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Comptroller General  
of the United States

United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** National Aeronautics and Space Administration--Reconsideration

**File:** B-408823.2

**Date:** May 8, 2014

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### DIGEST

The National Aeronautics and Space Administration's request reconsideration of our decision to take jurisdiction of a protest challenging the agency's lease of federal property (a space shuttle launch complex) is dismissed where the agency only objects to our decision to take jurisdiction but not the merits of our decision that denied the protest; we see no practical purpose of revisiting the decision in the absence of a dispute between the parties.

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### DECISION

The National Aeronautics and Space Administration (NASA) requests reconsideration of our decision in [Blue Origin, LLC](#), B-408823, Dec. 12, 2013, 2013 CPD ¶ 289, in which we denied a protest filed by Blue Origin concerning the terms of announcement for proposals (AFP) No. AFP-KSC-LC39A, issued by NASA for the lease of Launch Complex 39A (LC 39A) at the Kennedy Space Center (KSC). Although we denied the merits of the protest, NASA requests that we reconsider our conclusion that our Office had jurisdiction to hear the protest.

We dismiss the request.

### BACKGROUND

LC 39A is a launch complex that was utilized by NASA in connection with the Apollo and Space Shuttle programs. Because NASA no longer maintains these programs, the agency concluded that there was no foreseeable use for the complex. The agency also found that it lacked funds to operate and maintain the complex. NASA believed, however, that the complex potentially could be useful to commercial space

launch companies, which could assume financial and technical responsibility for operation and maintenance of LC 39A. To this effect, NASA issued the AFP to enter into an agreement with a commercial space launch company that would allow the company to use the facility for a minimum of 5 years. The intended transaction was described in the AFP as follows:

NASA intends to establish a Public-Private or Public-Public Venture (PPV) to grant a partner(s) an interest in real property for a specified term through an instrument(s) such as a lease, a use permit, or other form of property out-grant term as authorized by the Commercial Space Launch Act (CSLA) [51 U.S.C. chapter 509 (Supp. IV, 2010)] or the Space Act [51 U.S.C. chapter 201 (Supp. IV, 2010)]. NASA KSC intends to grant the industry partner(s) sufficient rights to occupy, operate, modify and maintain the LC 39A as necessary to support the partner's proposed use.

NASA expects the potential partner(s) to be fully responsible for the operations and maintenance of the facility, to include equipment, at their own expense, for the term of any agreement(s). The agreement(s) will fully define the roles and responsibilities of NASA and the Partner(s).

AFP at BATES 6.

After the submission of proposals, Blue Origin filed an agency-level protest with NASA in the wake of remarks made by NASA's Administrator. Specifically, by letter dated August 8, Blue Origin argued that the Administrator's remarks demonstrated that NASA intended to evaluate proposals in a manner that was inconsistent with what Blue Origin viewed as the requirements of the AFP. Agency Report (AR), exh. 17, Blue Origin Agency-Level Protest. Blue Origin took the position that the AFP expressed a preference for using LC 39A as a multi-user launch facility, but that the Administrator's remarks indicated that the agency would not apply this preference. By letter dated August 23, NASA denied Blue Origin's protest. The agency expressed its view that the AFP did not include a preference for a multi-user approach for LC 39A. On September 3, Blue Origin filed a protest with our Office, arguing that the agency intended to misapply the terms of the AFP in evaluating proposals and selecting a lessee.

NASA's response to the protest raised the threshold question of whether our Office had jurisdiction to consider Blue Origin's protest. NASA argued that the protest was not within our jurisdiction because the agency intended to execute a lease of federally-owned property to a private concern, rather than award a contract for goods and services.

As discussed in our decision, the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551, 3552 sets forth our Office's authority to hear protests. We review protests concerning alleged violations of procurement statutes or regulations by federal agencies in the award or proposed award of contracts for the procurement of goods and services, and solicitation leading to awards. Our jurisdiction generally does not extend to challenges concerning the sale or lease of government property, since these activities, by their nature, are not procurements. See Meyers Cos., Inc., B-275963 et al., Apr. 23, 1997, 97-1 CPD ¶ 148 at 4. Nevertheless, we have taken jurisdiction where an agency's action involved both a sale (or lease) of government property and a procurement of goods or services, which we characterize as a mixed transaction. See Armed Forces Hospitality, LLC, B-298978.2, B-298978.3, Oct. 1, 2009, 2009 CPD ¶ 192 at 8. We have found that our Office has jurisdiction over two categories of mixed transactions: (1) where the agency receives a direct intangible benefit, which aids the agency in the discharge of its mission, and/or (2) where the agency receives a concrete tangible benefit that involves the delivery of goods and/or services to the government that are of more than a de minimus value. See e.g., Gino Morena Enters., B-224235, Feb. 5, 1987, 87-1 CPD ¶ 121 at 4; Shields & Dean Concessions, Inc., B-292901.2, B-292901.3, Feb. 23, 2004, 2004 CPD ¶ 42, recon. denied, B-292901.4, Mar. 19, 2004, 2004 CPD ¶ 71.

We concluded that our Office had jurisdiction to consider Blue Origin's protest because the LC 39A transaction under the AFP was a mixed transaction under both of the categories outlined above. Blue Origin, LLC, supra, at 7-8. In considering the merits of Blue Origin's challenges to the terms of the AFP, we found that the AFP contemplated two possible approaches, but did not include a preference for one approach versus another. Id. at 8-12. For this reason, we denied the protest. Id. at 12.

## DISCUSSION

In requesting reconsideration, NASA does not question the merits of our decision denying the protest, but argues that our Office erred in taking jurisdiction over Blue Origin's protest. The agency contends that our decision contained errors of both fact and law regarding our conclusion that the AFP would result in a mixed transaction over which our Office has jurisdiction.

To prevail on a request for reconsideration, the requesting party must either show that our decision contains an error 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) (2013); Waterfront Techs., Inc.--Recon., B-403638.4, June 29, 2011, 2011 CPD ¶ 126 at 3. 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. For the reasons discussed

below, we conclude that because the merits of the underlying protest were denied, there is no purpose in revisiting our decision regarding jurisdiction.

As noted above, our decision concluded that the AFP was for a mixed transaction over which our Office had jurisdiction. Blue Origin, LLC, supra, at 7-8. We first found that the transaction would provide a benefit to NASA in the form of directly fulfilling its statutory mandate to seek and encourage the commercial use of space. Id. at 7, citing 51 U.S.C. §§ 20112(a)(4) and 50913(a)(1) (Supp. IV, 2010). Second, we found that the transaction conferred a concrete benefit on NASA because the successful contractor would be required to operate and maintain a configuration of LC 39A. Thus, we concluded that NASA would be left at the end of the transaction with a launch complex that was at least maintained in its current configuration, and one that might be improved by the tenant contractor.<sup>1</sup> Id. at 7-8. For these reasons, we concluded that a concrete benefit of more than de minimus value would be conferred on NASA. Id. at 8.

NASA takes issue with these findings. It first argues that our finding that NASA will receive a concrete benefit that is more than de minimus in value was not supported by the record. Specifically, NASA relies on the terms of the AFP as evidence that NASA is not seeking to receive a concrete benefit in terms of an improved launch complex. The AFP states as follows:

Upon conclusion of the lease term, Tenant shall remove from the Premises any alterations or improvements made by Tenant. Should Tenant abandon any such alterations or improvements, they shall become property of the United States Government and shall be retained by NASA.

AFP, Attach. C, at BATES 22.<sup>2</sup> Thus, NASA argues that the circumstances surrounding LC 39A and the precise terms of the AFP did not show that NASA would receive a concrete benefit--in the way of an improvement, alteration or repair --of more than a de minimus value.

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<sup>1</sup> We specifically concluded that "NASA will be left at the conclusion of the lease agreement either with a well-maintained launch complex in its current configuration, or a reconfigured launch complex that will be useful in one manner or another. Blue Origin, LLC, supra at 8.

<sup>2</sup> NASA also points out that the AFP states that NASA intends to maintain all facilities and systems regardless of any lease of LC 39A and that NASA would receive no benefit if the complex is preserved in its current configuration, since the Space Shuttle program is no longer a functioning NASA program. See Reconsideration Request at 3 n.2, n.3.

Second, NASA argues that our finding in the decision that the intangible benefit of directly assisting the agency in fulfilling its statutory mandate is adequate to confer jurisdiction on Office, Blue Origin, LLC, *supra*, at 7, abrogates the rule articulated in Rocketplane Kistler, B-310741, Jan. 28, 2008, 2008 CPD ¶ 22 at 5 and Exploration Partners, LLC, B-298804, Dec. 19, 2006, 2006 CPD ¶ 201 at 4. In Rocketplane, we stated that supporting and stimulating efforts in support of a lawfully mandated public policy--such as the commercial use of space--did not establish that NASA was acquiring services for its own direct benefit and use.

Third, NASA argues that our decision wrongly relied on Armed Forces Hospitality, LLC, *supra*, and Geno Morena Enters., *supra* in concluding that the transaction here would satisfy an agency need. NASA argues that the former decision does not support the proposition that a transaction fulfilling a statutory mandate confers jurisdiction on our Office, and that the latter decision is not germane because the lease of LC 39A does not satisfy an agency need.

We have reviewed all of NASA's arguments, and recognize that NASA has raised several significant arguments as to why our Office should not have taken jurisdiction over the matter. Nevertheless, since we have denied the merits of Blue Origin's protest, we see no practical purpose in revisiting our findings regarding jurisdiction in the absence of an active dispute on the merits between the parties. In this regard, we generally do not entertain questions related to protests that have no practical purpose and, in effect, result in an advisory decision. *See, e.g., Dyna-Air Eng'g Corp.*, B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132. For this reason, we do not address whether any of NASA's arguments for reconsideration have merit.

We also note, however, that our Office resolves questions of jurisdiction on a case-by-case basis. Consequently, NASA may raise any concerns with our decision in Blue Origin in future protests where the agency has concern as to whether our Office has jurisdiction to consider a protest concerning a NASA transaction.

The request for reconsideration is dismissed.

Susan A. Poling  
General Counsel