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Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: The State of Oklahoma--Reconsideration

File: B-416851.11

Date: February 11, 2021

Peter A. Nolan, Esq., Winstead PC, for the protester.
Alan Grayson, Esq., Law Office of Alan Grayson, for Mitchco International, Inc., the intervenor.
Andrew J. Smith, Esq., and Dana J. Chase, Esq., Department of the Army, for the agency.
Young H. Cho, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration is denied where the requesting party merely requests editorial changes to our decision and has not shown that our decision contains a material error of law or facts, or information not previously considered that warrants reversing or modifying our decision to dismiss its protest.

DECISION

The State of Oklahoma, a state licensing agency (SLA), requests that we reconsider our decision in *The State of Oklahoma*, B-416851.9, Sept. 22, 2020, 2020 CPD ¶ 341, dismissing its protest challenging the award of a contract to Mitchco International, Inc. (MCI), of Saint Mathews, Kentucky, under request for proposals (RFP) No. W9124J-18-R-0024, issued by the Department of the Army for full food services and dining facility services at Fort Sill, Oklahoma. Oklahoma argues that the public version of our decision issued on November 4, which included corrections to the protected decision issued on September 22, contained a legal error.

We deny the request for reconsideration.

BACKGROUND

As explained in our decision, the RFP, issued on August 31, 2018, stated that the procurement would be conducted pursuant to the Randolph-Sheppard Act (RSA), which establishes a priority for blind persons represented by SLAs under the terms of the RSA, in the award of contracts for, among other things, the operation of cafeterias in

federal buildings. *The State of Oklahoma*, B-416851.9, *supra* at 2. Award was to be made on a lowest-price, technically acceptable basis, considering the following factors: technical capability, past performance, and price. *Id.* Relevant here, the RSA's implementing regulations state as follows:

> § 395.33 Operation of cafeterias by blind vendors.
>
> (a) Priority in the operation of cafeterias by blind vendors on Federal property shall be afforded when the Secretary determines, on an individual basis, and after consultation with the appropriate property managing department, agency, or instrumentality, that such operation can be provided at a reasonable cost, with food of a high quality comparable to that currently provided employees, whether by contract or otherwise. Such operation shall be expected to provide maximum employment opportunities to blind vendors to the greatest extent possible.
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> (b) In order to establish the ability of blind vendors to operate a cafeteria in such a manner as to provide food service at comparable cost and of comparable high quality as that available from other providers of cafeteria services, the appropriate State licensing agency shall be invited to respond to solicitations for offers when a cafeteria contract is contemplated by the appropriate property managing department, agency, or instrumentality. Such solicitations for offers shall establish criteria under which all responses will be judged. Such criteria may include sanitation practices, personnel, staffing, menu pricing and portion sizes, menu variety, budget and accounting practices. If the proposal received from the State licensing agency is judged to be within a competitive range and has been ranked among those proposals which have a reasonable chance of being selected for final award, the property managing department, agency, or instrumentality shall consult with the Secretary as required under paragraph (a) of this section. If the State licensing agency is dissatisfied with an action taken relative to its proposal, it may file a complaint with the Secretary under the provisions of § 395.37.

34 C.F.R. § 395.33(a), (b).

Further, the applicable agency regulation provides that, except for limited circumstances, if an SLA submits a proposal and is within the competitive range, the contract will be awarded to the SLA. Army Regulation 210-25 ¶ 6.b.(1)(b).

Oklahoma submitted a proposal by the solicitation closing date. *The State of Oklahoma*, B-416851.9, *supra* at 2. After completing its evaluation, the agency eliminated Oklahoma from the competitive range on March 14, 2019. *Id.* Oklahoma subsequently filed a complaint with the Secretary of Education protesting, among other things, the agency's evaluation was inconsistent with 20 U.S.C. § 107d-3(e), and 34 C.F.R. § 395.33(a) of the RSA's implementing regulations, which establishes a priority for blind licensees to operate cafeterias, and challenging its elimination from the

competitive range.[1] *Id.* On April 12, the Department of Education (DOE) convened an arbitration panel to hear Oklahoma's complaints.[2] *Id.*

On May 15, the agency made award to MCI. *Id.* On May 22, Oklahoma timely challenged the award with our Office and subsequently filed two supplemental protests. These protests were docketed as B-416851.6, B-416851.7, and B-416851.8. On July 3, our Office declined to hear Oklahoma's challenges to the evaluation of MCI and another competitive-range offeror and the award decision, and dismissed the protests. *The State of Oklahoma*, B-416851.6 *et al.*, July 3, 2019 (unpublished decision). In dismissing the protest, our decision explained that given the posture of the procurement and Oklahoma's position relative to other offerors, resolution of Oklahoma's challenges was inappropriate. *Id.* at 3. In this regard, our decision explained that GAO lacks jurisdiction to hear an SLA's challenges to its elimination from the competitive range, which are subject to the RSA's binding arbitration provisions. Thus, DOE, rather than our Office, is the appropriate party to hear such challenges.[3] *Id.* Our decision further explained if DOE determined that Oklahoma's challenges were successful, its proposal would be restored to the competitive range, rendering academic any protest to our Office challenging MCI's evaluation. *Id.* at 3-4. However, if Oklahoma failed to convince DOE that its proposal should be restored to the competitive range, it would lack the requisite legal interest to challenge the award. *Id.* at 4.

On June 22, 2020, the DOE arbitration panel ruled that the Army had violated the RSA and was therefore required to include the protester in the competitive range and engage in negotiations. *The State of Oklahoma*, B-416851.9, *supra* at 2. On July 31, the Army notified Oklahoma that it intended to appeal the arbitration panel's decision. *Id.* The same day, Oklahoma protested to our Office, asserting that the agency's actions were inconsistent with the RSA and various related Army regulations and solicitation

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[1] With respect to disputes between SLAs and federal agencies, both the RSA and the regulations provide for the filing of complaints with the Secretary, which are then to be resolved by binding arbitration. 20 U.S.C. § 107d-1(b); 34 C.F.R. § 395.37.

[2] Section 395.37 of title 34 of the Code of Federal Regulations provides that DOE will convene an arbitration panel to hear an SLA's complaint regarding a federal agency's compliance with the RSA. The panel's decision will be final and binding, subject to appeal and review. 34 C.F.R. § 395.37(b).

[3] In this regard, our decision explained that we have interpreted the RSA and its implementing regulations as vesting authority with the Secretary of Education regarding SLA complaints concerning a federal agency's compliance with the RSA, including complaints such as the resolution of an SLA's challenge of its exclusion from the competitive range. *The State of Oklahoma.,* B-416851.6 *et al.*, *supra* at 3 (*citing Louisiana State Dep't of Soc. Servs. La. Rehab. Servs.*, B-400912.2, July 1, 2009, 2009 CPD ¶ 145 at 2*; Maryland State Dep't of Educ.*, B-400583, B-400583.2, Nov. 7, 2008, 2008 CPD ¶ 209 at 5; *Washington State Dep't of Servs. for the Blind*, B-293698.2, Apr. 27, 2004, 2004 CPD ¶ 84 at 3-5; *Mississippi State Dep't of Rehab. Servs.*, B-250783.8, Sept. 7, 1994, 94-2 CPD ¶ 99 at 3).

provisions that implement the RSA. *Id.* This protest was docketed as B-416851.9. On September 22, our Office dismissed the protest as concerning a matter not for consideration under our bid protest function. *Id.* at 6.

In that protest, Oklahoma acknowledged that the DOE was the proper forum to decide an SLA's challenge to its elimination from the competitive range, but nonetheless, argued that an SLA may return to GAO to protest a federal agency's compliance with the RSA after the conclusion of binding arbitration with DOE. *Id.* at 3. In dismissing the protest, our decision explained that we have interpreted the RSA and its implementing regulations as vesting authority with the Secretary of Education regarding SLA complaints concerning a federal agency's compliance with the RSA. *Id.* at 4. We also expressed our view that complaints, such as the resolution of the SLA's challenges to its exclusion from the competitive range or to the terms of a solicitation, are subject to the RSA's binding arbitration provisions and are not for consideration by our Office under its bid protest jurisdiction. *Id.* The decision explained that this interpretation reflected our more general view that where Congress has vested oversight and final decision-making authority in a particular federal official or entity, we will not consider protests involving issues subject to review by that official or entity. *Id.*

Our decision rejected the protester's arguments that its protest grounds were nothing more than procurement challenges to the agency's failure to follow the solicitation language. *Id.* In this regard, our decision found that the substance of the protester's challenges concerned the agency's compliance with the RSA and its implementing regulations. Specifically, the arguments challenged whether the Army reasonably excluded Oklahoma's proposal from the competitive range--issues that our Office has consistently stated would not be reviewed. *Id.* at 5.

Our decision also rejected the protester's argument that GAO's jurisdiction to hear disputes between an SLA and a federal agency depended on whether a complaint was filed before or after the completion of binding arbitration with DOE. *Id.* In this regard, our decision found that the RSA's implementing regulation concerning disputes between SLAs and federal agencies drew no distinction between disputes arising before or after arbitration. *Id.* (*citing* 34 C.F.R. § 395.37(a)). As a result, our decision concluded that a dispute between an SLA and a federal agency that arose after the completion of binding arbitration with DOE was also not for consideration by our Office under our bid protest function. *Id.* at 5-6.

Because a protective order had been issued in the protest, our decision dismissing Oklahoma's protest was issued under the protective order on September 22. *The State of Oklahoma*, B-416851.9, Electronic Protest Docketing System (Dkt.) No. 35, Protected Decision. Relevant here, the protected decision included a description of the RSA's implementing regulation set forth in 34 C.F.R. § 395.33. Specifically our decision stated the following in the background section:

> Under the RSA's implementing regulations, if a designated SLA submits an offer found to be within the competitive range for the acquisition, the

> agency *will enter into negotiations solely with the SLA*, in an effort to obtain the services at a reasonable cost. 34 C.F.R. § 395.33.

Id. at 2 (emphasis added). The protected decision also stated the following in the discussion section:

> If a designated SLA submits an offer found to be within the competitive range for the acquisition, the agency is required to *enter into negotiations solely with the SLA*, in an effort to obtain the services at a reasonable cost. *Id.* § 395.33(a), (b).

Id. at 3-4 (emphasis added).

On October 29, in preparation of issuing a public version of the decision, our Office posted a proposed public version of the decision on the Electronic Protest Docketing System that contained editorial changes to more closely reflect the language of the regulation discussed in our decision. *The State of Oklahoma*, B-416851.9, Dkt. No. 39, Proposed Public Decision. The proposed public version of the decision made the following change in the background section:

> Under the RSA's implementing regulations, if a designated SLA submits an offer found to be within the competitive range for the acquisition, the agency *will consult with DOE*, in an effort to obtain the services at a reasonable cost. 34 C.F.R. § 395.33.

Id. at 2 (emphasis added). Similarly, the following change was made in the discussion section of the decision:

> If a designated SLA submits an offer found to be within the competitive range for the acquisition, the agency is required to *consult with DOE*, in an effort to obtain the services at a reasonable cost. *Id.* § 395.33(a), (b).

Id. at 3-4 (emphasis added).

In the notice accompanying the proposed public version, our Office advised the parties that the decision contained those two corrections. *Id.,* Dkt. No. 39, Notice of GAO Proposed Public/Corrected Decision. To ensure the parties had adequate notice of GAO's intent to release a public version of the decision with the corrections, the notice also informed the parties that GAO would not release the decision until after October 30. *Id.*

GAO received no objections, inquiries, or comments about the proposed public decision. Consequently, on November 4, our Office issued the public version of the decision with the two identified changes to the protected decision. *Id.*, Dkt. No. 41. On November 13, Oklahoma filed this request for reconsideration.

DISCUSSION

In its request for reconsideration, Oklahoma argues that the corrections made by our Office in the public decision are inconsistent with the RSA and its implementing regulations. Req. at 1. Specifically, Oklahoma contends that the public version of our decision issued on November 4, fails to acknowledge the significance of the Secretary of Education's involvement in determining whether the SLA proposed a reasonable cost. *Id.* at 4. In this regard, Oklahoma alleges that our decision now suggests that it is the procuring agency--not the Secretary of Education--that ultimately determines whether the SLA is capable of operating the cafeterias at a reasonable cost. *Id.* at 3. Oklahoma also asserts that our decision now suggests that the procuring agency's only requirement under the RSA is to consult with the Secretary of Education about the reasonableness of the SLA's costs, and that ultimately the procuring agency may ignore this consultation and find the SLA's costs as unreasonable despite the Secretary of Education determining otherwise. *Id.* at 4. Oklahoma argues that these interpretations are material errors in law that must be corrected and requests that our Office modify the above quoted sections of our decision to read as follows:

> Under the RSA's implementing regulations, if a designated SLA submits an offer found to be within the competitive range for the acquisition, the agency will *notify the DOE Secretary. The DOE Secretary will then determine, after consultation with the agency*, whether such operations can be obtained in an effort to obtain the services at a reasonable cost. 34 C.F.R. § 395.33.
>
> If a designated SLA submits an offer found to be within the competitive range for the acquisition, the agency will *notify the DOE Secretary. The DOE Secretary will then determine, after consultation with the agency,* whether such operations can be obtained in an effort to obtain the services at a reasonable cost. *Id.* § 395.33(a), (b).

Req. at 4-5 (emphasis added).

Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must set out the factual and legal grounds upon which reversal or modification of the decision is deemed warranted, specifying any errors of law made or information not previously considered. 4 C.F.R. § 21.14(a). We will reverse a decision upon reconsideration only where the requesting party demonstrates that the decision contains a material error of law or facts. *The i4 Grp. Consulting, LLC--Recon.*, B-418842.2, Oct. 8, 2020, 2020 CPD ¶ 326 at 3; *AeroSage, LLC--Recon.*, B-417529.3, Oct. 4, 2019, 2019 CPD ¶ 351 at 2 n.2; *Department of Justice; Hope Village, Inc.--Recon.*, B-414342.5, B-414342.6, May 21, 2019, 2019 CPD ¶ 195 at 3. In this regard, the relevant standard for granting reconsideration before our Office is whether our decision contains a material error of fact or law; that is, but for the error, our Office would have likely reached a different conclusion as to the merits of the protest. *The i4 Grp. Consulting--Recon.*, *supra*. As explained below, Oklahoma's request fails to meet this standard.

As a preliminary matter, we note that Oklahoma does not request reversal or modification of the outcome of our decision, *i.e.*, dismissal of its protest. Rather, Oklahoma requests that our Office make an editorial change as to how the RSA's implementing regulation set forth in 34 C.F.R. § 395.33 is described. In this regard, we note that in the notice accompanying our September 22 protected decision advised the parties that "the public version may also contain editorial changes." *The State of Oklahoma*, B-416851.9, Dkt. No. 35, Notice of Decision Issued Under Protective Order. In making the editorial change, our Office wanted to ensure that the public version of the decision more accurately reflected the language of the applicable regulation. At this time, we decline to make any additional editorial changes, such as the one requested by Oklahoma to our decision.

Further, we disagree with Oklahoma that the public version of our decision contains any error of law. Oklahoma alleges that the public version our decision fails to acknowledge the significance of the Secretary of Education's involvement in determining whether the SLA proposed a reasonable cost. Oklahoma argues that the public decision "suggests that the [a]gency's only requirement under the RSA is to consult with the DOE Secretary about the reasonableness of the SLA's costs," and that the agency "may ignore this consultation and find the SLA's costs as unreasonable despite the DOE Secretary determining otherwise." Req. at 4. Notwithstanding the requester's assertions, the editorial changes made to the public version of our decision does nothing more than better mirror the actual language of the implementing regulation discussed in the protected decision. The language of the regulations states, verbatim:

> If the proposal received from the State licensing agency is judged to be within a competitive range and has been ranked among those proposals which have a reasonable chance of being selected for final award, the property managing department, agency, or instrumentality *shall consult with the Secretary* as required under paragraph (a) of this section. If the State licensing agency is dissatisfied with an action taken relative to its proposal, it may file a complaint with the Secretary under the provisions of § 395.37.

34 C.F.R. § 395.33(b) (emphasis added). Moreover, neither the role of the Secretary of Education nor the agency's obligations were at issue in the underlying protest, and both versions (protected and public) of the decision clearly recognize the priority afforded to an SLA in the selection process of a procurement conducted pursuant to the RSA. *The State of Oklahoma*, B-416851.9, *supra* at 3-4.

Even if we were to agree--and we do not--that our decision could be read in the manner suggested by Oklahoma, such reading would have no bearing on the outcome of our underlying decision. Our Office dismissed Oklahoma's protest because we found that Oklahoma's protest grounds--notwithstanding its characterization of the challenges--pertained to issues that our Office has consistently stated that it will not review because they concern the agency's compliance with the RSA and its implementing regulations. *The State of Oklahoma*, B-416851.9, *supra* at 5 ("[W]e will

not review issues that go to the question of whether the SLA should be included in the competitive range.”). We also found that our jurisdiction to hear disputes between an SLA and a federal agency was not dependent on whether a protest was filed before or after the completion of binding arbitration with DOE. *Id.* Accordingly, the request for reconsideration here does not provide a basis to reconsider our decision. *The i4 Grp. Consulting--Recon.*, *supra*.

The request for reconsideration is denied.

Thomas H. Armstrong
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