



Decision

Matter of: Kevcon, Inc.

File: B-406418

Date: March 7, 2012

William L. Bruckner, Esq., Bruckner & Walker, LLP, for the protester.
David G. Fagan, Esq., Department of Veterans Affairs, for the agency.
Jonathan L. Kang, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Challenge to the protester's exclusion from a task order competition conducted under Title 41 of the U.S. Code is dismissed where the task order is valued at less than \$10 million.

DECISION

Kevcon, Inc. protests the rejection of its quotation by the Department of Veterans Affairs (VA) under task order solicitation No. VA-260-11-RP-1516, for design-build services for the renovation of building B100, Ward 6E Oncology, at the VA Puget Sound Health Care System.

We dismiss the protest.

Kevcon was awarded one of the multiple indefinite-delivery/indefinite-quantity (ID/IQ) contracts by the VA for maintenance, repair, and construction at six locations. As relevant here, the ID/IQ contract awarded to Kevcon provided that "[t]he total of individual task orders placed against this contract shall not exceed \$22,500,000." Protest, attach. A, ID/IQ Contract, at 1.

On August 23, 2011, the VA issued the task order solicitation to vendors. Kevcon submitted its quotation by the closing date of September 13. On February 1, 2012, the agency advised the protester that it was not eligible to receive the award, or to compete for any future task orders under the ID/IQ contract, because the protester had been issued task orders for the maximum value set forth for its ID/IQ contract. Protest, attach. C, Letter from VA to Kevcon (Feb. 1, 2012), at 1.

On February 7, Kevcon filed an agency-level protest arguing that the VA unreasonably concluded that the protester was ineligible to receive awards under the ID/IQ contract. The protester further argued that the agency's conclusion resulted in the improper exclusion of its quotation from award consideration. On February 9, the contracting officer (CO) denied Kevcon's agency-level protest. VA Protest Decision (Feb. 9, 2012) at 1. The CO explained that the VA's decision to exclude the protester from award consideration for the solicitation, or from any future task order awards, was based on the \$22.5 million limitation in Kevcon's ID/IQ contract. Id. at 1-2. On February 13, Kevcon filed a protest with our Office, which raised essentially the same arguments raised in its agency-level protest.

Kevcon argues that the VA unreasonably interpreted the "shall not exceed" limit in the ID/IQ contract as a limitation on the value of task orders that may be issued under that contract.¹ For this reason, the protester contends that it is eligible to receive task orders above the maximum value set forth in its contract, and that the agency improperly refused to consider its quotation for award of the task order. We dismiss the protest.

We do not have jurisdiction to hear Kevcon's challenge because it concerns a task order valued at less than \$10 million. In this regard, the government estimate for the task order was \$2.7 million, and Kevcon's quoted price was \$2.64 million. Request for Dismissal at 2.

In 1994, the Federal Acquisition Streamlining Act (FASA) barred protests concerning task or delivery orders issued under ID/IQ contracts, other than those challenging the scope, period, or maximum value of the underlying contract. See Pub. L. No. 103-355, 108 Stat. 3243, 3264 (1994) (codified in Titles 10 and 41 of the U.S. Code). The Fiscal Year (FY) 2008 National Defense Authorization Act (NDAA) amended FASA to grant GAO jurisdiction to hear protests concerning task or delivery orders valued at more than \$10 million (in addition to those concerning scope, as discussed above). See Pub. L. No. 110-181, 122 Stat. 3, 237 (2008). The FY 2008 NDAA amendment to FASA also contained a sunset provision, which stated that the amended "subsection shall be in effect for three years." Id.

As explained in our decision in Technatomy Corp., B-405130, June 14, 2011, 2011 CPD ¶ 107, the sunset provision of the FY 2008 NDAA took effect on May 27,

¹ Kevcon primarily contends that an ambiguity exists between the "not to exceed" limitation of the contract, and provision of the ID/IQ contract solicitation which stated that the contractor "is not obligated to honor" orders in excess of \$22.5 million. Protest at 2. The protester argues that as a result of the alleged ambiguity, the agency and protester are not bound by the "not to exceed" provision of the contract. Id. For the reasons discussed above, we do not resolve this issue.

2011, with regard to procurements conducted under Title 41 of the U.S. Code.² Despite this sunset, we concluded that, with respect to Title 41 procurements, the plain language of the FY 2008 NDAA resulted in the elimination of FASA bar on protests; consequently, our Office had jurisdiction to consider protests concerning task or delivery orders of any size. Id. at 4.

On December 31, 2011, the FY 2012 NDAA amended our Office's jurisdiction, and effectively reinstated the FASA task or delivery order bar and the \$10 million exception established under the FY 2008 NDAA. FY 2012 NDAA, Pub. L. 112–81 125 Stat. 1298, 1491 (2011). Specifically, section 813 of the FY 2012 NDAA amended the sunset provision of the FY 2008 NDAA, as follows:

Paragraph (3) of section 4106(f) of title 41, United States Code, is amended to read as follows:

“(3) EFFECTIVE PERIOD.--Paragraph (1)(B) and paragraph (2) of this subsection shall not be in effect after September 30, 2016.”.

Id.

As a result of this amendment, the jurisdiction of our Office concerning task or delivery orders, under both Titles 10 and 41, returns to its status before May 27, 2011. Specifically, our Office has jurisdiction to hear protests concerning task or delivery orders issued under ID/IQ contracts only where: (1) the protest challenges the scope, period, or maximum value of the underlying contract; or (2) the order is valued at more than \$10 million.

Kevcon argues that because the task order solicitation was issued prior to the reinstatement of the \$10 million threshold by the FY 2012 NDAA, our Office has jurisdiction to hear this protest based on the analysis set forth in Technatomy. The protester's reading of Technatomy is incorrect. In that case, we interpreted our jurisdiction to hear task or delivery order protests based on the filing date of the protest, rather than the date of the underlying procurement action. Technatomy Corp., supra, at 5-6.

In Standard Communications, Inc., B-406021, Jan. 24, 2012, 2012 CPD ¶ 51, we confirmed our view that the authority of this Office to hear a protest relates to the date when the protest was filed. Specifically, we held that although the enactment of the FY 2012 NDAA reinstated the \$10 million threshold, we had jurisdiction to

² The FY 2011 NDAA included a provision which extended to September 30, 2016 the jurisdiction of our Office to hear protests concerning the issuance of task or delivery orders under Title 10 of the U.S. Code. Pub. L. No. 111-383, 124 Stat. 4137, 4270 (2011).

consider and issue a decision regarding a protest of a task order valued at less than \$2 million because the protest had been filed before the enactment of the FY 2012 NDAA. Id. at 3.

Here, Kevcon's protest was filed on February 13, 2012; on that date, the FY 2012 NDAA had taken effect. For this reason, our Office does not have jurisdiction to hear this protest because it concerns a task order valued at less than \$10 million.³

The protest is dismissed.

Lynn H. Gibson
General Counsel

³ To the extent that Kevcon argues that the VA improperly concluded that it was ineligible to receive additional task orders because the protester had reached the maximum order value set forth in the ID/IQ contract, this is a matter of contract administration which we do not review. Bid Protest Regulations, 4 C.F.R. 21.5(a) (2012); see Ceradyne, Inc., B-402281, Feb. 17, 2010, 2010 CPD ¶ 70 at 3 n.4 (arguments concerning a breach of a contractual term are matters of contract administration that GAO does not review). Specifically, we conclude that the general argument concerning Kevcon's eligibility to receive task orders, as opposed to Kevcon's challenge to its eligibility to receive a specific task order, is a matter of contract administration that we do not review.