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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Cogent Systems, Inc.

File: B-295990.4; B-295990.5

Date: October 6, 2005

Ron R. Hutchinson, Esq., and Gerard F. Doyle, Esq., Doyle & Bachman LLP, for the protester.

Capt. Geraldine Chanel, Lt. Col. Thomas C. Modeszto, and Raymond M. Saunders, Esq., Department of the Army, for the agency.

David Apatoff, Esq., and Shannon R. Hall, Esq., Arnold & Porter LLP, for Motorola, Inc., the intervenor.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In a negotiated procurement that provided for award on the basis of a price/technical trade-off, the agency's determination that the protester's lower-priced proposal was unacceptable was unreasonable, where the agency's assessment of a significant weakness in the protester's proposal with respect to its proposal of a flatbed scanner was unreasonable and the agency failed to provide meaningful discussions to the protester on this point.

DECISION

Cogent Systems, Inc. protests the award of a contract to Motorola, Inc. under request for proposals (RFP) No. W9124Q-05-R-AFIS, issued by the Department of the Army for an Automated Fingerprint Identification System (AFIS) to be used by the government of Iraq. Cogent challenges the agency's technical and price evaluation and source selection decision.

We sustain the protest.

The RFP, issued under a combined synopsis/solicitation for a commercial item in accordance with Federal Acquisition Regulation (FAR) part 12.6, provided for the award of a fixed-price contract for a turnkey AFIS for the Rapid Equipping Force

(REF) to be used by the Iraqi government.¹ Offerors were informed that the initial baseline system will have a “Commercial-off-the-Shelf (COTS) capability with an added ability to read in transactions [from] CD-ROMs generated by livescan equipment procured under a separate contract.” RFP at 2. The contract would also include options for three upgrades to the baseline system.

Offerors were provided with a number of documents describing the system and services to be provided, including the SOW, the Requirement Specification for the Iraqi AFIS System, and the Iraqi National Electronic Fingerprint Transmission Specification (EFTS). Offerors were informed that

[t]he initial delivery will be a tenprint AFIS capable of receiving transactions, per the Iraqi-EFTS, on CD-ROMs, storing and matching fingerprints, and outputting Hit and no-Hit reports both as SREs [System Response Electronics] and in paper reports[,]

and that later upgrades of the system would provide the capability to process latent prints. RFP, Tab 71D, Requirement Specification for the Iraqi AFIS System, at 2. The solicitation also stated search rates and response times by task; the baseline system was required to be able to process 10,000 tenprint transactions daily. Shorter response times were identified for the upgrade options depending upon the task and priority assigned. *Id.* at 5.

The RFP provided for award on the basis of a price/technical tradeoff and identified the following evaluation factors and subfactors:

Technical/management	
	Experience
	Integrated technical/management
	Design
	Risk management
	Key personnel
Past Performance	
Price	
Subcontracting Plan	

¹ The REF was formed to develop strategies and methodologies to swiftly introduce material innovations into the Army by taking emerging technologies to operational environments for initial field evaluation. RFP, Tab 71C, Statement of Work (SOW), at C.1.2.

RFP, Tab 71A, Evaluation Plan, at 1, 3-4. Offerors were informed that the technical/management factor was more important than the past performance factor, and that both non-price factors were, when combined, more important than price. Offerors were also informed that the subcontracting plan factor would be evaluated on a pass/fail basis.

The RFP also provided that proposals would be color rated under the technical/management factor as either purple (the highest rating), green, blue, yellow, or red (the lowest rating) and defined each rating. For example, green was defined as a “proposal that demonstrates competence and exceeds the minimum requirements of the [criterion]; has an above average probability of success; no significant weaknesses and only minor correctable deficiencies exist.” Blue was defined as a “proposal that meets in all aspects the minimum requirements of the [criterion]; has a good probability of success; no significant weaknesses and any deficiencies can be readily corrected.” Yellow was defined as a “proposal that fails to meet the minimum requirements of the criteria but may through negotiations; low probability of success; major weaknesses and/or significant number of deficiencies that may be improved or corrected through discussions.”² Red was defined as a “proposal that fails to meet minimum requirements of the criteria; proposal needs major revisions; very low probability of success.” RFP, Tab 71A, Evaluation Plan, at 2-3. The RFP also instructed offerors as to what was required to receive a blue (acceptable) rating under each of the subfactors to the technical/management factor. For example, offerors were instructed that, with respect to the design subfactor, they

must identify the methods to be used to optimize the goals of standards compliance, ease of use, accuracy and the utilization of best practices in designing a requirements compliant AFIS system to be deployed across multiple tasks. Include a discussion of the finalizing of the Plans and the role of the Design Review. For each rated requirement in the Requirements Specification and each rated

² The RFP defined a “deficiency” to be

[a] material failure in the proposal to meet a requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level.

“Weakness” was defined to be

[a] flaw in the proposal that increases the risk of successful contract performance. A “significant weakness” in the proposal is a flaw that appreciably increases the risk of unsuccessful contract performance.

RFP, Tab 71A, Evaluation Plan, at 3.

task in the Statement of Work provide a one to two page description of your approach in meeting the requirements. In order to get a blue rating, your proposal must present realistic approaches and practices.

Id. at 3-4.

The proposals received from Cogent and Motorola were evaluated by the agency's proposal evaluation board (PEB). Although no discussions were conducted, clarifications were obtained from the offerors before a final consensus judgment was made by the PEB. Motorola was found to have offered the only "fully acceptable technical/management proposal," while Cogent's proposal received a yellow rating under the technical/management evaluation factor. Agency Report (AR), Tab 86, Initial Price Objective Memo/Pre-Negotiation Memo, at 5, 13. On February 11, 2005, award was made to Motorola on the basis of initial proposals.

Following a debriefing, Cogent protested to our Office, complaining that the Army had miscalculated Cogent's technical and price proposals. After submission of the agency's report, Cogent filed a supplemental protest, complaining that Motorola's proposal failed to conform to several material terms and conditions of the solicitation. Prior to submission of a report responsive to Cogent's supplemental protest, the Army informed our Office that it would take corrective action by amending the solicitation, conducting discussions with the offerors, and obtaining revised proposals. On April 12, we dismissed Cogent's protest as academic.

By letters dated April 14, the Army informed Cogent and Motorola of certain evaluated weaknesses in the firms' technical/management and price proposals. On April 28, Cogent and Motorola submitted revised proposals. Although Cogent improved its proposal rating, its proposal was again rated yellow under the design subfactor of the technical/management factor and thus its technical/management proposal was considered yellow and unacceptable. See AR, Tab 25, PEB Consensus Evaluation of Cogent's Revised Proposal, at 9. Motorola's proposal was again found to be acceptable.

On May 12, the Army amended the solicitation and provided the offerors with additional written discussions. The Army advised Cogent at this time that its "design still has several weaknesses that are considered significant enough to result in a less than acceptable rating." AR, Tab 26, Army Letter to Cogent. On May 16, Cogent protested to our Office, complaining that the Army's discussions with the firm were not meaningful. We dismissed this protest as premature on May 19. On May 24, Cogent and Motorola submitted revised proposals; Motorola made no revisions to its technical proposal, submitting only price revisions.

By letter dated May 31, the Army again reopened discussions (apparently because of Cogent's previously dismissed protest on this point). Cogent was informed of a

number of areas of its proposal that were considered to be a significant risk under the design subfactor, including that the “design change required in REF requirement 2.2.2 is not adequately addressed,” that the “radical change in performance in your revised proposal (9600 time slower) causes doubt as to the stability of the design,” that there are “numerous disconnects between the calculations of response times in the revised proposal and the RFP and within other parts of your proposal,” and that its “projection on page C.7 regarding Upgrade 2 is based on equipment that is not currently available and is not supported in your [bill of materials].” The Army also advised Cogent that the firm had failed to provide adequate rationale for the tremendous price decrease for upgrades 1 and 2 nor had it supported “the relatively minor increase in the baseline system.” Cogent was instructed to provide additional information such as priced bills of material for the original and upgrade systems. AR, Tab 41, Army Letter to Cogent (May 31, 2005).

On June 8, Cogent filed an agency-level protest with the Army, complaining that the agency’s May 31 letter reflected a lack of meaningful discussions because it was based upon an incomplete evaluation of the firm’s May 24 revised proposal. Cogent also complained that the request for additional price information was contrary to law and the solicitation requirements. The Army dismissed Cogent’s protest “as being premature and without substance.” AR, Tab 56, Decision on Agency-level Protest.

On June 9, Motorola informed the Army that the firm’s April 28 proposal, as revised by its May 24 pricing proposal of \$22.8 million, was its final proposal. On that same date, Cogent submitted its final revised proposal. The PEB continued to rate Cogent’s final revised proposal yellow and unacceptable under the design subfactor of the technical/management factor, and thus unacceptable overall. The Army also found that, despite the agency’s request during discussions, Cogent had failed to provide cost information supporting the firm’s significant decrease in its proposed price. Based upon the agency’s determination that Cogent had not supported its price reduction, the Army ignored Cogent’s final revised price of \$16.6 million and instead used \$20.2 million in the award evaluation.³ AR, Tab 66, Final Price Analysis, at 3.

Because Motorola was again found to have submitted the only acceptable technical proposal, the agency affirmed the award made to Motorola. Following a requested debriefing, Cogent filed this protest.⁴

³ The \$20.2 million figure was derived from Cogent’s earlier submitted price proposal.

⁴ The Army authorized Motorola’s performance of the contract in the face of this protest based upon the agency’s determination that “urgent and compelling circumstances that significantly affect the interest of the United States will not permit awaiting the decision of the GAO.” AR, Tab 97, Army Determination & Finding, Aug. 3, 2005.

Cogent complains that the Army's evaluation of the firm's proposal under the design subfactor was unreasonable. Cogent challenges each of the evaluated weaknesses found in its design, arguing that the Army ignored information provided by Cogent in its final revised (fourth) proposal, "imposed requirements not provided for in the solicitation," and did not evaluate in accordance with the stated evaluation scheme. Protester's Comments at 12. In this regard, Cogent states that none of the weaknesses identified in its proposal under this subfactor shows Cogent's failure to satisfy the minimum solicitation requirements, but only "reflect areas in Cogent's proposal that offered to exceed the minimum requirements and the Army's alleged weaknesses are based on purported ambiguities or disconnects in the manner in which Cogent proposed to exceed the minimum requirements." *Id.* at 13.

In reviewing protests of an agency's evaluation and source selection decision, we do not reevaluate proposals but examine the record to determine whether the evaluation and source selection decision are reasonable and consistent with the solicitation's evaluation criteria and applicable procurement laws and regulations. *Abt Assocs., Inc.*, B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223 at 4.

A hearing was conducted by our Office, at which testimony was elicited to explain the agency's evaluation of Cogent's and Motorola's proposals under the design subfactor. That testimony indicated that, although the PEB's consensus judgment was based upon a totality of the evaluated weaknesses in Cogent's final revised proposal under the design subfactor, *see* Hearing Transcript (TR) at 104, 232, some of the evaluated weaknesses were considered by the PEB to be more significant than others and that other weaknesses were considered to be fairly minor,⁵ although the evaluators also testified that the PEB did not specifically identify in its consensus report which weaknesses were significant or minor. *See* TR at 104-06, 200-01, 203-05. Specifically, the weaknesses that the evaluators considered significant were (1) that Cogent's calculations supporting its system's response capacity and the use of a peak load factor of three were confusing and unexplained, which raised concerns about the maturity of Cogent's design,⁶ *see* TR at 55, 80-82, 200-01, and (2) that, although Cogent was now offering to provide a compliant scanner (in its initial proposal

⁵ We note, in this regard, that the agency's report was not consistent with the hearing testimony with respect to the significance of some of the weaknesses identified in the final consensus evaluation document. For example, although the agency asserted that the weakness associated with Cogent's proposed scanner did not affect Cogent's rating under this subfactor, *see* AR at 34, two of the agency's evaluators testified that this weakness was considered significant. *See* TR at 45, 120, 214.

⁶ The board assessed at least three weaknesses associated with its concern that Cogent's calculations regarding its system's response capacity and peak hour loading factor were confusing and unexplained. *See* TR at 203-06.

Cogent had not offered a scanner that satisfied the solicitation requirements), the firm did not explain how this was possible given the firm's earlier protest argument that a compliant scanner did not exist. See TR at 56, 59-60. There were no deficiencies, as defined in the solicitation, identified in the evaluation documentation.

As indicated above, one of the weaknesses identified in the hearing testimony as being significant to the PEB's judgment that Cogent's proposal was unacceptable under the design subfactor concerned the firm's proposed flatbed scanner. The RFP provided that, with the second planned upgrade of the system, the AFIS would be able to communicate electronically with flatbed scanners. Offerors were informed that the scanners must be certified by the Federal Bureau of Investigation (FBI) and be able to scan a fingerprint card at 1,000 pixels per inch (ppi) scanning in 90 seconds or less. RFP, Tab 71D, Requirement Specification for the Iraqi AFIS System, at 5.

In its January 25, 2005 initial proposal, Cogent proposed an Epson Expression 1680 scanner, which it stated would scan 1,000 ppi in 100 seconds or less. Cogent acknowledged in its proposal that its proposed scanner was not compliant with the solicitation requirements and stated that "[a]s soon as a commercial flatbed scanner becomes available that provides 1,000 ppi in 90 seconds or less, we will certify it through the FBI and provide it for the Iraq AFIS." AR, Vol. 6, Cogent Initial Proposal at C-21. The PEB considered this to be a minor weakness in Cogent's initial proposal. TR at 58.

After the reopening of the competition following Cogent's initial protests, Cogent proposed in its April 28 revised (second) proposal to satisfy this requirement by providing the FBI-certified Epson Perfection 4870 flatbed scanner, which it stated operated at 1,000 ppi and scans a fingerprint card in 90 seconds or less. Cogent also provided a copy of a December 2, 2004 letter from the FBI indicating that this scanner was certified.⁷ AR, Tab 22, Cogent's Revised (Second) Proposal at C-18. Although Cogent's revised proposal was again rated yellow under the design subfactor, there was no discussion of Cogent's proposed scanner in the consensus evaluation report. See AR, Tab 25, Consensus Evaluation Report of Cogent's Revised (Second) Proposal.

Subsequently, the Army sent Cogent two discussion letters, dated May 12 and May 31, and received from Cogent revised proposals dated May 24 (third proposal) and June 9 (fourth and final proposal). Cogent's proposed scanner was not

⁷ Cogent's proposed Epson Perfection 4870 scanner was also identified on the FBI's website as a product certified for compliance with the FBI's integrated automated fingerprint identification system image quality specifications. See <http://www.fbi.gov/hq/cjisd/iafis/cert.htm>.

mentioned in either of these discussion letters, and both the third and final proposal offered the same scanner proposed in Cogent's second proposal.

In its final consensus evaluation, the PEB identified Cogent's proposed scanner as a weakness under the design subfactor, and, as noted above, two of the Army's evaluators testified that this was considered to be a significant weakness. See TR at 45, 120, 214. In particular, the PEB noted that Cogent did not explain in its third or final proposal how it was now able to offer a compliant scanner, given the firm's earlier protest allegation that no FBI-certified scanner could satisfy all the solicitation requirements. With regard to this concern, the PEB noted:

Not addressed in the third proposal--still a mystery. Casts serious doubt on their protest (now withdrawn--but the major contributor to our not having an operational system in Iraq at this point in time.) Fourth proposal page C-20 there is no change to their proposal in this area--in their first Protest they explained how they nor anyone else not meet this rated requirement (see Protest #1 letter). Since there was no change to their proposal (fourth submittal) in this area they have still not explained how they meet it now and there is still no AFIS in Iraq because they protested saying no such system existed. What are we to believe? When will we have permission to move on and meet our critical need?

AR, Tab 54, Consensus Evaluation of Cogent's Final Revised (Fourth) Proposal, at 7.

The hearing testimony evidences that the PEB erroneously believed that the scanner offered by Cogent in its final revised proposal was the same as the one offered by Cogent initially. Specifically, one of the Army evaluators testified that the basis for the evaluated significant weakness concerning Cogent's flatbed scanner was that Cogent (in its third and final proposals) had offered the same scanner as was proposed in the firm's initial proposal, but that Cogent asserted, without explanation, that the scanner now satisfied all the solicitation requirements. See TR at 59-60, 120. As described above, however, Cogent proposed a different Epson scanner in its second, third, and fourth proposals than was offered in the firm's initial proposal to satisfy this requirement. When confronted with this information, the evaluator acknowledged that Cogent had proposed a different scanner and that the "underlying mandatory requirement to scan was met," but complained that the firm still had not explained how the firm could offer a compliant scanner after protesting that no such scanner existed. TR at 122-24, 126-28.

We find that the record does not establish a reasonable basis for the agency's assessment of a significant weakness with respect to Cogent's proposed scanner. First, as the record shows and the Army now admits (see Agency's Hearing Comments at 13-14), the evaluators failed to recognize that Cogent had proposed a different scanner in its revised proposals to satisfy the solicitation requirements--this

failure itself renders unreasonable the agency's evaluation judgment concerning Cogent's proposed scanner. Despite the error, the Army's evaluator nevertheless asserted that the weakness was based upon Cogent's failure to explain how it could offer a compliant scanner when the firm had asserted in its initial proposal and earlier protest that no such scanner existed. TR at 122-24. However, even assuming this latter evaluation judgment was reasonable, the Army failed to provide Cogent with meaningful discussions with respect to this scanner.⁸

The FAR requires at a minimum that contracting officers discuss with each firm being considered for award "deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond." FAR § 15.306(d)(3). Here, the Army twice provided Cogent with written discussions after it proposed the Epson Perfection 4870 scanner as a compliant product, but never identified its concern that Cogent had not explained how it was now able to offer a compliant product, even though the evaluators regarded this as a significant weakness.⁹

In short, we find no reasonable basis in the record for the agency's judgment that Cogent's proposed scanner was a significant proposal weakness. We also find that, in any event, the Army failed to conduct meaningful discussions with Cogent with respect to this aspect of the agency's evaluation.

⁸ The Army argues that Cogent's allegation concerning the adequacy of discussions with respect to its scanner is untimely. Cogent filed an agency-level protest with the Army on June 8, alleging that the Army had failed to provide Cogent with meaningful discussions. See Agency's Hearing Comments at 10-12. On June 17, the Army dismissed Cogent's agency-level protest as premature and without substance. The Army argues that Cogent's June 28 protest to our Office challenging the conduct of discussions is untimely because it was not filed within 10 days of the date that the firm received the agency's dismissal of the agency-level protest. See 4 C.F.R. § 21.2(a)(3) (2005). We disagree. The agency's decision on the agency-level protest itself states that the firm's protest was dismissed as premature and therefore not a decision on the merits. Thus, there was no obligation for Cogent to file a protest within 10 days of the agency's dismissal of the agency-level protest.

⁹ The parties disagree as to whether the Army was required to address Cogent's third proposal in the May 31 written discussions provided to the firm. In the Army's view, the third proposal was not the subject of a consensus evaluation, and Cogent was informed that the Army would not be evaluating this proposal. Although we need not address this disagreement given our conclusions above, we note that the Army did in fact evaluate the third proposal, as evidenced by the final consensus evaluation document, which repeatedly references Cogent's third proposal. See AR, Tab 54, Consensus Evaluation of Cogent's Final Revised (Fourth) Proposal, at 3-7.

The Army argues that, even assuming that it erred with respect to its evaluation of Cogent's proposed scanner and failed to provide Cogent with meaningful discussions with respect to it, Cogent was not prejudiced because this evaluated weakness was only one of a number of weaknesses assessed under the design subfactor. In the Army's view, since the PEB's judgment that Cogent was unacceptable under the design subfactor was based upon a totality of the identified weaknesses, the protester cannot demonstrate that it would have been found acceptable absent the Army's errors. See Agency's Hearing Comments at 10, 14.

Prejudice is an element of every viable protest, and our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that but for the agency's actions, it would have had a reasonable possibility of receiving award). McDonald Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 103 F.3d 1577, 1581 (Fed. Cir. 1996).

While, as noted above, the contemporaneous documentation and hearing record evidence that the unacceptability of Cogent's proposal under the design subfactor was based upon a number of evaluated weaknesses, the record also shows that the PEB considered some weaknesses to be more material than others. That is, the hearing testimony evidenced that the PEB, in its contemporaneous deliberations, considered weaknesses assessed—in Cogent's design—with respect to its proposed scanner and its peak loading factor to be more significant than other identified weaknesses, even though the PEB did not specifically rank weaknesses.¹⁰ See, e.g., TR at 47-50. Moreover, the Army admitted in its report that some of the weaknesses identified in the final consensus evaluation report actually concerned Cogent's earlier proposals and not the firm's final revised proposal. See AR at 29-34. The record shows that removing Cogent's proposed scanner from the list of evaluated weaknesses under the design subfactor would require the agency to reconsider whether Cogent's proposal remained unacceptable in light of the other evaluated weaknesses. Accordingly, we find from this record that there is a reasonable possibility, under a fair evaluation of Cogent's final proposal under this subfactor, that Cogent's proposal could be found acceptable. If Cogent's proposal were found acceptable, the agency then would be required to perform a price/technical tradeoff

¹⁰ Cogent also protested that the Army failed to provide the firm with meaningful discussions with respect to its proposed peak hour loading factor. Although we need not address this allegation, the record evidences that Cogent first proposed this design approach in its April 28 second proposal, see AR, Tab 22, Cogent's Revised (Second) Proposal, at C-19-22, and that it is not at all clear that the firm was meaningfully apprised of the evaluators' significant concerns with regard to Cogent's use of this peak hour loading concept.

to determine whether Cogent's lower proposed price reflected the best value to the government.¹¹

In sum, we find a reasonable possibility that Cogent was prejudiced by the Army's evaluation errors and failure to conduct meaningful discussions with respect to the firm's proposed flatbed scanner. We sustain Cogent's protest on this basis.¹²

Although we would ordinarily recommend, under these circumstances, that an agency reopen the competition, obtain revised proposals, and make a new source selection decision, here the Army reports that part of Motorola's baseline system has been delivered to the Army for shipment to Iraq and that the remainder of the system was to be delivered by September 27. Furthermore, the Army confirms that each offeror's proposed system upgrade is unique to that offeror's system and that Cogent could not upgrade Motorola's system. TR at 262-63. In light of these circumstances, we do not find it feasible to propose reopening the competition and performing a new source selection. Accordingly, we recommend that the Army reimburse Cogent both its costs of proposal preparation and of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d). The protester should

¹¹ We also find that the Army erred in ignoring Cogent's proposed reduction in its final fixed price. Where, as here, a solicitation provides for the award of a fixed-price contract, an agency is not permitted to make upward adjustments in an offeror's proposed fixed-prices that the agency may believe to be priced too low. See McDonnell Douglas Corp., B-259694.2, B-259694.3, June 16, 1995, 95-2 CPD ¶ 51 at 9. Moreover, here the RFP did not provide for an assessment of the realism of proposed offerors' proposed fixed prices, which would have allowed the agency to assess Cogent's understanding of the solicitation requirements or to assess risk inherent in the offeror's proposal.

¹² Cogent challenged numerous other aspects of the Army's evaluation, including the acceptability of Motorola's proposal. Given our decision sustaining Cogent's protest based upon the Army's errors with respect to that firm's proposed flatbed scanner, we need not address these other allegations. We note, however, that, as asserted by the protester in its supplemental protest, the record evidences that Motorola did not specifically offer to satisfy the solicitation's revised minimum number of daily fingerprint searches. See AR, Tab 23, Motorola Revised Proposal at 4-24. This error was not contemporaneously recognized or considered by the PEB in its evaluation of Motorola's proposal. TR at 130, 149-50.

submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after the receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Anthony H. Gamboa
General Counsel