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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

File: B-413382.2

Date: November 30, 2016

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 intervener.

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

Glenn G. Wolcott, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's challenge to the award of a task order to another offeror is 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

HP Enterprise Services, LLC (HPES), of Herndon, Virginia, protests the General Services Administration's (GSA) award 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.

We dismiss the protest because it is not within our jurisdiction.

In March 2016, the GSA issued TOR No. ID1150045 to contractors holding GSA ALLIANT indefinite-delivery/indefinite-quantity (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, 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. By letter of July 26, the agency informed our Office that it would review and reevaluate its best-value determination and award decision. On August 3, we dismissed HPES's protest, finding that the agency's pending corrective action rendered the protest academic.

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 this protest with our Office. On October 25, GSA submitted a motion to dismiss the protest on the basis that GAO's statutory authority to consider HPES's protest, 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 41.¹ See 10 U.S.C. §§ 2304a, 2304b, 2304c; 41 U.S.C. §§ 4103, 4105, 4106. 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

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.

\$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, 2016.² Specifically, as it is relevant to the protest at issue, section 4106(f) of Title 41 was amended to read:

(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).

² 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 permanently establishing GAO's jurisdiction to hear protests in connection with Title 10 task and delivery orders valued in excess of \$10 million.

(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, we find no reasonable dispute that HPES is challenging the award of a task order issued under a multiple-award IDIQ contract vehicle awarded by GSA, a civilian agency, under the authority and procedures set forth in Title 41. Further, it is clear that HPES's October 21 protest was filed after our jurisdiction expired on September 30, 2016. In short, HPES filed its protest after the sunset of our jurisdiction to resolve protests in connection with task and delivery orders issued under civilian agency IDIQ contracts.

HPES contends that our Office has jurisdiction over its protest pursuant to 10 U.S.C. § 2304c(e), rather than 41 U.S.C. § 4106(f), because the procurement is being conducted "on behalf" of DOD; the procurement is subject to certain DOD regulations; and performance will be funded by the DOD. Protest, Oct. 21, 2016, at 2-3; Response to Motion to Dismiss, Nov. 1, 2016, at 1-7.³

Here, we reject HPES's assertion that our Office has jurisdiction to consider its protest. Specifically, there can be no doubt that the protested task order has been, or will be, issued under a civilian agency IDIQ contract. Further, there is no

³ HPES also asserts that we should take jurisdiction over this protest, despite the sunset of our jurisdiction in connection with Title 41, since this is a "continuation" of its prior protest filed before our jurisdiction expired. See Response to Motion to Dismiss, Nov. 1, 2016, at 7. We do not view this argument as a valid basis for our Office to ignore the statutory expiration of our jurisdiction. Where an agency takes corrective action in response to a protest under which it reevaluates/reconsiders its prior source selection decision, we view such corrective action as superseding the prior action, rendering a protest challenging that prior action moot. See, e.g., InfoPro, Inc., B-408642.2, B-408642.3, Dec. 23, 2014, 2015 CPD ¶ 59 at 4. In short, it is clear that HPES's October 21 protest challenged the agency's October 14 decision to re-award the task order to CACI--a matter that we view as distinct from the agency's initial award decision. See Protest, Oct. 21, 2016, at 3.

meaningful dispute that the protest at issue was filed after September 30, when our jurisdiction to consider such protests expired.

HPES's arguments that we should exercise jurisdiction under Title 10 because of DOD's role in these procurements are unpersuasive. Specifically, we see nothing in the relevant provisions of Titles 10 or 41 that authorizes a different result because the agency that will benefit from the task order, or will fund the task order, is an agency covered by Title 10. Rather, 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 those 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, HPES does 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 this protest.

The protest is dismissed.

Susan A. Poling
General Counsel