

Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

<u>Protest of</u>	)	
	)	
MAXIMUS, Inc.	)	Docket No. 04-TSA-009
	)	
<u>Under RFP No. HSTS02-04-R-SCR009</u>	)	

DECISION DENYING MOTIONS TO DISMISS
FOR FAILURE TO STATE A CAUSE OF ACTION

The above-captioned Protest was filed with the Federal Aviation Administration Office of Dispute Resolution for Acquisition (“ODRA”) by MAXIMUS, Inc. (“MAXIMUS”) on August 26, 2004. On September 1, 2004, BearingPoint, Inc. (“BearingPoint” or “Awardee-Intervenor”), filed a Motion for Summary Dismissal of the Protest (“BearingPoint’s First Motion”). Specifically, BearingPoint’s First Motion alleges that the Protest is prohibited by: (1) the express terms of the Government Wide Acquisition Contract (“GWAC”) pursuant to which Maximus competed; and (2) the Federal Acquisition Streamlining Act (“FASA”), Pub. L. No. 103-355, which contains language prohibiting protests in connection with task or delivery order contracts. The Transportation Security Administration (“TSA”) also filed a Motion (“TSA Motion”) which, among other things, joined in BearingPoint’s First Motion.

MAXIMUS filed an Opposition (“Opposition”) to the First Motion on September 9, 2004. On September 13, 2004, BearingPoint filed a Reply (“BearingPoint Reply”) in Support of the First Motion. The ODRA concludes, for the reasons stated herein, that the MAXIMUS Protest sets forth grounds that properly are reviewable in the context of a bid protest. BearingPoint’s First Motion is therefore denied as is the pertinent portion of the TSA Motion.¹

¹ On September 10, 2004, BearingPoint filed a Second Motion for Summary Dismissal (“BearingPoint’s Second Motion”) alleging that (1) all the Protest counts are frivolous and without basis in law and fact; and (2) three counts of the Protest are untimely. The TSA Motion also set forth separate grounds for dismissing counts 1 – 3 of the MAXIMUS Protest as untimely, and dismissing count 2 as frivolous. BearingPoint’s Second Motion as well as the portion of TSA’s Motion alleging lack of timeliness and frivolity will be addressed in a separate decision.

As is discussed in the ODRA's September 13, 2004 Decision on Protester's Request for a Stay of Contract Performance, *Protest of MAXIMUS, Inc.*, 04-TSA-009, TSA acquisitions are subject to the FAA's Acquisition Management System ("AMS") pursuant to the Aviation & Transportation Security Act ("ATSA"), 49 U.S.C. §114. *MAXIMUS, supra*, citing *Protest of GLOCK, Inc.*, 03-TSA-003, Decision of October 28, 2003 on Protester's Request for Stay of Contract Performance.²

In accordance with ATSA, the TSA delegated to the ODRA broad authority in all dispute resolution actions involving designated solicitations issued and contracts awarded by the TSA. *See* Delegation, dated December 23, 2003.³ The delegation specifically provided the ODRA with authority to administer individual procurement related protests and take all other reasonable steps deemed necessary and proper for the resolution of TSA protests and contract disputes, in accordance with the TSA Acquisition Management System and applicable law. The guidance and principles outlined in the AMS apply to all designated TSA solicitations, contract awards and contracts. AMS §3.9.1. Moreover, the TSA Delegation expressly incorporates the ODRA Procedural Rules, 14 C.F.R. Part 17, pursuant to which the ODRA exercises broad and exclusive jurisdiction over all bid protests arising from acquisitions under the AMS. *See* 14 C.F.R. §§17.1 and 17(a). *See also* TSA Delegation, dated September 16, 2002. The ATSA, the TSA Delegation, and the AMS as adopted by the TSA, establish the ODRA's authority to review disputes arising from TSA acquisitions conducted under the AMS.

With respect to the justiciability of the instant Protest, the ODRA finds the analysis contained in the April 26, 2001 Decision on the Motion to Dismiss for Lack of Jurisdiction in the *Protest of Crown Consulting, Inc.*, 01-ODRA-00181⁴ to be controlling in this case. Noting that the protester in *Crown* was not challenging the FAA's compliance with the requirements of the General Services Administration for Federal

² Section 40110(d)(2)(C) of Title 49 specifically provides that FASA "shall not apply" to the FAA acquisition management system.

³ *See* <http://www.faa.gov/agc/odra/TSA%20Delegation.pdf>.

⁴ At the time the MAXIMUS Protest was filed, the *Crown* decision discussed above was not accessible on the ODRA Website. A copy of that decision is being provided to the parties herewith and added to the ODRA Website, along with this decision, for future reference.

Supply Schedule acquisitions, the ODRA stated that:

the protest raises justiciable issues regarding the Product Team's compliance with the requirements of the AMS in making its award decision. As is noted in the Protestor's Opposition to the Motion to Dismiss, *See Opposition*, at 4, the ODRA previously has reviewed FAA product team compliance with the AMS in situations where the acquisition involved other agencies. *See, Knoll, Inc.*, 99-ODRA-00122; *A&T Systems, Inc.*, 98-ODRA-00097.

The situation presented here is analogous to one often faced by the General Accounting Office ("GAO") in connection with bid protests relating to FSS acquisitions. Although FSS buys generally are not protestable at GAO, where an agency issues a solicitation for an FSS buy in the form of a request for quotations ("RFQ"), and performs a detailed technical evaluation and cost/technical tradeoff, the GAO will apply the standards under Part 15 of the Federal Acquisition Regulation ("FAR") to review whether the source selection process was reasonable and consistent with the terms of the agency's solicitation. *COMARK Fed. Sys.*, B-278343, B-278343.2 Jan. 20, 1998, 98-1 CPD ¶ 34; *see also Digital Systems Group, Inc.*, B-286931, 2001 U.S. Comp. Gen. LEXIS 46, *citing COMARK Fed. Sys.*, *supra*.

Crown Decision on Motion to Dismiss for Lack of Jurisdiction, *supra*.

As was the case in *Crown*, the instant Protest involves a solicitation that incorporates the AMS and designates the ODRA as the forum for the resolution of protests and contract disputes. The Protest here, like the one in *Crown*, does not challenge an agency's compliance with the requirements of the underlying GSA contract. Rather, it challenges the award decision as failing to comply with terms and conditions of the AMS-based solicitation. As we said in *Crown*, the ODRA will review such a protest to determine whether a product team has complied with the AMS, *i.e.*, whether the Product Team's actions in awarding the contract had a rational basis, and were not arbitrary, capricious, or an abuse of discretion. *See Protest of Crown, supra*, *citing Knoll, Inc.*, 99-ODRA-00122 and *A&T Systems, Inc.*, 98-ODRA-00097.

The ODRA notes that, under similar circumstances, the GAO has ruled that the FASA prohibition on protests of task and delivery orders is not without exception. In *Teledyne-*

Commodore, LLC – Reconsideration, B-278408.4, 98-2 CPD ¶121, the GAO concluded that the restriction on protests of orders placed under a task order contract did not bar the GAO’s exercise of bid protest jurisdiction, where the contracts involved neither recurring work nor an indefinite quantity of work for an individual contractor, and the agency was using task orders essentially as preliminary screening phases to lead up to the ultimate source selection.⁵

CONCLUSION

The ODRA concludes that the issues raised in the MAXIMUS Protest are reviewable within the context of a bid protest. The ODRA therefore denies the First Motion of BearingPoint and the TSA Motion to the extent that TSA’s Motion seeks summary dismissal of this matter as not protestable. The ODRA will not recommend that the Protest be summarily dismissed on that basis.⁶

-Signed-

Marie A. Collins
Dispute Resolution Officer
FAA Office of Dispute Resolution for Acquisition

September 20, 2004

⁵ Congress expressly exempted AMS acquisitions from FASA and review by the General Accountability Office (“GAO”), among other things, *see* Section 348 of Public Law 104-50, Department of Transportation and Related Agencies Appropriations Act, 1996; *see also Knoll, Inc.*, B-283031, June 22, 1999 (Unpublished). The ODRA views GAO decisions as persuasive authority in appropriate cases.

⁶ This is an interlocutory order. It will become final only upon its adoption by the TSA Administrator as part of the Final Order in this matter.