



## Decision

**Matter of:** Department of the Army--Reconsideration

**File:** B-401472.2

**Date:** December 7, 2009

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GAO, participated in the preparation of the decision.

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### DIGEST

Agency's request for reconsideration of decision sustaining a protest of the sole-source extension of a contract is denied where the agency has not shown any error of fact or law in the decision.

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### DECISION

The Department of the Army asks that we reconsider our decision in Major Contracting Servs., Inc., B-401472, Sept. 14, 2009, 2009 CPD ¶ 170, in which we sustained the protest filed by Major Contracting Services, Inc. (MCS) of Colorado Springs, Colorado, against the Army's sole-source extension of contract No. W911S2-08-D-3000, held by DAV Prime/Vantex Service Joint Venture (DAV) of Larue, Texas, for portable chemical toilet services at Fort Drum, New York.

We deny the request for reconsideration.

The contract at issue here was awarded to DAV on May 28 under request for quotations (RFQ) No. W911S2-08-T-3009, which was set-aside for Service-Disabled Veteran-Owned Small Business Concerns (SDVOSBC). The contract provided for a performance period of a base year, beginning June 1, 2008, and 4 option years, and included standard Federal Acquisition Regulation (FAR) clause 52.217-8, establishing an option for the agency to extend the period of performance in exigent circumstances, as follows:

The Government may require continued performance of any services within the limits and at the rates specified in the contract. These rates may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor. The

option provision may be exercised more than once, but the total extension of performance hereunder shall not exceed 6 months. The Contracting Officer may exercise the option by written notice to the Contractor within [30 days of contract expiration].

DAV began performance of the contract on June 1. After the agency notified MCS of the award on June 2, MCS challenged DAV's status as an SDVOSBC. The Army forwarded MCS's protest to the Small Business Administration (SBA), which sustained the challenge, finding that DAV was not eligible to receive an award under the RFQ and would be prohibited from submitting offers on future SDVOSBC procurements.<sup>1</sup> DAV appealed that decision to SBA's Office of Hearings and Appeals, which affirmed the decision on August 15. The Army determined that it would permit DAV to continue performing the contract, notwithstanding the SBA's determination that DAV was not an SDVOSBC.

MCS protested to our Office, asking that we recommend that the Army terminate DAV's contract. We denied DAV's protest because SBA's regulations do not require a procuring activity to terminate an award made to an entity that was subsequently determined to be ineligible for award as an SDVOSBC. See Major Contracting Servs., Inc., B-400616, Nov. 20, 2008, 2008 CPD ¶ 214. Rather, under these circumstances, the SBA regulations provide only that the "contracting officer cannot count the award as an award to an SDVOSBC and the concern cannot submit another offer as an SDVOSBC on a future SDVOSBC procurement unless it overcomes the reasons for the protest."<sup>2</sup> 13 C.F.R. § 125.27(g).

The Army decided to allow DAV to continue performance of the contract's base year but not the option years. On May 4, the Army informed MCS that the agency would not exercise the contract's first option year but would resolicit the requirement. Subsequently, the agency notified DAV that it did not "intend to renew subject contract," and that it intended "to extend subject contract under the authority of [FAR] clause number 52.217-8 [quoted above]" for a term of 4 months. Agency Report (AR), Tab 9, Notices to DAV (May 6, 2009). Also on May 6, the Army posted

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<sup>1</sup> The Army allowed DAV to continue performance of the contract while the SBA considered DAV's protest.

<sup>2</sup> In comments filed in response to MCS's protest, SBA stated that while its regulations do not require that the agency terminate the contract here, the Army "may certainly be subject to moral suasion" to do so. Major Contracting Servs., Inc., supra, at 3. Our decision noted that "given that DAV Prime JV is not an SDVOSBC and thus should not have been awarded the contract under this solicitation that was limited to SDVOSBCs, we think the agency should consider whether it is appropriate to exercise the options under that firm's contract." Id., at 4 n.3.

a pre-solicitation notice for the follow-on procurement, which was to be issued as a small business (rather than SDVOSBC) set-aside.

On May 13, the contracting officer prepared a justification for the sole-source extension of DAV's contract, stating, in pertinent part:

1. The Directorate of Contracting is working on a new award at this time but it will not be completed in time to continue services.

2. [In accordance with] FAR 17.207(c) the following determinations are made:

a. Due to the limited duration of the option period, the extent of the services required, this option period's proximity to the base award period and the determinations made there under, it is determined that the extension of services is the most advantageous method of fulfilling the Government's need.

b. The exercise of the option to extend services is in accordance with the terms of the option, the requirements of FAR 17.207 and Part 6.

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d. The Government has a bonafide need for continuing the services, which will be fulfilled by extending services for four months and will preclude a disruption of services.

AR, Tab 10, Contracting Officer's Memorandum for Record (May 13, 2009). DAV's contract was extended for 4 months, and MCS protested to our Office, arguing that the Army instead should have issued a new solicitation under which MCS could have competed.

We sustained MCS's protest because we found that the exercise of the option did not comply with FAR requirements. Specifically, FAR § 17.207(f) requires that a contracting officer, before exercising an option, make a written determination that the exercise of the option is in accordance with the terms of the option and the requirements of FAR § 17.207 and FAR Part 6, and further specifies that in order to meet the requirements of FAR Part 6 regarding full and open competition, the option must have been evaluated as part of the initial competition and be exercisable at an amount specified in or reasonably determinable from the terms of the basic contract. We found that the option to extend DAV's contract had not been evaluated as part of the initial competition, so that the agency was required to justify the use of noncompetitive procurement procedures in accordance with FAR Subpart 6.3 before exercising this option. The contracting officer's memorandum, despite its asserted

compliance with FAR § 17.207 and FAR Part 6, provided no specific justification for the sole-source extension in accordance with FAR § 6.303. We recognized that the agency did not have a follow-on contract in place at the end of DAV's contract, and that the circumstances (that is, the need to have the portable chemical toilet services in place during the summer months, when they would be most used) reasonably provided an exception to the requirement for full and open competition based on unusual and compelling urgency. However, we also found that this urgency resulted from the Army's failure to adequately plan for this procurement in advance, and that DAV was not the only firm interested and capable of performing the services. Based on the record before us, we concluded that the Army had not provided a reasonable basis for the sole-source extension, and sustained MCS's protest. Because DAV's contract extension was about to expire and a follow-on contract had already been awarded, our recommendation was limited to the reimbursement of protest costs.

In its request for reconsideration, the Army argues that we erred in citing to our decision in Laidlaw Envtl. Servs. (GS), Inc.; International Tech. Corp.--Claim for Costs, B-249452, B-250377.2, Nov. 23, 1992, 92-2 CPD ¶ 366 at 4, to support our conclusion that the exercise of an unevaluated contract extension amounted to a sole-source extension beyond the scope of the contract, and in determining that the option to extend DAV's contract had not been evaluated as part of the initial competition.

To prevail on a request for reconsideration, the requesting party must either show that our decision contains errors of fact or law, or present information not previously considered that warrants the decision's reversal or modification. 4 C.F.R. § 21.14(a) (2009); Department of Housing and Urban Dev.--Recon., B-279575.2, Nov. 4, 1998, 98-2 CPD ¶ 105 at 2; Department of the Army--Recon., B-271492.2, Nov. 27, 1996, 96-2 CPD ¶ 203 at 5. A request for reconsideration that reiterates arguments made previously and merely expresses disagreement with the prior decision does not meet the standard for granting reconsideration. Gordon R.A. Fishman--Recon., B-257634.4, Sept. 9, 1996, 96-2 CPD ¶ 110 at 2-3. Here, the Army does not show that our decision contains material errors of law or fact that warrant modification or reversal or our prior decision.

The Army argues that we erred in citing to the Laidlaw decision, because that case is factually distinguishable from the facts presented in MCS's protest. Specifically, in Laidlaw the option to extend the contract was added to the contract at time of award, whereas in this case the option to extend the contract clause was included in the solicitation under which the offerors competed for the initial award.<sup>3</sup>

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<sup>3</sup> In Laidlaw, we found, as here, that FAR § 17.207(f) meant that the contract extension needed to be separately justified as a noncompetitive procurement under CICA, and the urgency on which the agency had relied for justification resulted from the agency's failure to adequately plan for the procurement in advance.

We agree that Laidlaw is factually distinguishable from this case. That factual distinction, however, does not demonstrate error, given that our decision was based upon the FAR requirements for exercising options. As explained in our prior decision, FAR § 17.207(f) requires that a contracting officer, before exercising an option, make a written determination that the exercise of the option is in accordance with the terms of the option and the requirements of FAR § 17.207 and FAR Part 6.<sup>4</sup> FAR § 17.207(f) further states that to meet the requirements of FAR Part 6 regarding full and open competition, the option must (1) have been evaluated as part of the initial competition, and (2) be exercisable at an amount specified in or reasonably determinable from the terms of the basic contract. Both in Laidlaw and under the facts presented here, the agency exercised an option that had not been evaluated as part of the initial competition. We found that the Army had not evaluated the option to extend the contract as part of the initial competition, and concluded that, in accordance with FAR § 17.207(f), the agency was required to (but did not) reasonably justify the extension of the contract in accordance with FAR § 6.303.

The Army does not contend that it evaluated the option to extend the contract as part of the initial competition,<sup>5</sup> but instead argues that it “basically conducted the equivalent of such an evaluation, to the extent practicable, when the Army evaluated the base year and option year prices, which are the predicates upon which the price of an extension period would be based, depending upon when the extension was exercised.” Recon. Request at 7. The Army also contends that the option to extend the contract “essentially is self-executing because, when the contracting officer decides to exercise the extension, the clause causes the limits and rates specified in the contract to be the applicable limits and rates, with no upward or downward adjustment in rates permitted” except as a result of revisions to prevailing labor rates. Id.

We find no merit to the Army’s arguments, which would render meaningless the specific language of FAR § 17.207(f) that requires that an option be evaluated as part of the initial competition. The Army’s interpretation of this clause would either ignore the first requirement under FAR § 17.207(f) or deem it to be satisfied when the second requirement is met—that is, render one of the two parts of the clause meaningless. Such an interpretation would be inconsistent with the fundamental

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<sup>4</sup> The FAR defines “option” to include an “elect[ion] to extend the term of the contract.” FAR § 2.101.

<sup>5</sup> The Army concedes that it “may not have specifically conducted an evaluation of the various offerors’ terms under FAR 52.217-8 as part of the evaluation of quotes.” In this respect, the FAR refers to the evaluation of options for award purposes as a price evaluation, effected by “adding the total price for all options to the total price for the basic requirement,” see FAR § 52.217-5, a process that did not occur here.

principle that statutes and regulations must be read and interpreted as a whole, thereby giving effect to all provisions. See Sea Box, Inc., B-291056, Oct. 31, 2002, 2002 CPD ¶ 181 at 3. In this regard, the agency cites to no legal authority or any other authority that would support its argument that an “equivalent” evaluation satisfies this unambiguous regulatory requirement.

The purpose of the contract clause at FAR § 52.217-8 is merely to reserve for the agency a right to seek from the contractor—without further negotiation—an additional period of performance beyond the end of a contract period where exigent circumstances create the need for continued performance. See FAR § 37.111; Akal Security, Inc., B-244386, Oct. 16, 1991, 91-2 CPD ¶ 336 at 5. With respect to the agency’s argument that the option to extend the contract clause was “self-executing,” the fact that the clause reserves this right for the procuring agency does not mean that it relieves the agency of its obligation to comply with the requirements in the FAR. The Army’s contention that, as a practical matter, an option to extend under FAR 52.217-8 would never be evaluated as part of the initial competition does not create an exception to the requirements of FAR § 17.207(f). Rather, it simply means that where, as here, the agency exercises an option to extend the contract that does not satisfy the FAR § 17.207(f) requirements, the agency should have a reasonable justification for its extension in accordance with FAR Part 6.<sup>6</sup>

The request for reconsideration is denied.

Lynn H. Gibson  
Acting General Counsel

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<sup>6</sup> The Army does not argue that we erred in finding that the agency failed to provide a reasonable basis for the sole-source extension or that the urgency of the requirement was created by the agency’s failure to plan in advance.