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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Basic Engineering Concepts & Technologies, Inc.--Reconsideration

File: B-409231.4

Date: February 6, 2015

Terry L. Elling, Esq., and Elizabeth M. Gill, Esq., Holland & Knight LLP, for the protester.

Michael J. Gardner, Esq., and Shomari B. Wade, Esq., Troutman Sanders LLP, for the intervenor.

Marvin D. Rampey, Esq., John M. Davis, Esq., and Philip Lazarus, Esq., Department of the Navy, for the agency.

Evan D. Wesser, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of a prior decision dismissing a protest concerning the issuance of a task order under an indefinite-delivery, indefinite-quantity contract is denied, where the protester does not show that the prior decision contains errors of fact or law that warrant reversal or modification of the decision.

DECISION

Basic Engineering Concepts & Technologies, LLC (BecTech), of Alexandria, Virginia, requests reconsideration of our decision in Basic Engineering Concepts & Techs., LLC, B-409231.3, Oct. 2, 2014 (BecTech II), in which we dismissed BecTech's protest of the Department of the Navy's issuance of a task order to ICI Services, Inc., of Virginia Beach, Virginia, pursuant to request for proposals No. N00024-13-R-3222 for engineering support services for the Naval Surface Warfare Center in Port Hueneme, California. BecTech asserts that our Office erred in finding that the value of the awarded task order was not in excess of \$10,000,000, and that our Office therefore did not have jurisdiction to hear the protest under the terms of the Federal Acquisition Streamlining Act, as amended by the National Defense Authorization Act of Fiscal Year 2012 (FASA).

We deny the request for reconsideration.

BACKGROUND

Prior to this request for reconsideration, our Office has reviewed three protests involving this procurement. First, BecTech filed a protest challenging the Navy's October 25, 2013, award of a task order to ICI. We dismissed that protest as academic based on the agency's proposed voluntary corrective action to terminate the task order awarded to ICI, reevaluate proposals, and make a new award decision based on the reevaluation. Basic Eng'g Concepts & Techs., Inc., B-409231, Dec. 3, 2013.

Next, our Office considered a protest filed by ICI challenging the Navy's rejection of ICI's final proposal revision (FPR) submitted during the corrective action taken in response to the first protest, as late. Our Office sustained ICI's protest after finding that the record showed the agency unreasonably found that ICI's FPR was late. ICI Servs., Inc., B-409231.2, Apr. 23, 2014, 2014 CPD ¶ 132. Although no party disputed our jurisdiction concerning this protest, we noted that although the protester's proposed task order cost was less than \$10 million, the proposed costs of all the remaining offers exceeded \$10 million. Id. at 3 n.3. Therefore, we found that the procurement was within our protest jurisdiction under FASA because the value of the yet-to-be awarded task order, but for the protest, would have been in excess of \$10 million. Id.

Most recently, our Office considered BecTech's protest challenging the Navy's August 22, 2014, award of a new task order to ICI in the amount of \$8,428,911.94. BecTech II, supra, at 2 n.1. Our Office dismissed this protest, concluding that we did not have jurisdiction under FASA, which provides that a protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for "a protest of an order valued in excess of \$10,000,000," or where the protest alleges that the order exceeds the scope, term, or maximum value of the underlying task or delivery order contract. 10 U.S.C. § 2304c(e)(1). BecTech argued that FASA's jurisdictional threshold was satisfied because "notwithstanding ICI's evaluated cost of nearly \$9 million, the actual, realistic estimated cost of the Task Order [would be] substantially in excess of \$10 million" had the agency "conducted proper discussions and properly assessed ICI's cost realism." Protest (Sept. 2, 2014) at 2.

The Navy requested dismissal of the protest arguing, among other grounds, that our Office lacked jurisdiction over BecTech's protest because FASA's \$10 million jurisdictional threshold was not satisfied. The agency argued that "[t]he value or cost of the task order here is the value of the services in support of the CLINs, to be furnished pursuant to the order," which in this case was the \$8,428,911.94 awarded amount of the order. Agency Request for Dismissal (Sept. 17, 2014) at 4. The agency also argued that the order's applicable limitation of costs or funds language further demonstrated that the value of the awarded order was less than \$10 million, as the agency would not be obligated to pay the awardee for any costs incurred in

excess of the \$8.4 million awarded amount. Id. at 4-5, citing Federal Acquisition Regulation clauses 52.232-20 and 52.232-22.

BecTech opposed the request for dismissal on three grounds. First, BecTech argued that the ICI decision established that our Office had jurisdiction over a protest involving the same procurement, and thus we should exercise jurisdiction over BecTech's protest. Protester's Response to Request for Dismissal (Sept. 22, 2014) at 3. Second, BecTech argued that the FASA jurisdictional threshold was satisfied based on its challenge to the cost realism evaluation of ICI's proposed cost, and on the proposed costs of the protester and another offeror, which were in excess of \$10 million. Id. at 3-4. Alternatively, BecTech argued that adjudication of jurisdiction was premature pending resolution of the cost realism protest allegations. Id. at 4-6.

Our Office initially denied the Navy's request for dismissal, finding that the award of an order over \$10 million could occur if GAO sustained BecTech's challenge of the agency's cost realism evaluation. Email from GAO (Sept. 24, 2014) at 1. On September 29, the agency requested reconsideration of the denial of its request in light of our Office's subsequent decision in Goldbelt Glacier Health Servs., LLC, B-410378, B-410378.2, Sept. 25, 2014, 2014 CPD ¶ 281, recon. denied, B-410378.3, February 6, 2015, 2015 CPD ¶ ___. Email from Agency Counsel (Sept. 29, 2014). In Goldbelt, we held that "where an order has in fact been issued by the government, we view the jurisdictional limit to turn on the value of the disputed order, which is reflected in the terms of the order itself since the order defines the scope and terms of the contractual commitment between the selected contractor and the government." Goldbelt Glacier Health Servs., LLC, supra, at 2.

BecTech opposed the Navy's request for reconsideration on three grounds. First, BecTech argued that our decision in the Goldbelt protest was incorrect as a matter of law regarding the interpretation of FASA's protest bar. Protester's Response to Agency's Request for Reconsideration (Sept. 30, 2014) at 1. Second, BecTech attempted to distinguish Goldbelt on the ground that Goldbelt involved the award of a fixed-price task order, while BecTech challenged the award of a cost-reimbursement task order. Id. at 3. In this regard, BecTech argued that under a cost-reimbursement type contract or order, the relevant inquiry is the most probable cost of performance, not the initial ceiling value of the awarded contract or order. Id. at 4-5. Finally, BecTech again asserted that our adjudication of jurisdiction was premature until we resolved BecTech's cost realism evaluation protest. Id. at 5-6.

Our Office granted the Navy's request for reconsideration, and dismissed the protest for lack of jurisdiction. BecTech II, supra. We found that "when considering the value of the task order for jurisdictional purposes, our Office has focused on the total anticipated funds (or other economic value) to be received as compensation for the goods and services to be provided under the order, as reflected in the contractual agreement between the government and contractor." Id. at 3. In this

regard, our Office found that the amount of the order as awarded and the most probable cost of ICI's proposal as evaluated by the agency were both under \$10 million. Id. at 3-4. Additionally, our Office found that the order's applicable limitation of cost or funds language put the agency under no obligation to pay ICI in excess of the \$8,428,911.94 amount of the awarded order. Id. at 3. Furthermore, our Office distinguished ICI, explaining that "ICI challenged the elimination of its proposal from a competition in which the agency had not yet issued a task order following its corrective action, and in which each of the proposals remaining in the competition were valued over \$10 million," and, thus "in ICI's protest, any task order that would have been awarded in the absence of the protest would have been valued over \$10 million." Id. at 4 n.4.

REQUEST FOR RECONSIDERATION

On reconsideration, BecTech argues that our prior decision contains a material error of law because "a task order's value is not the estimated cost contained in an offeror's cost proposal, but can only logically be the amount of the reasonably estimated costs associated with [] all of the requirements in the order's Statement of Work." Protester's Request for Reconsideration (Oct. 10, 2014) at 2. BecTech argues that the true "value" of the task order can only be ascertained after determining the most probable cost of ICI's proposal, and, thus, we erred in making a jurisdictional determination prior to adjudication of the merits of BecTech's protest. Id. at 2-4, 5-6. BecTech also argues that we erred in finding the order's applicable limitation of costs or funds clauses relevant to determining the value of the order because, while the clauses are relevant to "the Government's ability to avoid funding the full value of the contract or task order in the event the costs of the supplies or services being procured exceed estimated costs," they "have no bearing on the reasonable, complete costs that are necessary to provide the supplies or services." Id. at 5. For the reasons that follow, we find that none of the alleged errors provide a basis for reconsideration of our decision.

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) (2014). The repetition of arguments made during our consideration of the original protest and disagreement with our decision do not meet this standard. Veda, Inc.--Recon., B-278516.3, B-278516.4, July 8, 1998, 98-2 CPD ¶ 12 at 4.

As a threshold matter, most, if not all, of the arguments raised in the request for reconsideration mirror the arguments that were previously raised and considered by our Office in the earlier protest. As addressed above, BecTech was previously afforded a full opportunity to present these arguments. The same arguments raised again fail to state an adequate basis for reconsideration of our decision.

In any event, we find that BecTech's arguments have no merit. With regard to the protester's argument that the issue of a task order's value requires our Office to first consider the merits of the protester's challenge to the evaluation of the awardee's proposed costs, our Office held in BecTech II, and in Goldbelt, that where an award has been made by the government, our jurisdictional inquiry regarding the value of the order focuses on the terms of the contractual agreement between the parties. BecTech II, *supra*, at 3; Goldbelt Glacier Health Servs., LLC, *supra*, at 2. For the reasons discussed below, we find that deferring evaluating whether the FASA jurisdictional "value" threshold is satisfied until after consideration of the merits of the protest would improperly make jurisdiction dependent on the outcome of the substantive merits of the protest.

In support of its argument, BecTech cites our decision in Assisted Housing Servs. Corp. et al., B-406738 *et al.*, Aug. 15, 2012, 2012 CPD ¶ 236, in which we answered a mixed question of jurisdiction and merits.¹ Protester's Request for Reconsideration at 5. We find that the protester's arguments concerning Assisted Housing are misplaced, as our decision there is clearly distinguishable from the circumstances here.

In Assisted Housing, several entities protested the Department of Housing and Urban Development's (HUD) use of a notice of funding availability (NOFA) that would result in the issuance of cooperative agreements for the administration of Project-Based Section 8 Housing Assistance Payment contracts. Assisted Housing Servs. Corp. et al., *supra*, at 2. The protesters alleged that HUD's use of a NOFA was improper because HUD was seeking contract administration services that were required to be solicited through a procurement instrument that would result in the award of contracts. *Id.* at 8. The protesters also argued that certain terms of the NOFA were inconsistent with applicable procurement law and otherwise improper. *Id.* at 14.

As we discussed in Assisted Housing, although our Office does not have jurisdiction to review protests of the award, or protests of solicitations for award, of non-procurement instruments, we do have jurisdiction over a protest challenging whether an agency is improperly using a non-procurement instrument in lieu of a required procurement contract. Assisted Housing Servs. Corp. et al., *supra*, at 9. Thus, the question as to whether our Office could proceed to the second inquiry regarding the terms of the NOFA, and whether they were in accordance with applicable procurement laws, was dependent on the resolution of the predicate issue of whether the proposed use of non-procurement instruments was appropriate. As we explained, if HUD had appropriately proposed to use non-

¹ See also CMS Contract Mgmt. Servs. v. Mass. Housing Fin. Agency, 745 F.3d 1379 (Fed. Cir. 2014), petition for cert. filed, (U.S. Jan. 5, 2015) (Nos. 14-781, 14A444).

procurement instruments, our Office would lack jurisdiction over the protesters' challenges to the terms of the NOFA; if, however, the use of a procurement instrument was required, our Office would have jurisdiction over the protests of the terms of the NOFA. Id. at 8-9. Thus, in Assisted Housing, our Office concluded that the predicate issue of whether HUD had properly proposed to utilize non-procurement instruments--a matter over which we unquestionably had jurisdiction--had to be developed and resolved before we could determine whether we had jurisdiction over the protesters' substantive challenges to the terms of the NOFA.

Here, in contrast, there is no predicate matter that must be resolved before we can ascertain whether we have jurisdiction over BecTech's substantive challenges to the agency's evaluation.² Instead, as discussed in our decision dismissing Goldbelt's protest, our inquiry regarding jurisdiction was complete based on our finding that the value of the task order did not exceed \$10 million.

Additionally, we find no basis to reconsider our previous determination that the limitation of costs or funds language in the awarded order is relevant to determining the "value" of the order for jurisdictional purposes. See Protester's Request for Reconsideration at 4-5. Here, both ICI's proposed cost of performance and the Navy's evaluated most probable cost of performance were under \$9 million. BecTech II, supra, at 2. Thus, at the time of award, the expectation of both the agency and awardee was that performance would cost less than \$10 million. As we explained, in a post-award protest, our jurisdictional inquiry is focused on the value of the order based on the terms and conditions of the order as awarded. Id. at 3. In addition to the awarded amount and anticipated most probable cost being less than \$10 million, the order is currently structured such that the anticipated funds that can be recovered by ICI cannot exceed \$8,428,911.94, which is below the FASA jurisdictional threshold. Therefore, under the circumstances here, we find the

² We similarly do not find that our decisions in The Panther Brands, LLC, B-409073, Jan. 17, 2014, 2014 CPD ¶ 54 and NEK Advanced Secs. Grp., Inc., B-405270.2, B-405270.3, Oct. 3, 2011, 2011 CPD ¶ 202, stand for the broad proposition that "GAO has repeatedly assumed jurisdiction, reviewed a record on the merits and then determined whether it possessed the requisite jurisdiction." Protester's Reply in Support of Request for Reconsideration (Oct. 27, 2014) at 4. Both of those decisions, involving protests of the award of subcontracts, also required a two-step inquiry. Whether we had jurisdiction over the protesters' challenges to the awards was dependent on whether the subcontracts were essentially awarded "by" the government, a predicate matter over which we had jurisdiction. See The Panther Brands, LLC, supra, at 5; NEK Advanced Secs. Grp., Inc., supra, at 3.

limitations language to be relevant in determining the value of the order as awarded for jurisdictional purposes.

The request for reconsideration is denied.

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General Counsel