U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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

Comptroller General
of the United States

B-158766

November 14, 2024

Re: GAO Bid Protest Annual Report to Congress for Fiscal Year 2024

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 2024, 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 2024, one federal agency declined to implement the recommendations made by our Office in connection with a bid protest. By letter dated September 30, 2024, we reported an occurrence involving the Department of State: *Pernix Fed., LLC*, B-422122.2, Mar. 22, 2024, 2024 CPD ¶ 73. As explained in our September 30 letter, the protest concerned the relationship between the requirements to qualify as a U.S. person under the Omnibus Diplomatic Security and Antiterrorism Act of 1986, as amended (Security Act), regulations promulgated by the Department of State implementing the Security Act, as well as Federal Acquisition Regulation requirements related to registration in the System for Award Management (SAM).

The protest revealed a conflict created by the Department of State's Security Act regulations and the agency's interpretation of the SAM registration requirements. In sum, the requirement that a *de facto* joint venture register in SAM (which is not possible due to the joint venture not possessing a formal legal structure) could not be harmonized with the Department of State's current regulations that permit a *de facto* joint venture to qualify as a U.S. person under the Security Act. In sustaining the protest, we found that the Department of State's determination of the protester's ineligibility for award under both the Security Act and SAM registration requirements was unreasonable. As explained in our September 30 letter, we recommended that the agency reinstate Pernix Federal in the competition, amend the solicitation to clarify SAM registration requirements with respect to *de facto* joint venture members, and thereafter

proceed with the procurement as appropriate. On April 5, 2024, the Department of State notified our Office that it would not implement our recommendations.

Enclosed for your information is a copy of our letter of September 30 reporting the Department of State's failure to implement our recommendations. As discussed in the letter, we also included a recommendation that Congress take action to correct inequities highlighted by this bid protest and enact legislation that directs the Department of State to revise its Security Act regulations to resolve the conflict with the SAM registration requirements.

As a final matter, we note that, after we issued our decision, Pernix Federal filed a protest at the U.S. Court of Federal Claims that similarly challenged the Department of State's elimination of Pernix Federal from the competition in this procurement. Although a decision in this case is not publicly available, information available from the docket in this case indicates that on August 13, the court denied Pernix Federal's motion for judgment on the administrative record and request for injunctive relief in this matter and granted the government's motion for judgment on the administrative record. The court's decision would purportedly allow the agency to continue with its procurement as the agency argued before our Office. The docket also reflects that on September 11, Pernix Federal filed a notice of appeal of the decision to the U.S. Court of Appeals for the Federal Circuit.

Summary of Overall Protest Filings

During the 2024 fiscal year, we received 1,803 cases: 1,740 protests, 33 cost claims, and 30 requests for reconsideration. We closed 1,706 cases during the fiscal year: 1,635 protests--23.7 percent of which were issued merit decisions (sustain or deny), 39 cost claims, and 32 requests for reconsideration. Of the 1,706 cases closed, 346 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 2020-2024.

Most Prevalent Grounds for Sustaining Protests

Of the protests resolved on the merits during fiscal year 2024, our Office sustained 16 percent of those protests. Our review shows that the most prevalent reasons for sustaining protests during the 2024 fiscal year were: (1) unreasonable technical

evaluation;[1] (2) flawed selection decision;[2] and (3) unreasonable cost or price evaluation.[3] 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

[1] *E.g.*, *Kauffman and Assocs., Inc.*, B-421917.2, B-421917.3, Jan. 29, 2024, 2024 CPD ¶ 40 (finding multiple aspects of the agency's technical evaluation unreasonable, including where the contemporaneous record did not support the agency's conclusion that the awardee's quotation met solicitation requirements under the management plan factor pertaining to procedures for protecting certain data, because the awardee's quotation in fact did not address how that data would be protected); *Deloitte Consulting, LLP*, B-422094, B-422094.2, Jan. 18, 2024, 2024 CPD ¶ 36 (finding the agency's technical evaluation unreasonable where the awardee revised its quotation to mitigate an organizational conflict of interest raised by the agency during discussions by severing a proposed team member from its team, but the agency failed to consider the impact that removal of the team member would have on contract performance).

[2] *E.g.*, *Washington Bus. Dynamics, LLC*, B-421953, Dec. 18, 2023, 2023 CPD ¶ 286 (finding the agency's best-value tradeoff determination unreasonable where the determination was based on a flawed underlying evaluation, the agency failed to look beyond assigned adjectival ratings to qualitatively compare quotations, and the agency did not document its rationale for its source selection conclusions).

[3] *E.g.*, *Criterion Corp.*, B-422309, Apr. 16, 2024, 2024 CPD ¶ 96 (finding the agency's price realism evaluation unreasonable where the record did not show that the agency considered whether the protester's technical approach could reasonably be performed at the proposed price).

List of Congressional Committees

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

The Honorable Gary C. Peters
Chairman
The Honorable Rand Paul, M.D.
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 Jamie Raskin
Ranking Member
Committee on Oversight and Accountability
House of Representatives

Bid Protest Statistics for Fiscal Years 2020-2024

	FY2024	FY2023	FY2022	FY2021	FY2020
Cases Filed[1]	1803 (down 11%)[2]	2025 (increase of 22%)[3]	1658 (down 12%)	1897 (down 12%)	2149 (down 2%)
Cases Closed[4]	1706	2041	1655	2017	2137
Merit (Sustain + Deny) Decisions	387	608	455	581	545
Number of Sustains	61	188	59	85	84
Sustain Rate	16%	31%	13%	15%	15%
Effectiveness Rate[5]	52%	57%	51%	48%	51%
ADR[6] (cases used)	76	69	74	76	124
ADR Success Rate[7]	92%	90%	92%	84%	82%
Hearings[8]	.2% (1 case)	2% (22 cases)	.27% (2 cases)	1% (13 cases)	1% (9 cases)

[1] 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.

[2] From the prior fiscal year.

[3] The bid protest activity for fiscal year 2023 includes our Office's resolution of an unusually high number of protests challenging a single procurement. This procurement involved the Department of Health and Human Services' award of Chief Information Officer-Solutions and Partners 4 (referred to as "CIO-SP4") government-wide acquisition contracts; a single procurement for the award of hundreds of information technology services contracts.

[4] Of the 1,706 cases closed in FY 2024, 346 are attributable to GAO's bid protest jurisdiction over task or delivery orders placed under indefinite-delivery, indefinite-quantity contracts.

[5] 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.

[6] Alternative Dispute Resolution.

[7] Percentage of cases resolved without a formal GAO decision after ADR.

[8] Percentage of fully developed cases in which GAO conducted a hearing; not all fully developed cases result in a merit decision.

U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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

Comptroller General
of the United States

B-422122.2

September 30, 2024

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

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

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Committee on Oversight and Accountability
House of Representatives

Subject: *Pernix Federal, LLC*, B-422122.2, Mar. 22, 2024, 2024 CPD ¶ 73

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 report 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 report we do

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

The subject bid protest decision, *Pernix Federal, LLC*, B-422122.2, Mar. 22, 2024, 2024 CPD ¶ 73, addressed the actions of the Department of State in a procurement for the construction of anew consulate compound in Adana, Turkey. The protest issues concerned the qualification requirements of The Omnibus Diplomatic Security and Antiterrorism Act of 1986, as amended (Security Act), as implemented in regulations promulgated by the Department of State, as well as the Federal Acquisition Regulation (FAR) requirements related to registration in the System for Award Management (SAM). As discussed in the decision and in more detail in the attached appendix, the protest revealed a conflict created by the Department of State's Security Act regulations and the agency's interpretation of SAM registration requirements. In sum, the requirement that a *de facto* joint venture register in SAM (which is not possible) could not be harmonized with the Department of State's current regulations that permit a *de facto* joint venture to qualify under the Security Act. We sustained the protest because we found that the agency's determination that the protester was ineligible for award under both the Security Act and SAM registration requirements was unreasonable.

Thus, we recommended that the agency reinstate Pernix Federal in the competition, amend the solicitation to clarify SAM registration requirements with respect to *de facto* joint venture members, and thereafter proceed with the procurement as appropriate. We also recommended the agency reimburse Pernix Federal the cost of filing and pursuing its protest.

The agency has advised our Office that it does not agree with our conclusions, and therefore does not intend to follow our recommendation. The agency contends that our decision was inconsistent with its regulations, as well as recent decisions from the U.S. Court of Federal Claims (COFC) regarding SAM registration.

As detailed in the appendix below, we disagree with the agency's position and assert that the agency's arguments for not implementing our recommendation do not accurately reflect the conclusions stated in our decision and rely on COFC decisions that did not address the issues raised in Pernix Federal's protest. In addition to reporting to Congress the agency's failure to follow our recommendation, we also recommend that Congress pass legislation that directs the Department of State to revise its Security Act regulations to resolve the conflict with the SAM registration requirements.

In addition to the appendix, enclosed for your review are copies of our public decision in the protest and the Department of State's letter of April 5, 2024. If you, or your staff, have any questions about this letter, please contact me at emmanuellipereze@gao.gov or (202) 512-2853 or either of the following 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. *Pernix Federal, LLC*, B-422122.2, Mar. 22, 2024, 2024 CPD ¶ 73
3. Letter from Department of State to GAO, April 5, 2024

APPENDIX

This discussion responds to the Department of State's decision not to implement the recommendation our Office made in sustaining a protest filed by Pernix Federal, LLC challenging the agency's decision that Pernix Federal was ineligible for award in a procurement to construct a new consulate compound in Adana, Turkey. In procurements for diplomatic construction, the Omnibus Diplomatic Security and Antiterrorism Act of 1986, as amended (Security Act) contains certain qualification requirements for companies that want to submit offers and compete for the procurement. The protest issues concerned the qualification requirements of the Security Act, as implemented in regulations promulgated by the Department of State, as well as the Federal Acquisition Regulation (FAR) requirements related to registration in the System for Award Management (SAM).

The Security Act requires that, where adequate competition exists, only United States persons and qualified United States joint venture (JV) persons may bid on a diplomatic construction or design project. 22 U.S.C. § 4852(a)(1). In its regulations implementing the Security Act, the Department of State defines a United States joint venture person as including a "*de facto* joint venture." 48 C.F.R. § 652.236-72.

Specifically, in discussing how to determine status as a United States person under the Security Act, the Department of State regulations provide the following relevant guidance:

> Organizations that wish to use the experience or financial resources of any other legally dependent organization or individual . . . must do so by way of a joint venture. A prospective bidder/offeror may be an individual organization or firm, a formal joint venture in which the co-venturers have reduced their arrangement to writing, or a de facto joint venture where no formal agreement has been reached, but the offering entity relies upon the experience of a related U.S. firm that guarantees performance.

Id. Put differently, the agency's regulations define a United States person to include a *de facto* joint venture, *i.e.*, a joint venture without a formal agreement, where firms that do not independently meet the qualification requirements of a United States person can rely on the experience of at least one other related U.S. firm, and the other related U.S. firm: (1) itself meets all the requirements of a United States person and (2) guarantees performance of the contract. In such a case, the partnering firms are considered a *de facto* joint venture consisting of an "offering entity" and a "related U.S. firm that guarantees performance."

Separately, the FAR requires that an "offeror" be registered in SAM when submitting an offer or quotation. FAR clause 52.204-7(b)(1) ("An Offeror is required to be registered in SAM when submitting an offer or quotation and shall continue to be registered until time of award, during performance, and through final payment of any contract, basic agreement, basic ordering agreement, or blanket purchasing agreement resulting from this solicitation.").

On November 27, 2019, the agency posted a synopsis in SAM to advise offerors that it would conduct the subject procurement in three phases. Phases 1 and 2 involved prequalifying firms based on their prior experience. During phase 1, firms were required to complete prequalification pamphlets to demonstrate status as a U.S. person for the construction firm, as well as for the architectural and engineering design firm with which the construction firm had partnered to design the consulate compound. Firms prequalified in phase 1 were invited to participate in phase 2, which involved assessing the experience on past projects completed by the proposed lead design firm and construction firm. The highest technically qualified firms in phase 2 were invited to participate in phase 3 which involved a competition for a fixed-price contract based on technical and price proposals.

Pernix Federal participated in the procurement, and its phase 1 submission represented that it was competing as the offering entity of a *de facto* joint venture with co-venturers Pernix Group, Inc. and BE&K Building Group. Under this arrangement, the technical and financial resources of the three firms would be combined, and Pernix Group, Inc. and BE&K Building Group would be responsible and individually and severally liable for the full performance of any contract awarded to Pernix Federal for the Adana project. In this regard, the phase 1 submission included guarantee letters from both Pernix Group, Inc. and BE&K Building Group that identified Pernix Federal, LLC as the entity to which a contract would be awarded and stated that each company would be individually and severally liable for the full performance of the contract.

Consistent with the Department of State's regulations, therefore, the relevant entities involved in seeking prequalification were as follows:

The *de facto* joint venture:	Composed of Pernix Federal, LLC, Pernix Group, Inc., and BE&K Building Group.
Pernix Federal, LLC:	The offering entity. A wholly owned subsidiary of Pernix Group, Inc.
Pernix Group, Inc.:	A co-venturer. The parent company of Pernix Federal, LLC.
BE&K Building Group:	A co-venturer. A wholly owned subsidiary of Pernix Group, Inc.
Hellmuth, Obata & Kassabaum, PC (HOK):	Architectural and engineering design firm that partnered with Pernix to compete in the procurement.

After review of the phase 1 submission, on April 27, 2020, the Department of State notified Pernix that "Pernix Federal (defacto JV with Pernix Group & BE&K) & HOK Inc." had prequalified. In addition, in the public notices identifying the firms prequalified to participate in phase 2 of the procurement, the agency stated that the following team had

prequalified: "Pernix Federal & HOK, Inc." On July 8, Pernix Federal was invited to phase 2 where its submission was rated among the highest technically qualified firms, and on May 20, 2021, Pernix was invited to compete in phase 3. The agency again issued a public notice that identified Pernix Federal and HOK Inc. as the phase 2 prequalified team that would be invited to submit a phase 3 proposal.

The phase 3 solicitation included the SAM registration FAR clause, and additionally stated that offerors, including any *de facto* joint ventures, must have an active SAM registration at the time of proposal submission. Pernix Federal, as a stand-alone entity, was properly registered in SAM. However, Pernix Federal's *de facto* joint venture was not registered in SAM. As discussed more below, due to the nature of *de facto* joint ventures as contemplated by the agency's regulations implementing the Security Act requirements, it is not possible to register a *de facto* joint venture in SAM. Pernix Federal submitted a phase 3 proposal, and following the evaluation of proposals, on September 30, 2023, the agency selected Pernix Federal for award of the contract.

On October 11, B.L. Harbert International, a competitor, filed a protest challenging the award to Pernix Federal, prompting the agency to review the procurement. As a result of that review, the agency decided that Pernix Federal was ineligible for award for two reasons. First, the agency concluded that Pernix Federal, as a stand-alone entity, was not the prequalified offeror and therefore should not have been allowed to participate in the phase 3 competition. Essentially, the agency's position is that "Pernix Federal *de facto* Joint Venture" was the prequalified offeror and that "Pernix Federal, LLC" as a stand-alone entity was not prequalified. Second, the agency concluded that Pernix Federal was ineligible for award because its *de facto* joint venture entity was not itself registered in SAM as was explicitly required by the phase 3 solicitation.

After learning the agency's bases for revoking its award eligibility, Pernix Federal filed the protest at issue with our Office. In short, Pernix Federal argued that after it was prequalified as the "offering entity" of a *de facto* joint venture, it could submit its phase 3 proposal as the "offering entity" to compete for the Adana project. Pernix Federal further asserted that it met the SAM registration requirement because Pernix Federal and its co-venturers were all individually registered in SAM. In support of this position, Pernix Federal noted that a *de facto* joint venture cannot otherwise register in SAM because the FAR does not contemplate *de facto* joint ventures as defined in the State Department's regulations implementing the Security Act. Pernix Federal thus contended that the agency's conclusions were unreasonable and that it remained eligible for award.

In our decision, we first examined the issue of Pernix Federal's prequalification. Based on our review of the record and the applicable laws and regulations, we found that where an offeror chooses to utilize a *de facto* joint venture to qualify as a United States person in Security Act procurements, it can prequalify as a *de facto* joint venture and make any subsequent submissions from the stand-alone "offering entity" and still be considered the same entity that was prequalified. Consistent with the applicable regulations and the terms of the solicitation, the offering entity is the member of the *de facto* joint venture that is responsible for contract performance; the co-venturers provide a performance guarantee.

As discussed, Pernix Federal competed as the offering entity of its *de facto* joint venture, while Pernix Group and BE&K Building Group served as co-venturers and would provide performance guarantees. We concluded that in such a case, the offering entity and the prequalified *de facto* joint venture entity are essentially the same. Accordingly, we found unreasonable the agency's conclusion that Pernix Federal was no longer eligible for award because its proposal was submitted by "Pernix Federal, LLC," rather than "Pernix Federal *de facto* Joint Venture."

We next examined the FAR's requirements for SAM registration. As explained in our decision, the protest record established that it is impossible for a *de facto* joint venture to register in SAM. As contemplated by the agency's regulations implementing the Security Act requirements, a *de facto* joint venture is an entity without a formal agreement and is therefore unable to provide the required documents and information (*e.g.*, articles of formation; a Department of Treasury, Internal Revenue Service entity identification number) that are necessary to complete SAM registration. Since we concluded that Pernix Federal was the "offering entity" of the *de facto* joint venture and could reasonably be considered the prequalified offeror eligible to submit a proposal and to whom the SAM registration requirement applied, we concluded that the agency's ineligibility determination on this basis was also unreasonable.

In sum, the requirement that a *de facto* joint venture register in SAM (which is not possible) could not be harmonized with the Department of State's current regulations that permit a *de facto* joint venture to qualify under the Security Act and contemplate that the offering entity awarded a contract will be supported with performance guarantees from its co-venturers. Thus, we recommended that the agency reinstate Pernix Federal in the competition, amend the solicitation to clarify SAM registration requirements with respect to *de facto* joint venture members, and thereafter proceed with the procurement as appropriate. We also recommended the agency reimburse Pernix Federal the cost of filing and pursuing its protest.

By letter dated April 5, 2024, the agency notified our Office that it will not implement our recommendation. In its letter, the agency challenged GAO's legal conclusions on both issues discussed above. The agency explained that it disagreed with our legal conclusions, which it believed were inconsistent with the agency's regulations and recent decisions from the U.S. Court of Federal Claims (COFC) regarding SAM registration. The agency's arguments for not implementing our recommendation do not accurately reflect the conclusions stated in our decision and rely on COFC decisions that have not addressed the issues raised in Pernix Federal's protest.

First, the agency's letter incorrectly states that our decision concluded that the Security Act regulations permit an offeror to "switch" the nature of the prequalified legal entity. Letter at 2-4. Contrary to the Department of State's contention, our decision concluded that the same entity that prequalified under the Security Act was eligible for the contract award to Pernix Federal. In our decision, we found that Pernix Federal, consistent with the Security Act regulations, prequalified as the offering entity of a *de facto* joint venture eligible to submit a phase 3 proposal. Decision at 8 ("Pernix Federal, LLC was the 'offering entity' of the *de facto* joint venture that relied on the experience of related firms

to guarantee performance."). We reached this conclusion because the record did not reflect that Pernix Federal was no longer relying on its related entities to guarantee performance at any point in the procurement process. *Id.* at 9. We further noted that given the nature of a *de facto* joint venture as contemplated by the agency's regulations and prequalification requirements, one of the entities that makes up the *de facto* joint venture must act as the offering entity and be allowed to do just that: submit the offer. On this basis, we concluded that "the same prequalified entity"--Pernix Federal as the offering entity of a *de facto* joint venture--submitted the phase 3 proposal. *Id.*

Nevertheless, the agency argues that our decision "negates" the definition of joint venture in its regulations which state: "Joint venture means a formal or de facto arrangement by and through which two or more persons or entities associate for the purpose of carrying out the prospective contract." 48 CFR § 652.236-72(d). However, as discussed in our decision, the same regulation also states that a prospective offeror may be "a formal joint venture in which the co-venturers have reduced their arrangement to writing, or a de facto joint venture where no formal agreement has been reached, but the offering entity relies upon the experience of a related U.S. firm that guarantees performance." *Id.* The agency has ignored the identification in its regulation of an offering entity as part of a *de facto* joint venture, and otherwise fails to explain how our conclusion is inconsistent with the regulation when read as a whole.

Further, the agency also argues:

> Contrary to GAO's Pernix Decision, neither the Omnibus Act requirements nor the Department's implementing regulations (or its prior practice) allow offerors to switch the nature of the legal entity that has prequalified and/or submitted a proposal under a Solicitation. The Department practice is to publish the list of prequalified offerors and only those prequalified offerors are eligible for award. This practice allows for Omnibus eligibility protests at the time of the publication of the list. To the extent the identity of the offeror changes at award, post-award challenges to the Omnibus certifications will be timely and will cause procurement delays. . . . For these reasons, the Department's Omnibus prequalification process would be rendered meaningless, and the door would open to numerous protests if, as the Pernix Decision suggests, offerors are allowed to switch legal identities post-prequalification.

Letter at 5-6. Yet, as noted in our decision, the agency's public list of prequalified offerors identified the phase 1 prequalified entity and the phase 2 offeror that would be invited to submit a phase 3 proposal as "Pernix Federal & HOK Inc." Based on our review of the record, we concluded that the agency's public identification of Pernix Federal as the prequalified offeror indicated that the agency recognized that Pernix Federal would be the offering entity of a *de facto* joint venture, consistent with its regulation.

Second, the letter also states that our decision directly conflicts with decisions from the COFC that address SAM registration requirements for joint ventures. *See* Letter at 6, citing *G4S Secure Integration LLC v. United States*, No. 21-1817, 2022 WL 211023

(Fed. Cl. Jan. 24, 2022) (procurement for overseas security guard services that did not include prequalification pursuant to Security Act regulations); *G4S Secure Integration LLC v. United States*, 161 Fed. Cl. 387 (2022) (same). On this point, we note that the specific facts in Pernix Federal's protest are distinguishable from the facts in the COFC cases cited by the agency. Importantly, neither case cited by the Department of State involved a procurement that required prequalification under the Security Act regulations in order to compete in the procurement. Therefore, the COFC decisions necessarily do not address the interpretation of a solicitation that includes an impossible requirement, in this case, the requirement that a *de facto* joint venture register in SAM. Accordingly, we do not agree that our decision conflicts with these COFC decisions as they are factually distinguishable and do not directly address a main issue that was before us in the Pernix protest.[1]

We note that, after we issued our decision, Pernix Federal filed a protest at the COFC that similarly challenges the Department of State's elimination of Pernix Federal from the competition in this procurement; the docket for this case shows that on August 13, the court denied Pernix's motion for judgment on the administrative record and request for injunctive relief and granted the government's motion for judgment on the administrative record. The court's decision would purportedly allow the agency to continue with its procurement as the agency argued before our Office. A decision in this case was not publicly available at the time of this letter, however the docket reflects that on September 11, Pernix Federal filed a notice of appeal of the decision to the Court of Appeals for the Federal Circuit.

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 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. We believe the issues highlighted by this bid protest warrant such a recommendation.

In declining to follow our recommendation, the agency states: "The Department's updated Solicitation requirements relative to the SAM registration requirements are fully

[1] Even so, similar to our recommendation, the COFC concluded that the Department of State was required to amend its solicitation where, as here, "the question in this protest is whether State may issue a solicitation that allowed Plaintiffs to compete for the procurement, interpret the solicitation in a manner that allowed Plaintiffs to compete up to the eve of award, and then, at the eleventh hour, eliminate Plaintiffs from competition based on a newly adopted interpretation of a FAR provision (and, in turn, the solicitation itself), all without amending the solicitation pursuant to FAR 15.206 or conducting discussions pursuant to FAR 15.306." *G4S Secure Integration LLC v. United States*, 161 Fed. Cl. 387, 399 (2022).

consistent with current law and regulation, FAR 52.204-7 (2018), and while these updated SAM registration requirements may have implications for offerors electing to propose and seek Omnibus Act prequalification as a Joint Venture without a formal arrangement, that is a business determination that is not within the control of the Department." Letter at 8. As discussed, we disagree with the agency's position and think it precludes potential competitors from future Security Act procurements.

We recognize that the Security Act implicates only a narrow subset of the agency's procurements, and the competition for Security Act construction and design projects consists of a small pool of firms. However, the agency's implementation of the Security Act and its interpretation of the SAM registration requirements could restrict competition and create an insurmountable barrier to entry for new firms.

To resolve the conflict created by the Department of State's interpretation of its regulations, we recommend that Congress pass legislation that directs the Department of State to revise its Security Act regulations in one of two ways:

1. in the Note included in the Introduction section of 48 C.F.R. 652.236-72(d), add a statement indicating that where an offeror chooses to prequalify and compete as a *de facto* joint venture, the offering entity of the *de facto* joint venture is the offeror for purposes of submitting a proposal and satisfying SAM registration requirements; or

2. remove all language in the regulations allowing offerors to qualify and compete as a *de facto* joint venture for procurements subject to the Security Act. To the extent the Department of State wants to allow a potential offeror to meet the requirements of the Security Act by relying on the experience of a related United States firm that guarantees performance, the regulation could be revised to state this without characterizing this type of offeror as a *de facto* joint venture.

The first recommendation would clarify the party that is eligible to submit a proposal when the offeror chooses to qualify under the Security Act as a *de facto* joint venture and resolve the conflict between the Security Act regulations and SAM registration requirements. The second recommendation would remove any confusion created by using the term "*de facto* joint venture" and would also make clear how a potential offeror could qualify as a stand-alone entity that is relying on a related United States firm to meet the Security Act requirements to the extent the Department of State wants to allow offerors to qualify and compete in this manner.