" requirements that were optional but desirable. *See* Agency Report (AR), Tab 9e, Technical Requirements Document at 8. Relevant here, among the threshold requirements was a requirement that terminals "**shall** provide auto-tracking/auto-acquire functionality," and that this requirement would be verified by demonstration. *Id.* at 15, 46. Additionally, the solicitation also required that "[t]he terminal assembly **shall** be certified via [Army Forces Strategic Command] for operation with the antenna(s), allowing transmission over [Wideband Global Satellite Communications (WGS)] when integrated with WGS-certified equipment." *Id.* at 18. During the question and answer (Q&A) period, one offeror asked "[d]oes the terminal need to [be] WGS certified at time of proposal submission?" to which the agency responded "Yes." AR, Tab 9f, Revised Q&As Spreadsheet, Item 58.

The agency received four proposals, including from ATP and iGov. COS at 11. Of note, ATP proposed a terminal assembly that had auto-tracking capability and was WGS-certified at the time of proposal submission at a total evaluated price of $300,219,569. *Id.* at 11-12. 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 hence would require recertification, at a total evaluated price of $180,182,031. *Id.*

The agency issued a delivery order to iGov, and ATP filed a protest of that award with our Office. ATP principally alleged that the WGS certification process requires that terminals and all attached equipment must be certified as an assembly, and that iGov's proposed terminal assembly, as a whole, was not WGS certified and therefore did not

[1] We also recommended that the agency pay ATP's costs of filing and pursuing its protest, including reasonable attorney fees. The agency does not request that we modify this portion of our recommendation.

[2] Unless otherwise noted, references to the record are to the documents in the agency report provided in the initial protest.

meet the solicitation's requirement to be WGS certified at time of proposal submission. Protest at 12-19.

In our prior decision, we concluded that ATP was correct. Specifically, we explained that question 58 and the agency's answer formed part of the solicitation and clearly explained to offerors that the terminal assembly had to be WGS certified at the time of proposal submission. *ATP Gov, LLP, supra* at 6-7. In this regard, while the awardee's proposed base terminal was certified at the time of proposal submission, that terminal as certified did not meet the solicitation's requirement for auto-tracking. *Id.* Furthermore, while the modified terminal assembly proposed by the awardee met the solicitation's requirement for auto-tracking, that modified terminal assembly was not certified at the time of proposal submission. *Id.* Accordingly, we concluded the awardee's terminal assembly did not meet the material requirements of the solicitation and the agency erred by making award to iGov. *Id.* We issued our decision sustaining the protest on December 12, 2024. *Id.*

The agency represents that no completed terminal assemblies have been deployed to date, but that iGov is seeking certification for its modified terminal assembly and has completed [DELETED] testing phases necessary for that certification. *Id.* at 3. The agency filed its request to modify our recommendation on January 15, 2025.

DISCUSSION

The agency asks that we modify our recommendation for several reasons. The principal arguments advanced by the agency are that our recommended remedy is impracticable because implementing either of our proposed remedies will involve significant expense and unacceptable delays.[3] *Id.* at 3-5. First, the agency contends that, in order to implement either of our recommendations it would need to terminate iGov's delivery order, which would result in an unspecified amount of termination for convenience costs.[4] *Id.*

Second, the agency notes that if it elected to reevaluate proposals, ATP's proposal was the only technically acceptable proposal the agency received, and so ATP would most likely be the awardee following reevaluation. *Id.* However, the agency notes that ATP's

[3] Of note, because ATP filed its protest more than five days following its debriefing, there was no automatic stay of performance under 31 U.S.C. § 3553(d) during the protest and the agency did not voluntarily stay performance of the delivery order. Agency Req. for Modification of Remedy at 2.

[4] While the agency represents that it has obligated funds approximately equal to [DELETED] of the total contract value, the agency has not identified what portion, if any, of those funds have actually been paid to--or what costs have already been incurred by--iGov. *See* Agency Req. for Modification of Remedy at 3. The agency represents only that its payment for performance to date and termination for convenience costs would be "some portion" of the obligated amount. *Id.*

price was approximately 60 percent higher than iGov's price, ATP's terminal assembly met fewer of the optional objective solicitation requirements, and making a new award to ATP would delay delivery of the terminal assemblies by an estimated 7 to 9 months. *Id.* In the alternative, the agency argues that if it elected to amend the solicitation and resolicit, that would delay delivery by more than 18 months, which would have unacceptable impacts to readiness. *Id.*

Finally, the agency represents that it does not view its filing as a request for reconsideration because the agency does not contend that our prior decision contained errors of fact or law. Agency Req. for Modification of Remedy at 1. Rather, the agency is solely requesting modification of our recommended remedy. *Id.*

While we acknowledge the readiness and cost-related concerns that the agency has raised for the first time in its request for modification of remedy, for the reasons discussed below our Bid Protest Regulations require that we dismiss the request because it is untimely.

Preliminarily, we note that, contrary to the agency's suggestion that its request is not a request for reconsideration, requests to modify our recommendations are requests for reconsideration of a portion of our decision--the recommended remedy. *See* 4 C.F.R. § 21.14(a) (noting that requests for reconsideration must provide "factual and legal grounds upon which reversal *or modification*" of our decisions is warranted) (emphasis supplied). Significantly, we have consistently concluded that requests for modification of the recommended remedy are effectively requests for reconsideration and have resolved them consistent with our regulations governing requests for reconsideration. *See, e.g., Tripp, Scott, Conklin & Smith--Claim for Costs,* B-243142.4, Nov. 16, 1992, 92-2 CPD ¶ 345 (explaining that reconsideration timeliness requirements apply to requests for modification of our recommended remedy); *Management Sys. Designers, Inc.--Request for Modification of Remedy*, B-244383.8, June 8, 1992, 92-1 CPD ¶ 496 (applying reconsideration timeliness rules to dismiss an untimely request for modification of remedy); *see also Department of the Navy--Request for Modification of Remedy*, B-401102.3, Aug. 6, 2009, 2009 CPD ¶ 162 (applying reconsideration pleading standards to request to modify remedy).

In this regard, our regulations require that 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. 4 C.F.R. § 21.14(b). In this case, the agency's request, filed on January 15, 2025, was filed more than a month after the issuance of our decision on December 12, 2024. We note that the agency does not argue that there have been any significant changes or developments since the issuance of our decision that informed this request; indeed, the gravamen of the concerns the agency now raises were known to the agency during the pendency of the protest and were not raised as objections to the protester's ability to demonstrate competitive prejudice or to the protester's requested remedies. *See, e.g.*, Memorandum of Law at 21-22 (arguing the protester cannot demonstrate competitive prejudice, but not

because it would impracticable to provide a remedy, or because the delivery order was already being performed).

Further, while the agency has provided two letters from senior Air Force officials, dated in early January of 2025, elaborating on the potential impacts of implementing our recommendation, those letters describe impacts that the agency knew (or should have been aware of) at the time our decision was issued. *See* Agency Req. for Modification of Remedy, attachs. 1 and 2. That is, the letters identify potential readiness impacts stemming from changes in the timeline to field the satellite terminal assemblies, but those impacts are not newly developed in the month between the issuance of our decision and the filing of the agency's request for modification of our recommendation. *See, e.g.*, Agency Req. to Modify Recommendation at 5 (explaining that the requirement for the terminals is urgent because they were "already late to need"). In sum, the agency does not suggest that those impacts have meaningfully changed since our decision was issued.

Significantly, we note that the issue of timeliness here 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 has exacerbated the potential termination for convenience costs and reprocurement delays that the agency now raises as arguments in favor of modifying our recommendation.

Finally, we also note that, while our regulations provide for the consideration of untimely protests where a significant issue is involved or for good cause shown, 4 C.F.R. § 21.2(c), there is no similar provision regarding untimely requests for reconsideration. *See Simulators Limited, Inc.--Recon.*, B–208418.2, Mar. 17, 1983, 83-1 CPD ¶ 274. That is, 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 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).

In short, the agency's request was filed more than ten days after it knew or should have known the basis on which it now requests the modification of the recommended remedy in our decision, and we dismiss the agency's request to modify the remedy as untimely. 4 C.F.R. § 21.14(a).

The request for modification is dismissed.

Edda Emmanuelli Perez
General Counsel