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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Hospital Klean, Inc.

File: B-286791

Date: December 8, 2000

Johnathan M. Bailey, Esq., for the protester.

Donald E. Barnhill, Esq., Douglas & Barnhill, for BMAR & Associates, Inc., an intervenor.

Steven W. Feldman, Esq., and Craig R. Schmauder, Esq., Department of the Army, for the agency.

Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in preparing the decision.

DIGEST

Protest that contracting agency improperly proposes to issue a task order under an indefinite-delivery/indefinite-quantity contract is dismissed pursuant to 10 U.S.C. § 2304c(d) (1994), which provides that “[a] protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued,” where the enumerated exceptions do not apply.

DECISION

Hospital Klean, Inc. protests the proposed issuance of a task order to BMAR & Associates, Inc. by the United States Army Corps of Engineers, Huntsville Center, Alabama, for hospital housekeeping services at the Womack Army Medical Center, Fort Bragg, North Carolina. The Army states that it proposes to issue the task order under an indefinite-delivery/indefinite-quantity (ID/IQ) contract (No. DACA87-00-D-0004) that it awarded to BMAR on April 26, 2000. Hospital Klean contends that the agency intends improperly to issue the task order on a sole-source basis and that the requirement should have been set aside under the Small Business Administration’s (SBA) section 8(a) program.

We dismiss the protest.

The contract awarded to BMAR states that it is to provide operation and maintenance or minor repairs and replacement services to government medical facilities, and specifically provides that it is an “[ID/IQ contract], as defined in [Federal Acquisition Regulation] FAR § 16.504,” and that the agency intends to issue task orders (fixed price, time and materials, or a combination of both types) for the required services. Agency Request for Summary Dismissal, exh. 1, Contract § B, ¶ 6, at 3. The statement of work (SOW) specifically enumerates all of the services that could be obtained, as follows:

The services provided shall include those both inside and outside the facilities including grounds, Hospital Aseptic Management Systems (HAMS) Service, and custodial services. . . .Custodial services will include general housekeeping, trash collection and removal.

Id. § C ¶ 1.1, at 7.

As the Army notes, 10 U.S.C. § 2304c(d) (1994) provides that “[a] protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued.” The Army argues that the statute precludes our consideration of the protest because the protest does not raise any of the enumerated statutory exceptions.

The protester disagrees with the agency’s position, arguing that it “supplemented its protest to specifically challenge award under the contract . . . as being outside the intended scope of that contract, and a violation of FAR § 19.502.2.” Protester’s Comments, Nov. 29, 2000, at 3. According to Hospital Klean, therefore, our Office is not precluded from considering the protest. Hospital Klean also maintains that the requirement should have been set aside under the SBA’s section 8(a) program. According to Hospital Klean, this contention is properly for consideration by our Office at this juncture.

As a preliminary matter, we think that the protester’s contention that the requirement should have been set aside for 8(a) concerns is untimely. We further conclude that 10 U.S.C. § 2304c(d) precludes our considering Hospital Klean’s challenge to the proposed issuance of the task order to BMAR. Below we discuss our conclusions in greater detail.

Untimely Allegation

On November 20, subsequent to filing its initial protest letter, Hospital Klean supplemented its protest to argue that the requirement should have been set aside exclusively for small businesses under the SBA’s section 8(a) program. Although Hospital Klean couched this allegation in terms of a challenge to the issuance of the proposed task order, it is essentially a challenge to the terms of the underlying solicitation that resulted in the award of the ID/IQ contract to BMAR. In this

connection, the Army explains, and the record shows, that the underlying solicitation clearly placed Hospital Klean on notice that the agency intended to obtain housekeeping services under the contemplated ID/IQ contract. Accordingly, if Hospital Klean believed that the services covered by the proposed order should have been set aside exclusively for 8(a) firms, as it contends, it was required to raise this issue prior to the time set for receipt of initial proposals under the solicitation. Bid Protest Regulations, 4 C.F.R. § 21.2(a) (2000). Since Hospital Klean did not raise its objection until November 20--7 months after award--its objection is untimely, and will not be considered. Dunn Eng'g Assocs., B-266273, Feb. 9, 1996, 96-1 CPD ¶ 59 at 2 n.1.

Relying on letters our Office issued to the Departments of the Air Force and Army, see B-277979, Jan. 26, 1998, 98-1 CPD ¶ 51, Hospital Klean argues that its protest should not be dismissed because the SOW is so broad that Hospital Klean could not have known that the agency intended to issue an order solely for housekeeping services under any of the multiple-award contracts contemplated by the solicitation. Hospital Klean argues, therefore, that since the solicitation did not reasonably inform it that the agency could order the work covered by the order at issue here, we should consider its protest allegation that the proposed task order is not within the scope of the contract. Hospital Klean's argument is without merit.

As already explained, the SOW specifically enumerated all of the services that the agency could obtain by issuing task orders under the contract, including general housekeeping services. Further, nothing in the SOW suggests that the agency would be precluded from issuing orders for only one category of tasks listed there. Since the SOW clearly placed Hospital Klean on notice that housekeeping services are among the tasks that the agency could order, either individually or as part of a more comprehensive order combining other services, any challenge to the inclusion of these services in the ID/IQ contract should have been raised before the time set for receipt of initial proposals under that solicitation. Since Hospital Klean failed to do so, its allegation is untimely. 4 C.F.R. § 21.2(a).

Issuance of Proposed Task Order

Despite the protester's view to the contrary, we see no reason why the statutory restriction on protests set forth at 10 U.S.C. § 2304c(d) is not applicable here. The only issue Hospital Klean raised in its initial protest letter concerned the proposed issuance of the task order to BMAR on a sole-source basis. Specifically, Hospital Klean stated that "[t]he basis of this protest is that the agency has violated the Competition in Contracting Act and its implementing regulations by awarding this

requirement to BMAR on a sole source basis without justification.” Protest, Nov. 9, 2000, at 1. Subsequently, Hospital Klean supplemented its protest, explaining as follows:

Hospital Klean, Inc. hereby files this supplement to the above referenced protest to provide further factual detail recently obtained by Hospital Klean. At the time of filing of the original protest, Hospital Klean was unaware of the contractual vehicle through which the agency intended to improperly satisfy its requirement for hospital housekeeping services on a sole source basis. The agency has since informed Hospital Klean that the agency will be accomplishing that non-competitive award via a task order to be issued under contract number DACA87-00-D0004.

* * * * *

The legal basis for challenging this proposed issuance of the task order to BMAR & Associates, Inc. remains the same. Hospital Klean files this supplement merely to clarify as a factual matter the non-competitive contractual vehicle through which the agency intends to satisfy the subject requirement.

* * * * *

Hospital Klean hereby modifies its document request to include a copy of contract DACA87-00-R-0004 and any amendments so that it can be determined whether the subject requirement is within the scope of work of that contract.

Supplemental Protest, Nov. 20, 2000, at 1-2 (emphasis added).

Thus, contrary to the protester’s assertions, it did not argue in its initial or supplemental filings that the proposed task order exceeds the scope of the underlying contract. Rather, as confirmed by the quoted language above, Hospital Klean maintained in both of its submissions that the agency improperly proposed issuing the task order on a sole-source basis. Indeed, in its reply to the agency’s dismissal request, Hospital Klean reiterates that “[t]he stated basis for Hospital Klean’s original protest was that the agency intended to award the subject housekeeping service requirement to BMAR without conduct of competition,” further highlighting the central issue in its protest. Supplemental Comments, supra, at 3.

Further, a fair reading of Hospital Klean’s November 20 submission does not support the protester’s assertion that it specifically challenged the proposed task order as being beyond the scope of the underlying ID/IQ contract. The only reference in its November 20 supplemental protest to the task order being “out of scope” appears in the section, quoted above, where Hospital Klean requests a copy of the contract so that it may then determine whether “the subject requirement is within the scope of work of that contract.” We do not consider Hospital Klean’s supplemental document

request to be a protest. In this regard, Hospital Klean's submission contains no stated objection to or expression of dissatisfaction with the scope of the proposed task order, nor is there any request for agency relief or other action. As such, Hospital Klean's supplemental document request cannot reasonably constitute a protest. See Federal Acquisition Regulation § 33.101(b)(2); compare Great Southwestern Constr., Inc., B 252917, Apr. 14, 1993, 93-1 CPD ¶ 322 (protester's letter was not an agency-level protest since it did not request any response or relief from the agency) with American Material Handling, Inc., B-250936, Mar. 1, 1993, 93-1 CPD ¶ 183 (protester's letter was clearly an agency-level protest since it recommended changes in the solicitation specifications and requested a response from the agency to its letter).

In conclusion, it is undisputed that the vehicle by which the Army has elected to obtain the required services is a task order issued under BMAR's ID/IQ contract. As such, absent certain exceptions not applicable here, our Office is without authority to consider Hospital Klean's challenge to the proposed issuance of the task order by virtue of the restrictions on protests set forth at 10 U.S.C. § 2304c(d).

The protest is dismissed.

Anthony H. Gamboa
Acting General Counsel