

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 ON BEARINGPOINT INC.'S REQUEST FOR RECONSIDERATION
OF DECISION DENYING FIRST MOTION FOR SUMMARY DISMISSAL**

I. INTRODUCTION

This matter currently is before the Office of Dispute Resolution for Acquisition (“ODRA”) on the Request (“Request”) of BearingPoint, Inc. (“BearingPoint”) that the ODRA reconsider its Decision denying BearingPoint’s First Motion for Summary Dismissal (“First Motion”). The ODRA Decision in question, dated September 20, 2004, denied BearingPoint’s First Motion as well as a portion of the Motion of the Transportation Security Administration (“TSA Motion”). Both the BearingPoint First Motion and the TSA Motion had sought to dismiss the underlying Protest filed by MAXIMUS, Inc. (“MAXIMUS”). The First Motion, which the TSA joined in, alleged that the MAXIMUS Protest is prohibited by: (1) the terms of the Government Wide Acquisition Contract (“GWAC”); and (2) the Federal Acquisition Streamlining Act (“FASA”), 41 U.S.C. §253 *et seq.*

In its original Decision, the ODRA concluded that “the MAXIMUS Protest sets forth grounds that properly are reviewable in the context of a bid protest.” ODRA Decision at 1. In so holding, the ODRA cited to an earlier Decision on a Motion to Dismiss issued in the *Protest of Crown Consulting, Inc.*, 01-ODRA-00181, noting that:

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.

ODRA Decision at 3. The Decision went on to hold that “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.” *Id.*

In its Request for Reconsideration, BearingPoint asserts that the ODRA Decision denying BearingPoint’s First Motion is based on material errors of fact and law.¹ For the reasons discussed herein, the ODRA concludes that BearingPoint’s Request is without merit and summarily denies it.

II. DISCUSSION

A. The Standard for Reconsideration

Where a party seeks reconsideration of a decision, the ODRA examines whether the moving party has demonstrated: (1) clear errors of fact or law in the underlying Decision; or (2) previously unavailable information that would warrant a reversal or modification of the Decision. *See Protest of Raytheon Technical Services Company*, 02-ODRA-00210, Findings and Recommendations on Request for Reconsideration; *Protest of Consecutive Weather*, 99-ODRA-00112, Recommendation Regarding Reconsideration Request; *Protest of Camber Corporation and Information Systems and Networks Corporation, Consolidated*, 98-ODRA-00079 and 98-ODRA-00080, Findings and Recommendations on Motion for Reconsideration of the Administrator’s Order. As the ODRA previously has stated, requests for reconsideration are not “reviewed as a routine matter and mere disagreement with the underlying decision or restatement of previously rejected arguments does not provide grounds for reconsideration.” *Protest of Raytheon Technical Services Company*, *supra* at 2. In the instant case, BearingPoint does not allege any new information that would warrant reversal or modification of the challenged

¹ The TSA has not joined in BearingPoint’s Request for Reconsideration.

Decision. The ODRA, therefore, will review only whether the alleged factual and legal errors support a modification or reversal.

B. BearingPoint's Request Alleges But Does Not Demonstrate Factual or Legal Error

As grounds in support of its Request, BearingPoint alleges that the ODRA erred in: (1) relying on “an earlier Decision that was factually and legally inapposite to the situation here...”; (2) failing to follow its own precedent and rendering “unambiguous provisions of the Solicitation meaningless and superfluous...”; and (3) failing “to address properly the application of the section of the Federal Acquisition Streamlining Act (“FASA”), codified at 41 U.S.C. Section 253 j(d), which expressly prohibits the type of Protest that MAXIMUS has filed here.” See BearingPoint Request at 3. BearingPoint's Request also alleges that the ODRA Decision incorrectly relies on inapplicable Government Accountability Office (“GAO”) precedent. See Request at 4, 5.² Finally, BearingPoint restates arguments, originally made in support of its First Motion, that the Protest is barred by specific provisions of the GWAC contract and the FASA.

BearingPoint's Request contends that “ODRA's reliance on the decision in *Crown* constitutes clear error, because both the facts and the applicable law in *Crown* are substantively different from the situation here.” Request at 1. According to BearingPoint, the fact that *Crown* involved a Federal Supply Service (“FSS”) contract, while the current procurement involves a GWAC contract, renders *Crown* inapplicable to this situation. Request at 1, 2. This alleged “key difference”, however, is immaterial to the ODRA's rationale for the decisions in *Crown* and here. As is pointed out in the Decisions in *Crown* and in this case, the Solicitations involved incorporated the FAA's Acquisition Management System (“AMS”) and specifically provided for the filing of bid protests at the ODRA. See Solicitation Section L.5. Neither in *Crown* nor in this case

² Although the ODRA is not bound by GAO decisions, the ODRA Decision referenced the GAO decision in *Teledyne-Commodore, LLC – Reconsideration*, B-278408.4, 98-2 CPD ¶121. That case was included in the ODRA Decision to demonstrate that, notwithstanding BearingPoint's assertions, even in cases where FASA applies there is a recognized exception to the general rule regarding the nonprotestability at GAO of orders placed under task order contracts.

does the Protester challenge the Agency's compliance with the requirements of the underlying contracts. Rather the challenges in both cases center on allegations that the award decisions did not comply with the terms and conditions of the Solicitation and of the AMS. Both in *Crown* and in this case, the ODRA stated that it will not review compliance with the requirements of the Government-wide contract vehicles; but that it is authorized to determine whether the Product Team: (1) conducted an evaluation process in accordance with the requirements of the Solicitation and the AMS; and (2) made a selection decision that has a rational basis and is not arbitrary or capricious or an abuse of discretion.

In directing the FAA and the TSA to establish their own Acquisition Management System, the Congress specifically mandated that acquisitions conducted thereunder would not be governed by existing acquisition laws and regulations. Moreover, Congress expressly directed that the FASA not apply to AMS procurements.³ The will of Congress in this regard was more recently expressed in the statute creating the TSA and making the AMS applicable to it, *see* 49 U.S.C. §114(o), as well as in the FAA's recent reauthorization. *See* 49 U.S.C. §40110(d). The BearingPoint First Motion and Request fail to recognize that: (1) the FAA and TSA operate under a unique acquisition system; (2) the ODRA process is a statutorily-mandated, agency-based process; (3) the ODRA has been authorized to act on behalf of the FAA and the TSA Administrators to review challenged actions of agency acquisition officials; and (4) the Solicitation in this case authorizes the filing of bid protests. Neither FASA nor the GWAC provisions divest the TSA or FAA Administrators of authority to review the actions of their own contracting officials, where such actions are timely challenged in an agency-based dispute process expressly contemplated by the AMS and the underlying Solicitation.

The AMS provision cited by BearingPoint, indicating that where the Agency acquires goods or services from other agencies it is bound by the laws governing those agencies, constitutes a general policy statement. As such, the provision applies only to the extent that its application is consistent with the statutes that govern AMS acquisitions.

³ *See* 49 U.S.C. §40110(d)(2)(C).

III. CONCLUSION

For the reasons set forth above, the ODRA concludes that BearingPoint's Request has failed to identify material errors of fact or law that would require modification or a reversal of the ODRA Decision. The ODRA further concludes that BearingPoint's Request constitutes a mere disagreement with the challenged Decision and a re-statement of BearingPoint's previously rejected arguments. The ODRA therefore finds the Request without merit and summarily denies it.⁴

\S\

Anthony N. Palladino
Associate Chief Counsel and Director
FAA Office of Dispute Resolution for Acquisition

October 8, 2004

⁴ This Decision constitutes an interlocutory order. It will become final and appealable upon its adoption and issuance in the Final Order of the TSA Administrator in this case.