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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Analytic Strategies LLC; Gemini Industries, Inc.

File: B-413758.2; B-413758.3

Date: November 28, 2016

J. Alex Ward, Esq., Damien C. Specht, Esq., and Rachael Plymale, Esq., Morrison & Foerster LLP, for Analytic Strategies LLC; Clayton S. Marsh, Esq., for Gemini Industries, Inc., the protesters.

Kelli Cochran-Seabrook, Esq., General Services Administration, for the agency. Young H. Cho, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protesters' challenges to the exclusion of their proposals from a competition for the placement of a task order are dismissed because the statutory grant of jurisdiction to the Government Accountability Office to consider protests in connection with task and delivery orders valued above \$10 million, issued under civilian agency multiple-award indefinite-delivery/indefinite-quantity contracts, has expired.

DECISION

Analytic Strategies LLC, of Vienna, Virginia, and Gemini Industries, Inc., of Burlington, Massachusetts, protest the exclusion of their proposals from further consideration under task order request (TOR) number GSC-QF0B-16-32998, issued by the General Services Administration (GSA), for mission support services for the Joint Improvised-Threat Defeat Agency (JIDA).

We dismiss the protests because they are not within our jurisdiction.

JIDA is the most recent incarnation of the Joint Improvised Explosive Device Defeat Organization (JIEDDO), which was established in 2006 as a Deputy Secretary of Defense-directed initiative with the mission to rapidly provide solutions to defeat the enemy's improvised threat campaign and save the lives of service members deployed fighting insurgent networks that employ improvised threats as a strategic weapon of choice. TOR, Section C, Performance Work Statement, at C-1. On March 11, 2015, the Deputy Secretary of Defense directed the establishment of JIEDDO as a defense agency and designated JIEDDO as a combat support

agency, aligned under the Under Secretary of Defense for Acquisition, Technology, and Logistics. Id. On April 30, 2015, JIEDDO was renamed as JIDA. Id.

The TOR to procure mission support services to support JIDA, was issued by GSA on April 20, 2016, under Federal Acquisition Regulation (FAR) subpart 16.5, to contractors holding GSA's One Acquisition Solution for Integrated Services (OASIS) small business multiple-award indefinite-delivery/indefinite-quantity (IDIQ) – pool 1 contracts. TOR, Cover Page.

The solicitation contemplated the issuance of a single cost-plus-award-fee task order with not-to-exceed contract line item numbers for travel, materials and equipment, and other direct costs, on a best-value basis. See id., Section B, Supplies or Services and Prices/Costs at B-1 – B-6; id., Section M, Evaluation Factors for Award, at M-1. The solicitation provided for a one-year base period and four one-year option periods. Id., Section B, Supplies or Services and Prices/Costs, at B-1 – B-6. The solicitation estimated the total value of the cost-plus-award-fee portion of the task order to be between \$126,081,247 and \$132,717,104. Id., Section L, Instructions, Conditions, and Notices to Offerors, at L-3.

Analytic Strategies and Gemini Industries submitted responses to the TOR. On September 21 and October 18, 2016, respectively, the agency informed these vendors that the agency would no longer consider their proposals for award. Analytic Strategies, Protest, attach. B, Notice of Elimination from Competition; Gemini Industries, Protest, attach. A, Protest Grounds, at 3. The protesters filed their protests on October 3 (Analytic Strategies), and October 28, 2016 (Gemini Industries).¹ In response, the agency sought dismissal of the protests on the basis that our jurisdiction to hear their protests, which is grounded in the Federal Acquisition Streamlining Act (FASA), has expired.

In 1994, Congress enacted FASA, which, as relevant here, provided statutory guidance for the award of 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 41.² See 10 U.S.C. §§ 2304a, 2304b, 2304c; 41 U.S.C. §§ 4103, 4105, 4106.

¹ These protests have been docketed as B-413758.2 (Analytic Strategies) and B-413758.3 (Gemini Industries). Prior to September 30, 2016, a protest was filed by BlueWater Federal Solutions, Inc., challenging its exclusion from the competition; BlueWater's protest has been docketed as B-413758.1.

² The procurement provisions of Title 10 apply to the Secretaries of Defense, Army, Navy, Air Force, Homeland Security, and the Administrator of the National Aeronautics and Space Administration (military departments or agencies).

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Section 4103 of Title 41 establishes the authority of civilian agencies to award IDIQ contracts. As relevant here, this provision states that “[s]ubject to the requirements of this section, section 4106 of this title, and other applicable law, the head of an executive agency may enter into a task or delivery order contract” for procurement of services or property. 41 U.S.C. §§ 4103(a). Section 4106 of Title 41 “applies to task and delivery order contracts entered into under section[] 4103” of Title 41, and provides the process for issuing orders under those contracts. 41 U.S.C. § 4106(a).

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); Ryan Consulting Grp., Inc., B-414014, Nov. 7, 2016, 2016 CPD ¶ __ at 2-3; 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 military agency orders and civilian agency orders where the value of the order exceeded \$10 million; this jurisdiction was in addition to the existing jurisdiction to hear protests concerning orders that increase the scope, period, or maximum value of the underlying IDIQ contract. Pub. L. No. 110-181, 122 Stat. 3, 237, 239 (2008). The NDAA for Fiscal Year 2008 also included a sunset provision under which the general bar on our task and delivery order jurisdiction also would expire on May 27, 2011. Id.; Ryan Consulting Grp., Inc., supra, 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). It also established a new sunset date, whereby the 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, 2016.³ Specifically, as it is relevant to the protest at issue, section 4106(f) of Title 41 was amended to read:

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10 U.S.C. § 2302. Title 41 applies to executive agencies (civilian agencies).
41 U.S.C. § 4103.

³ Although our jurisdiction with respect to protests of task and delivery orders issued pursuant to Title 41 expired 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
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(f) Protests--

(1) Protest not authorized. A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for --

(A) a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued; or

(B) a protest of an order valued in excess of \$10,000,000.

(2) Jurisdiction over protests. Notwithstanding section 3556 of title 31, the Comptroller General shall have exclusive jurisdiction of a protest authorized under paragraph (1)(B).

(3) Effective period. Paragraph (1)(B) and paragraph (2) of this subsection shall not be in effect after September 30, 2016.

41 U.S.C. § 4106(f). Based on the above language, the sunset provision with respect to GAO's task and delivery order protest jurisdiction effectively reinstated the original FASA prohibition on GAO's task order jurisdiction. Moreover, because section 4106 by its terms, "applies to task and delivery order contracts entered into under section [] 4103" of Title 41, the reinstated prohibition on GAO's task order jurisdiction necessarily applies to protests of orders issued against task and delivery order contracts entered into under section 4103, i.e., multiple-award IDIQ contracts awarded by civilian agencies.

Here, there is no dispute that the protesters are challenging their elimination from further consideration for a task order that will be issued under a multiple-award IDIQ contract vehicle awarded by GSA, a civilian agency under the authority and procedures set forth in Title 41. There is also no dispute that these protests were filed after September 30, 2016. Thus, it is clear that the protesters filed their protests after the sunset of our jurisdiction to resolve protests in connection with task and delivery orders issued under civilian agency IDIQ contracts.

Analytic Strategies contends that our Office has jurisdiction over its protest under 10 U.S.C. § 2304c(e), rather than 41 U.S.C. § 4106(f), because the task order contemplated here will provide services to a Department of Defense (DoD) agency;

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permanently establishing GAO's jurisdiction to hear protests in connection with Title 10 task and delivery orders valued in excess of \$10 million.

will be funded by DoD; and incorporates various DoD regulations.⁴ Analytic Strategies' Response to Agency's Request for Dismissal at 1-2.

As set forth above, however, there is no dispute that the task order at issue here will be issued under a civilian agency IDIQ, or that these protests were filed after September 30. The protesters' arguments that we have jurisdiction under Title 10 because of DoD's role in these procurements are misplaced. We see nothing in the relevant provisions of Titles 10 or 41 that authorize a different result because the agency that will benefit from the task order, will fund the task order, or will place the order, is an agency covered by Title 10. Instead, the statutory scheme under Title 41 sets forth the authority of civilian agencies to award IDIQ contracts, describes the process for ordering against those contracts, and in some instances, limits the jurisdiction of forums like GAO to hear protests in connection with the placement of these orders.

Accordingly, we conclude that the jurisdictional bar to protests applies here because the bar is established under the statutory framework authorizing multiple-award IDIQ contracts within Title 41. Moreover, the protesters do not otherwise argue that the order to be issued under the TOR increases the scope, period, or maximum value of the underlying IDIQ contract. In short, our Office does not have jurisdiction to consider these protests.

The protests are dismissed.

Susan A. Poling
General Counsel

⁴ Analytic Strategies also raises a number of arguments as to why our Office should take jurisdiction over the protest in spite of the sunset of our jurisdiction in connection with Title 41, including that our Office has taken jurisdiction over a protest filed by a competitor; that the protester was excluded from the competition prior to the sunset; and because, in the protester's view, our jurisdiction might be restored within the 100-day period for the decision on this protest. See Analytic Strategies' Response to Agency's Request for Dismissal at 2-3. None of these arguments provide a sound basis to ignore the sunset of our jurisdiction to hear a protest in connection with a civilian-agency task order. Gemini Industries maintains that our Office has jurisdiction over its protest based on its mistaken belief that the OASIS contract at issue is a contract established within the Federal Supply Schedule (FSS) program, and thus is unaffected by this jurisdictional bar. See Protest at 1; Gemini Industries' Response to Agency's Request for Dismissal at 3-4; Gemini Industries' Response to GAO Request for Information. Our Office has long held that the jurisdictional bar set forth in FASA is inapplicable to orders placed under the FSS program. See, e.g., Severn Cos., Inc., B-275717.2, Apr. 28, 1997, 97-1 CPD ¶ 181 at 2-3 n.1.