

PROTESTERS MUST FILE TIMELY PROTESTS AND PLEADINGS, AND AGENCIES MUST FILE TIMELY AS WELL

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There are literally hundreds (perhaps thousands) where the Government Accounting Office (“GAO”) has dismissed a protest because it was untimely filed (generally more than 10 days after the protester knew or should have known its reasons for protesting). You will be interested in knowing that the GAO handles agency time-sensitive filings (with deadlines in the GAO rules) the same way, dismissing them if they are untimely. *Dep’t of the Air Force*, B-422938.3, Feb. 5, 2025.

The Air Force requested that the GAO modify the recommendation in the GAO decision sustained in *ATP Gov, LLC*, B-42298 et. Al, Dec. 12, 2024. The Air Force wanted the remedy changed to only a payment of ATP’s proposal preparation costs in lieu of GAO’s remedy of reevaluating proposals or amending the solicitation. The reason for this revised remedy was because either GAO recommendation would require the termination of the awarded delivery order which would result in an unspecified amount of termination for convenience costs. Also, the awardee was the only technically acceptable proposal received by the agency, so ATP would most likely be the awardee.

First, the Air Force stated that it did not view this filing as a request for reconsideration because it does not contend that GAO’s decision contained errors of fact or law—the Air Force viewed it as a “modification of the remedy.” GAO rejected this, noting that requests to modify GAO recommendations are requests for reconsideration of a portion of the decision. 4 CFR § 21.14(a) in the GAO rules notes that a request for reconsideration must provide factual and legal grounds upon which reversal or modification of a GAO decision is warranted.

Next, the GAO noted that a request for reconsideration of a bid protest shall be filed not later than 10 days after the basis for reconsideration is known or should have been known, whichever is earlier. In this case, the agency request was filed on January 15, 2025, *more than a month after the issuance* of the GAO decision on Dec. 12, 2024. The Air Force does not argue that anything changed between those two dates. Indeed, the Air Force knew of these concerns during the pendency of the protest.

In an interesting passage, GAO stated:

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 [GAO] 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.

Furthermore, GAO noted that although its regulations provide for untimely protests where a significant issue is involved or for good cause, there is no similar provision for untimely requests for reconsideration. GAO therefore has no 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. GAO dismissed the Air Force request to modify the remedy as untimely.

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