



Decision

Matter of: Mission Analytics, LLC--Reconsideration

File: B-422841.4

Date: April 22, 2025

Michael F. Winters for the requester.

Jonathan S. Baker, Esq., Department of Commerce, for the agency.

Jacob M. Talcott, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of prior decision is denied where the requesting party has not shown that our decision contains material errors of fact or law.

DECISION

Mission Analytics, LLC, a small business of Falls Church, Virginia, requests that we reconsider our decision, *Mission Analytics, LLC*, B-422841.3, Dec. 11, 2024, 2024 CPD ¶ 305, dismissing its protest of the issuance of a purchase order under request for quotations (RFQ) No. 1333ND24QNB770135, issued by the Department of Commerce, National Institute for Standards and Technology (NIST) for a direct view light-emitting diodes display system. The requester argued that the agency violated Federal Acquisition Regulation (FAR) section 33.103(f) by issuing the purchase order while the protester's agency-level protest was pending. We dismissed the protest because the record did not support the requester's assertion that the agency issued the purchase order while the requester's agency-level protest was pending. We also concluded that, in any event, the requester failed to demonstrate competitive prejudice. Mission Analytics argues that our decision contained errors of fact and law that warrant modification of our prior decision.

We deny the request for reconsideration.

BACKGROUND

The agency issued the RFQ as a small business set-aside on May 7, 2024, to procure an equipment upgrade for NIST's High Performance Computing and Visualization Group. Req. for Dismissal at 2; Req. for Dismissal, attach. 1, Contracting Officer Decl. at 1.¹ As relevant here, the RFQ included a waiver of the nonmanufacturer rule.² Req. for Dismissal at 2. On May 8, Mission Analytics emailed the contracting officer, objecting to the NAICS code assigned to the RFQ, the omission of FAR clause 52.219-33 from the RFQ, and the agency's use of a nonmanufacturer rule class waiver. Resp. to Req. for Dismissal, attach. 1, May 2024 Agency-Protester Emails at 3. Mission Analytics asked the agency to amend the RFQ. *Id.*

On May 17, Mission Analytics filed an appeal with the SBA, Office of Hearings and Appeals (OHA), challenging the NAICS code assigned to the RFQ and NIST's inclusion of the nonmanufacturer rule class waiver. Req. for Dismissal at 2. On July 24, OHA issued a decision denying Mission Analytics's appeal. *NAICS Appeal of: Mission Analytics, LLC*, SBA. No. NAICS-6298, July 24, 2024, 2024 SBA LEXIS 85.

Following OHA's decision, Mission Analytics emailed the contracting officer and requested a meeting to discuss the nonmanufacturer rule class waiver. Protest, attach. 3, July 2024 Agency-Protester Emails at 6. The contracting officer responded on July 26, pointing out that in its decision, OHA did not question the agency's use of the nonmanufacturer rule class waiver and that the agency regarded the class waiver as "applicable and appropriate[.]" *Id.* at 5. Mission Analytics responded by email the same day, disagreeing with NIST's interpretation of OHA's decision and repeating its opinion

¹ Citations are to the documents filed in response to Mission Analytics' underlying protest, B-422841.3.

² Ordinarily, when a procurement that has an assigned manufacturing or supply North American Industry Classification System (NAICS) code is set aside for small business, a small business vendor must be the manufacturer or producer of the end item being procured to be eligible to provide manufactured products or other supply items under the procurement. 13 C.F.R. § 121.406(a)(1). If the vendor does not manufacture the item being purchased, the "nonmanufacturer rule" provides that the quotation of a nonmanufacturer small business concern can be considered if the small business vendor, among other things, represents that it will supply the product of a domestic small business manufacturer or processor, or that a waiver of this requirement is granted by the Small Business Administration (SBA). 13 C.F.R. § 121.406(b).

Section 19.507(h) of the FAR provides that FAR clause 52.219-33, Nonmanufacturer Rule, should be included when the item being acquired has been assigned a manufacturing or supply NAICS code and any portion of the requirement is to be (1) set aside for small business and is expected to exceed the simplified acquisition threshold or (2) set aside or awarded on a sole-source basis. The FAR also states that the contracting officer shall not include FAR clause 52.219-33, Nonmanufacturer Rule, where the SBA has waived the nonmanufacturer rule. FAR 19.507(h)(2).

that NIST was improperly using a nonmanufacturer rule class waiver for the procurement. *Id.* at 1-3. The deadline for receipt of quotations was August 6; Mission Analytics did not submit a quotation, and the agency proceeded with the acceptance of quotations. Req. for Dismissal at 2, 4.

Protest with Our Office

Mission Analytics filed a protest with our Office on September 23, 2024, arguing that that the agency violated FAR section 33.103(f) by issuing the purchase order while the protester's agency-level protest was pending. Protest at 1.

We dismissed the protest because the record demonstrated that there was no pending agency-level protest at the time of award and, in any event, any failure by the agency to stay contract award pursuant to FAR section 33.103(f) was a procedural defect that did not competitively prejudice the protester. *Mission Analytics, LLC*, B-422841.3, Dec. 11, 2024, 2024 CPD ¶ 305 at 1. Our Office explained that the contracting activity effectively resolved Mission Analytics's agency-level protest when it conveyed its disagreement with Mission Analytics's position and proceeded with the procurement without undertaking the requested corrective action. *Id.* at 4. Accordingly, we concluded that Mission Analytics's agency-level protest was not pending when the agency issued the purchase order. *Id.* We further noted that Mission Analytics could not demonstrate competitive prejudice because NIST's actions did not prevent the protester from filing a protest with the SBA to challenge the nonmanufacturer rule class waiver after the purchase order was issued. *Id.* at 5. This request for reconsideration followed.

DISCUSSION

In its request for reconsideration, Mission Analytics argues that our Office incorrectly concluded that there was no pending agency-level protest at the time of award and that it was not prejudiced by the agency's actions. Req. for Recon. at 2-4. The requester also argues that our decision "misrepresents the express language" of FAR section 19.507(h) and that OHA lacks jurisdiction over waivers of the nonmanufacturer rules. *Id.* at 1-3. For reasons discussed below, we deny the 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). We will reverse a decision upon reconsideration only where the requesting party demonstrates that the decision contains a material error of law or fact; that is, but for the error, our Office would have likely reached a different conclusion as to the merits of the protest. *Department of Justice; Hope Village, Inc.--Recon.*, B-414342.5, B-414342.6, May 21, 2019, 2019 CPD ¶ 195 at 4 (declining to grant a request for reconsideration alleging that our decision contained a material error of fact where, even assuming the requester's assertion of a factual error was correct,

the changed facts would not have impacted our underlying legal analysis). The repetition of arguments made during our consideration of the original protest and disagreement with our prior decision do not meet this standard. *Veda, Inc.--Recon.*, B-278516.3, B-278516.4, July 8, 1998, 98-2 CPD ¶ 12 at 4.

We first address the requester's argument that our Office incorrectly concluded that there was no pending agency-level protest when the agency issued the purchase order. In its protest, Mission Analytics argued that the issuance of the purchase order was prohibited by FAR section 33.103(f) because Mission Analytics had a pending agency-level protest at the time of award. Protest at 1. In addressing this argument, our Office concluded that there was no pending agency-level protest because the contracting officer effectively resolved Mission Analytics's protest by proceeding with the procurement without undertaking the corrective action requested by the protester. *Mission Analytics, LLC, supra*, at 4. Mission Analytics then filed this request for reconsideration, arguing that the agency failed to issue a "well-reasoned explanation" as required by FAR section 33.103(h). Req. for Recon. at 3. Therefore, the requester argues, there was, in fact, a pending agency-level protest. *Id.*

We disagree. Although the requester contends that a contracting activity must issue a well-reasoned explanation to resolve an agency-level protest, our decisions make clear that the agency's decision to proceed with the receipt of quotations is another means by which the agency may resolve an agency-level protest. See, e.g., *DAI, Inc.*, B-408625, B-408625.2, Nov. 6, 2013, 2013 CPD ¶ 259 at 3. In those instances, we have concluded that the protester is on notice that the agency will not undertake the requested corrective action and must file a protest within 10 days of the adverse agency action. *Id.* Accordingly, we deny this challenge because the protester has failed to demonstrate that our conclusion that there was no pending agency-level protest contained an error of law or fact.³

Mission Analytics also argues that our Office erred by misquoting the FAR. Req. for Recon. at 1-2. Specifically, Mission Analytics contends that although FAR clause

³ Because we deny the challenge to our Office's conclusion that there was no pending agency-level protest at the time of award, we do not address Mission Analytics's challenge to the conclusion that it failed to demonstrate prejudice in its protest. As discussed in that decision, our analysis regarding the lack of prejudice addressed a hypothetical set of facts that would have been relevant only if we were to conclude that there was an agency-level protest when the agency issued the purchase order. See *Mission Analytics, LLC, supra*, at 4. We explained that if we were to assume, "for the sake of argument," that there was no pending agency-level protest, we would still dismiss for a lack of prejudice. *Id.* at 5; See *American Mutual Protective Bureau, Inc.*, B-229967, Jan. 22, 1988, 88-1 CPD ¶ 65 at 1 (stating that prejudice is an essential element of a viable protest and where no prejudice is evident, our Office will not disturb an award). Because as stated above we conclude there was no pending agency-level protest, we do not address the alternative analysis concerning prejudice as it has no bearing on the outcome of the underlying decision.

52.219-33, Nonmanufacturer Rule, provides that the contracting officer “shall” insert the nonmanufacturer rule in solicitations and contracts, our Office erroneously replaced the word “shall” with the word “should.” *Id.* According to Mission Analytics, we must grant its request for reconsideration because the decision contains an error of law. *Id.* at 2. We dismiss this argument. Even if Mission Analytics were correct that our decision contained an error of law, Mission Analytics has not demonstrated that but for that error, our Office would have likely reached a different conclusion as to the merits of the protest. See *Department of Justice; Hope Village, Inc.--Recon., supra*. In this regard, the citation in question concerns the contracting officer’s obligation to include the nonmanufacturer rule in a solicitation, which was not at issue in the protest. Instead, Mission Analytics’s protest concerned only whether the agency improperly proceeded with the procurement despite Mission Analytics’s contention that it had a pending agency-level protest. See Protest at 1. Our citation to FAR clause 52.219-33 had no bearing on that analysis. Therefore, this argument is dismissed.

We also dismiss Mission Analytics’s argument that OHA had no jurisdiction to issue a decision concerning the agency’s waiver of the nonmanufacturer rule. Req. for Recon. at 3-4. According to Mission Analytics, our Office relied on the decision issued by OHA “as if it somehow resolved the issue” of the waiver of the nonmanufacturer rule. *Id.* at 3. Similar to the discussion provided above, Mission Analytics has failed to demonstrate that the decision contains a material error of law or fact; that is, but for the error, our Office would have likely reached a different conclusion as to the merits of the protest. *Department of Justice; Hope Village, Inc.--Recon., supra*. As mentioned, Mission Analytics’s protest challenged the agency’s decision to issue a purchase order despite Mission Analytics filing an agency-level protest. See Protest at 1. Our Office did not rely on OHA’s decision in resolving that issue; instead, we referenced the decision issued by OHA solely to establish the factual background of the protest. See *Mission Analytics, LLC, supra*, at 2, 4. Accordingly, our mention of OHA’s decision had no impact on the outcome of the protest.

The request for reconsideration is denied.

Edda Emmanuelli Perez
General Counsel