



Decision

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Matter of: AMAR Health IT, LLC

File: B-414384.3

Date: March 13, 2018

Hal J. Perloff, Esq., David P. Hendel, Esq., and Steven A. Neeley, Jr., Esq., Husch Blackwell LLP, for the protester.

J. Patrick McMahon, Esq., William T. Welch, Esq., and Peter A. Fish, Esq., McMahon, Welch and Learned, PLLC, for Zolon Tech., Inc., the intervenor.

Christine F. Simpson, Esq., Department of Health and Human Services, for the agency. Katherine I. Riback, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of the issuance of a task order conducted under Title 41 of the United States Code is dismissed where the task order is valued at less than \$10 million.
 2. Protest is dismissed where GAO does not have jurisdiction to resolve a protest of a task order below \$10 million dollars based on the allegation the agency “effectively terminated” protester’s task order where the agency argues that the original task order (valued above \$10 million) was not terminated, but lapsed.
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DECISION

AMAR Health IT, LLC, of North Bethesda, Maryland, protests the issuance of a task order under request for quotations (RFQ) No. NIHM2017001GB, issued by the Department of Health and Human Services, National Institute of Health, to Zolon Tech., Inc. for information technology services for the processing of health-related journal manuscripts. AMAR argues that the agency “effectively terminated” the task order that it had been awarded--which at the time exceeded our jurisdictional threshold, and then based on an improper evaluation, issued a task order to Zolon that fell below our jurisdictional threshold. Protest at 9.

We dismiss the protest because our Office does not have jurisdiction to entertain protests of task orders issued under civilian agency multiple-award, indefinite-delivery, indefinite-quantity (IDIQ) contracts that are valued at less than \$10 million.

The protester states that it was initially issued a task order under the solicitation valued at \$13,992,733.80, and that, in response to a protest filed by Zolon, the agency issued a stop work order to AMAR pursuant to Federal Acquisition Regulation (FAR) clause 52.233-3.¹ Protest, Tab B, Agency Stop Work Order (Feb. 23, 2017); AMAR's Response to Summary Dismissal Request at 2. The agency announced that it would take corrective action in response to Zolon's protest, which included reviewing and amending the award "to ensure that the award decision is documented and reflects the solicitation." Protest at 7-8. Our Office dismissed the protest as academic (Zolon Tech., Inc., B-414384, Mar. 6, 2017 (unpublished decision)), and the agency, after completing the corrective action, affirmed the award to AMAR. Id. at 8. Zolon again protested the award to AMAR arguing that the agency did not evaluate its quotation consistent with the solicitation and failed to conduct adequate discussions. In response, the agency again elected to take corrective action and our Office dismissed the protest. Zolon Tech., Inc., B-414384.2, May 16, 2017 (unpublished decision). As part of this corrective action, the agency conducted discussions with the vendors and requested final revised quotations. Protest at 2. According to the protester, the agency then evaluated final quotations and issued a task order to Zolon at a price of \$6,321,615.88. Id. at 9. This protest to our Office followed.

AMAR argues that the agency acted improperly when it "effectively terminated" the task order that had been issued to AMAR which exceeded our jurisdictional threshold, and then, based on an improper evaluation, issued a task order to Zolon that was below our jurisdictional threshold. Protest at 9. The protester argues, citing EA Eng'g, Sci., and Tech., Inc., B-411967.2 et al., Apr. 5, 2016, 2016 CPD ¶ 106, that our Office may review the award of a task order to Zolon, even though it is below the jurisdictional threshold, because its protest challenge of the "effective terminat[ion]" of its previously issued task order is "intertwined" with the new task order issued to Zolon, such that there is no basis to separate the termination from the award.² Id. at 5.

¹ The agency issued the RFQ as part of the CIO-SP3SB government-wide agency contract. The RFQ contemplates the issuance of a single task order. Protest, Tab D, CIO-SP3SB Government-Wide Acquisition Contract (GWAC) Statement of Work (SOW) § 8.0.

² An agency's decision to terminate a contract is generally a matter of contract administration that falls outside of GAO's bid protest jurisdiction. American Material Handling, Inc., B-406739, Aug. 14, 2012, 2012 CPD ¶ 234 at 3. As a limited exception to that rule, GAO will consider the termination of a contract only where the agency's decision to terminate arises from a defect or impropriety in the award of the contract. See Optimum Servs., Inc., B-401051, Apr. 15, 2009, 2009 CPD ¶ 85 at 2; Freedom Graphics Sys., Inc., B-277305, Sept. 22, 1997, 97-2 CPD ¶ 82 at 2. Our review of such terminations extends to the termination of task orders where the protest is based in whole or in part on alleged improprieties concerning the award of the order. See Bay Area Travel, Inc. et al., B-400442 et al., Nov. 5, 2008, 2009 CPD ¶ 65 at 7-8.

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Protests filed with our Office in connection with the issuance or proposed issuance of a task or delivery order under a civilian agency IDIQ contract are not authorized except where the order is valued over \$10 million, or where the protester can show that the order increases the scope, period, or maximum value of the contract under which the order is issued. 41 U.S.C. § 4106(f)(1); AdvanceMed Corp., B-415062, B-415062.2, Nov. 17, 2017, 2017 CPD ¶ 345 at 6 n.9. For the purposes of determining our jurisdiction, the value of the task order to Zolon on its face is controlling since the terms of the order define the scope and terms of the contractual commitment between the contractor and the government. Serco Inc., B-410676.2, Dec. 12, 2014, 2014 CPD ¶ 371 at 2; see Goldbelt Glacier Health Servs., LLC, B-410378, B-410378.2, Sept. 25, 2014, 2014 CPD ¶ 281 at 3 (actual dollar amount of order issued was appropriate measure of task order value). Here, because the order at issue is valued at less than \$10 million, we lack jurisdiction to consider the protester's challenge. Serco Inc., supra at 2.

We are not persuaded by the protester's argument, citing EA Eng'g, Sci., and Tech., Inc., that our Office may review the issuance of a task order to Zolon even though it is below the jurisdictional threshold because its protest challenging the "effective terminat[ion]" of its previously issued task order was so "intertwined" with the new award that there was no basis to separate the termination from the award. Protest at 5. As the protester noted by using such phrases as "effective terminat[ion]" and "de facto termination," the agency has not terminated its task order and has asserted that it is not required to terminate the task order, because the order has lapsed during the pendency of the multiple corrective actions.³ Protest at 5; AMAR's Response to Summary Dismissal Request at 2; Agency Request for Summary Dismissal at 3.

To the extent that the protester has issues regarding the agency's determination that its task order lapsed or expired, this is a matter of contract administration over which we do not exercise jurisdiction. Our Office considers bid protest challenges to the award or proposed award of contracts. 31 U.S.C. § 3552. Therefore, we generally do not review matters of contract administration, which are within the discretion of the contracting

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In EA Eng'g, Sci., and Tech., Inc., we stated that while our Office would not ordinarily have jurisdiction to review the propriety of the issuance of a task order under \$10 million, the termination of EA's task order was "so intertwined" with the decision to issue an order to another vendor that we found no basis to separate the termination from the award. Under those circumstances our Office reviewed the reasonableness of the issuance of the order to another vendor as part of the review of the reasonableness of the agency's decision to terminate EA's task order. EA Eng'g, Sci., and Tech., Inc., supra, at 4.

³ The agency states that AMAR's task order expired, by its terms, on December 31, 2017. Agency Filing, Feb. 13, 2018, at 2.

agency and for review by a cognizant board of contract appeals or the Court of Federal Claims. Bid Protest Regulations, 4 C.F.R. § 21.5(a). The few exceptions to this rule include situations where it is alleged that a contract modification improperly exceeds the scope of the contract and therefore should have been the subject of a new procurement; where a protest alleges that the exercise of a contractor's option is contrary to applicable regulations; or where an agency's basis for contract termination is that the contract was improperly awarded. See Sprint Communications Co., L.P., B-271495, April 26, 1996, 96-1 CPD ¶ 211 at 4. Since none of the exceptions applies in this case, we decline to consider this matter further.

AMAR, in its comments on the additional materials and argument provided by the agency in support of its dismissal request, alternatively challenges the issuance of a sole-source order to Zolon. AMAR Filing, Feb. 14, 2018, at 7. While throughout the protest the agency framed the issuance of the task order to Zolon as under RFQ No. NIHM2017001GB (Agency Filing, Feb. 13, 2018, at 2), the argument also could be made that this was a stand-alone sole source award to Zolon on the theory that the solicitation was no longer in existence once AMAR's task order expired, and, thus, any subsequent award must have been on a sole-source basis.⁴ To the extent that the protester now contests a sole source award to Zolon (AMAR Filing, Feb. 14, 2018, at 7), we find that such a protest ground is untimely because it was filed more than 10 calendar days after the protester knew, or should have known, the basis for its protest. Under our Bid Protest Regulations, a protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Here, the issue of whether the award to Zolon was a stand-alone sole source contract should have been apparent by a review of the agency's summary dismissal request of January 16, 2018, when AMAR, who already knew of the award to Zolon, learned of the agency's determination that its task order expired and that, therefore, a termination was not necessary. Agency Request for Summary Dismissal (Jan. 16, 2018). However, this protest issue was not raised until February 14. Therefore, we find this protest issue to be untimely.

The protest is dismissed.

Thomas H. Armstrong
General Counsel

⁴ Our Office raised this argument with the parties in a conference call on February 9, 2018, following which all parties were permitted to submit comments.