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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: HP Enterprise Services, LLC--Reconsideration

File: B-413382.3

Date: January 26, 2017

Kevin J. Maynard, Esq., Gary S. Ward, Esq., and Cara L. Lasley, Esq., Wiley Rein LLP, for the protester.

Sharon L. Larkin, Esq., Steptoe & Johnson LLP, for CACI, Inc., the intervenor.

Maria G. Bellizzi, Esq., General Services Administration, for the agency.

Alexander O. Levine, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Request for reconsideration of prior decision, which dismissed a protest due to our Office's lack of jurisdiction over civilian agency task order protests, is denied, notwithstanding Congress's reinstatement of such jurisdiction, where the requester does not show that the prior decision contained an error of law that warrants reversal or modification of the decision and where the reinstatement of our jurisdiction was not made retroactive.

2. Request to consider reconsideration request as a new protest, where filing was submitted after the reinstatement of GAO's civilian agency task order protest jurisdiction, is denied, where the filing was not submitted within ten days of when the protester knew, or should have known, of its basis for protest.

3. Request to reinstate initial protest is denied where protest was dismissed as academic and where subsequent agency inaction does not provide a basis to reinstate the protest.

DECISION

HP Enterprise Services, LLC (HPES), of Herndon, Virginia, requests that we reconsider our decision in HP Enterprise Services, LLC, B-413382.2, Nov. 30, 2016, 2016 CPD ¶ 343. In that decision, we dismissed, for lack of jurisdiction, HPES's protest of the General Services Administration's (GSA) issuance of a task order to CACI, Inc., of Chantilly, Virginia, pursuant to task order request (TOR) No. ID1150045, to provide various information technology (IT) support services for the

Department of Defense. In the alternative, HPES asks that its request for reconsideration be treated as a new protest, or that its initial protest of the task order award be reinstated.

We deny the requests.

BACKGROUND

History of GAO's Civilian Agency Task Order Protest Jurisdiction

In 1994, Congress enacted the Federal Acquisition Streamlining Act (FASA), which, as relevant here, provided statutory guidance for the award of indefinite-delivery/ indefinite-quantity (IDIQ) contracts. See Pub. L. No. 103-355, 108 Stat. 3243 (1994), codified in Titles 10 and 41 of the U.S. Code; Technatomy Corp., B-405130, June 14, 2011, 2011 CPD ¶ 107 at 2. The authorities to award IDIQ contracts and to issue orders under IDIQ contracts are codified under Titles 10 and 41.¹ See 10 U.S.C. §§ 2304a, 2304b, 2304c; 41 U.S.C. §§ 4103, 4105, 4106. FASA also established a bar against protests filed in connection with military and civilian agency task and delivery orders issued under multiple-award IDIQ contracts, with the exception of those protests alleging that an order increases the scope, period, or maximum value of an underlying IDIQ contract. See Pub. L. No. 103-355, 108 Stat. 3243, 3253, 3264 (1994), codified in Titles 10 and 41 of the U.S. Code; Technatomy Corp., supra, at 2-3.

The National Defense Authorization Act (NDAA) for Fiscal Year 2008 amended FASA to grant GAO limited jurisdiction to hear protests in connection with the issuance or proposed issuance of orders placed under military agency IDIQ contracts and orders placed under civilian agency IDIQ contracts, where the value of the order exceeded \$10 million. Pub. L. No. 110-181, 122 Stat. 3, 237, 239 (2008). The 2008 NDAA also included a sunset provision under which the general bar on our task and delivery order protest jurisdiction would expire on May 27, 2011. Id.; Ryan Consulting Grp., Inc., B-414014, Nov. 7, 2016, 2016 CPD ¶ 324 at 2; Kevcon, Inc., B-406418, Mar. 7, 2012, 2012 CPD ¶ 108 at 2-3; Technatomy Corp., supra. The Fiscal Year 2012 NDAA amended our jurisdiction to reinstate the FASA task or delivery order bar, as well as the \$10 million exception to the bar established under the FY 2008 NDAA (in addition to the exception concerning scope, as discussed above). Pub. L. No. 112-81, § 813, 125 Stat. 1298, 1491 (2011), codified at 41 U.S.C. § 4106(f)(2012). It also established a new sunset date, whereby the

¹ The procurement provisions of Title 10 apply to the Secretaries of Defense, Army, Navy, Air Force, Homeland Security (for the Coast Guard), and the Administrator of the National Aeronautics and Space Administration (military departments or agencies). 10 U.S.C. §§ 2302, 2303. Title 41 applies to executive agencies (civilian agencies). 41 U.S.C. § 4103.

grant of jurisdiction to hear protests in connection with orders issued under the authority and procedures established by Title 41, valued in excess of \$10 million, expired after September 30, 2016.²

The sunset provision went into effect on October 1, 2016, resulting in our Office losing jurisdiction over protests of task and delivery order contracts entered into under section 4103 of Title 41. See Ryan Consulting Grp., Inc., supra. On December 14, 2016, President Obama signed into law the GAO Civilian Task and Delivery Order Protest Authority Act of 2016, Pub. L. No. 114-260, 130 Stat. 1361 (2016), codified at 41 U.S.C. § 4106(f)(3). This act removed the sunset provision, thereby reinstating GAO's jurisdiction over protests of task orders placed under civilian agency IDIQ contracts.

Protest History

In March 2016, the GSA issued TOR No. ID11150045 to contractors holding GSA ALLIANT IDIQ contracts, including HPES and CACI. The solicitation provided that the task order awardee will provide various IT support services for the Department of Defense (DOD) Joint Service Provider (JSP), stating: "JSP provides IT support for Washington Headquarter Services (WHS), Pentagon Force Protection Agency (PFPA), Office of the Secretary of Defense (OSD) components, and designated [DOD] activities." Protest, Oct. 21, 2016, exh. 4, TOR, at C-1.

On June 30, GSA notified HPES that a task order had been awarded to CACI. On July 11, HPES filed a protest challenging that award. On July 26, the agency informed our Office that it would "review the [HPES] technical evaluation solely with respect to the issues raised in the protest, consider other protest issues raised, and make any necessary changes to the HPES evaluation and rating as well as the best value determination/award decision." Notice of Corrective Action, July 26, 2016, at 1. On August 3, we dismissed HPES's protest as academic on the basis that the agency's pending corrective action would supersede and potentially alter its prior source selection decision.

² Although our jurisdiction with respect to protests of task and delivery orders issued pursuant to Title 41 was set to expire on September 30, 2016, section 830 of the NDAA for Fiscal Year 2013 amended Title 10 to delete the sunset language with respect to non-civilian agency task and delivery orders. See Pub. L. No. 112-239, 126 Stat. 1632, 1842 (2013) (codified at 10 U.S.C. § 2304c(e)). This change had the effect of making permanent GAO's jurisdiction to hear protests in connection with Title 10 task and delivery orders. The dollar threshold applicable to such defense agency task order protests has subsequently been increased to \$25 million. See 2017 NDAA, Pub. L. No. 114-328, 130 Stat. 2000 § 835 (2016).

On October 14, GSA advised HPES that, following its review and reevaluation, it had again selected CACI for award on the basis that “CACI presented the most advantageous offer to the Government, technical and price factors considered.” Letter from GSA to HPES, Oct. 14, 2016. On October 21, HPES filed a protest of the award decision with our Office, asserting that the agency’s “corrective action was ineffective and failed to adequately address the serious issues raised by HPES’s initial protest.” Protest, Oct. 21, 2016, at 1. On November 30, our Office dismissed HPES’s October 21 protest on the basis that our statutory grant of jurisdiction to consider protests in connection with task and delivery orders valued above \$10 million, issued under civilian agency multiple-award IDIQ contracts, had expired.

On December 12, HPES filed a request for reconsideration of our November 30 decision. On December 16, following the passage of the GAO Civilian Task and Delivery Order Protest Authority Act, HPES filed a supplement to its request for reconsideration. The substance of these requests are discussed below.

DISCUSSION

HPES argues that our decision erred in dismissing its protest because GSA was conducting a procurement on behalf of a defense agency and therefore was subject to the same requirements applicable to defense agencies. HPES also asserts that our decision should be reconsidered in light of the reinstatement of GAO’s civilian agency task order protest jurisdiction. In the alternative, HPES requests that we treat its reconsideration request as a new protest, or that we reinstate its July 11 protest in light of the failure of the agency’s corrective action to provide a meaningful remedy. For the reasons discussed below, we deny HPES’s requests.

Request for Reconsideration

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), (c).

HPES argues that our decision erred as a matter of law in finding that the subject task order procurement was conducted under the statutory framework falling under Title 41, and therefore dismissing the protest in accordance with the then-applicable FASA bar found at 41 U.S.C. § 4106(f)(1). The protester asserts that both section 801 of the 2008 NDAA and the provisions of Federal Acquisition Regulation (FAR) § 17.703 require civilian agencies conducting procurements on behalf of defense agencies to comply with defense procurement requirements. HPES argues that this mandate means that such civilian agencies are “subject to GAO review, even if the civilian agency uses a non-DoD contract vehicle.” Recon. Request at 4. We disagree.

Section 801 of the 2008 NDAA generally provides that a defense agency may place an order in excess of the simplified acquisition threshold through a non-defense agency only if certain procedures have been followed to ensure that the non-defense agency is compliant with defense procurement requirements. See 2008 NDAA, Pub. L. No. 110-181, 122 Stat. 3, 204-205, § 801 (2008), included at 10 U.S.C. § 2304 note. The provision states that such a non-defense agency is compliant with defense procurement requirements when its procurement policies, procedures, and internal controls, and the manner in which they are administered, are adequate to ensure compliance with the laws and regulations applicable to DOD procurements. See id. Similarly, FAR § 17.703 includes requirements for civilian agencies conducting procurements on behalf of defense agencies, including the incorporation of DOD-unique terms, conditions, statutes, regulations, directives, and other requirements into the order or contract being procured.

These provisions thereby address the legal requirements applicable to civilian agencies conducting procurements on behalf of a defense agency. Neither of these provisions, however, authorize a civilian agency to issue a contract or order under 10 U.S.C. § 2304c, a statutory provision that is applicable only to defense agencies. See 10 U.S.C. § 2303(a). Nor do these provisions address, or purport to govern, GAO's jurisdiction to consider protests of civilian agency procurements. As such, HPES's argument that the 2008 NDAA and FAR § 17.703 vests our Office with jurisdiction to consider protests of civilian agency task order awards is not well founded. Instead, our jurisdiction to consider such protests is found at 41 U.S.C. § 4106(f)(2), the provision that, at the time of HPES's October 21 protest filing, had expired by operation of the sunset provision.

HPES also argues that our decision should be reconsidered in light of the enactment of the GAO Civilian Task and Delivery Order Protest Authority Act on December 14, which reinstated GAO's jurisdiction to consider protests of civilian agency task order awards. HPES contends that Congress intended this legislation to apply retroactively to protests that were filed prior to the act's enactment date. In support of this point, HPES primarily relies upon a September 21, 2016 committee report from the House Committee on Oversight and Government Reform, which stated that the bill would "harmonize" jurisdiction over DOD and civilian agency task order protests, prevent "disruption" in the protest process, and "ensure there is no gap in GAO's existing authority to hear protests of civilian task and delivery order contract awards[.]" Suppl. to Recon. Request at 2 (quoting H.R. REP. NO. 114-779, at 3 (2016)).

We do not agree that the GAO Civilian Task and Delivery Order Protest Authority Act applies retroactively to provide GAO with jurisdiction to consider civilian agency task order protests filed during the time our Office's jurisdiction had otherwise lapsed. In this regard, our Office has found that in the absence of an express statement in the statute providing for it, such retroactivity is disfavored by law. See

Technatomy Corp., *supra*, at 6; KPMG Peat Marwick, LLP--Costs, B-259479.4, July 25, 1996, 96-2 CPD ¶ 43 at 4 (citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988)).³ Here, the language of the act provides no support for HPES's argument that it was intended to apply retroactively. In addition, we note that the September 21 committee report relied upon by HPES was created prior to the expiration of GAO's civilian agency task order jurisdiction, which occurred on September 30. As such, general statements found in the report regarding the need to "harmonize" jurisdiction or "ensure there is no gap" in GAO's existing jurisdiction do not evidence an unstated intent to make the act retroactive. H.R. REP. No. 114-779, at 3 (2016). Instead, these statements are more naturally read as reflecting a desire to prevent such a gap from occurring in the first place.

Request to File a New Protest

HPES additionally argues that even if its reconsideration request is not granted, our Office should nonetheless treat HPES's December 16 filing as a new protest because it was filed within ten days of the renewal of GAO's jurisdiction over civilian agency task order protests. We disagree.

Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2), require that a protest be filed within 10 days of when a protester knew or should have known of its basis for protest. While this case is unique in that HPES could not have filed a protest with our Office within ten days of GSA's award to CACI, this fact does not alter or affect the basis for HPES's protest. In this regard, the underlying action being challenged is the agency's allegedly improper award to CACI, which occurred on October 14.⁴ HPES's challenge therefore is based on the agency's failure to comply with applicable legal requirements, *i.e.*, the Competition in Contracting Act, that were in

³ Our decisions in this area are consistent with Supreme Court jurisprudence on this issue. Generally, in analyzing whether to apply a statute retroactively, the Supreme Court has applied a two-part test. *See Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 278-80 (1994)). The first step under this framework is to ask "whether Congress has expressly prescribed the statute's proper reach." *Id.* Where, as here, the statute does not expressly state whether it is retroactive, the Court next seeks to determine "whether applying the statute to the person objecting would have a retroactive consequence in the disfavored sense of 'affecting substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment.'" *Id.* at 37. The Court has held that a statute that creates jurisdiction, where such jurisdiction did not previously exist, does affect substantive rights and is therefore subject to the presumption against retroactivity. *See Hughes Aircraft Co. v. Schumer*, 520 U.S. 939, 951 (1997).

⁴ Specifically, HPES seeks to challenge the agency's price realism analysis, its non-price evaluation, and its best-value tradeoff analysis. Protest, Oct. 21, 2016.

place as of the time of award. The subsequent enactment of the GAO Civilian Task and Delivery Order Protest Authority Act did not change these governing legal requirements, but instead only affected the ability of HPES to challenge and obtain a remedy for the agency's alleged violation of such requirements. Accordingly, it is the award to CACI, and not the reinstatement of our protest jurisdiction, which forms the basis for HPES's protest. Since HPES learned of its basis to protest more than two months before December 16, its protest was not timely filed.

We recognize that this conclusion denies HPES a forum to protest the GSA's award of the task order to CACI. This result, however, is necessitated by the express statutory bar in place at the time HPES filed its October 21 protest, and by the fact that the subsequent reinstatement of the exception to that bar (i.e., our jurisdiction to hear a protest involving a civilian agency task order valued over \$10 million) was not made retroactive. In light of these statutory requirements and the requirements found in our Bid Protest Regulations, we cannot consider HPES's December 16 submission to be a timely-filed protest.

Request to Reinstate HPES's Initial Protest

Finally, HPES requests that we reinstate its initial protest, which was filed on July 11 (prior to the sunset provision taking effect), based on the failure of the agency's corrective action to provide a meaningful remedy. In support of this contention, the protester argues that the agency failed to fully implement its proposed corrective action and instead simply performed a nominal corrective action that did not in fact address the issues raised in HPES's protest.

We find that the agency's alleged failure to fully implement its proposed corrective action does not provide a basis to revive HPES's initial protest. A protest, like the one here, that was once academic is not revived by subsequent agency action or inaction. AdaRose Inc.--Protest & Costs, B-299091.2, Jan. 14, 2008, 2008 CPD ¶ 18 at 3; Envirosolve LLC, B-294974.4, June 8, 2005, 2005 CPD ¶ 106 at 6. Rather, the subsequent agency conduct gives rise to a new basis for protest. Id. Accordingly, because HPES is challenging the subsequent steps taken by the agency in its corrective action, the protester's challenge does not revive its previously dismissed July 11 protest, and instead constitutes a new protest. That new protest, however, was expressly barred by statute at the time it was filed, as discussed above.

The request for reconsideration is denied.

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General Counsel