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Decision

Matter of: Global Computer Enterprises, Inc.

File: B-310823; B-310823.2; B-310823.4

Date: January 31, 2008

Lawrence J. Sklute, Esq., Sklute & Associates, for the protester.
William L. Walsh, Jr., Esq., J. Scott Hommer, III, Esq., Patrick R. Quigley, Esq., and Peter A. Riesen, Esq., Venable LLP, for QSS Group, Inc., an intervenor.
Timothy A. Chenault, Esq., U.S. Coast Guard, for the agency.
Louis A. Chiarella, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the issuance of modifications to a task order under an indefinite-delivery/indefinite-quantity (ID/IQ) contract as being beyond the scope of the task order is dismissed; Government Accountability Office lacks jurisdiction to consider whether a modification is beyond the scope of the task order.
 2. Protest that the agency improperly bundled work requirements previously performed by separate small businesses by means of the modification of an ID/IQ task order being performed by a small business is dismissed given the statutory bar on protests concerning the issuance of task orders.
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DECISION

Global Computer Enterprises, Inc. (GCE) protests the decision of the U.S. Coast Guard, Department of Homeland Security, to obtain federal financial information technology support services through modifications to a task order issued to QSS Group, Inc. under a multiple-award, indefinite-delivery/indefinite quantity (ID/IQ) contract. GCE principally maintains that these services are beyond the scope of QSS's task order, and that by acquiring them under the task order, the Coast Guard has engaged in improper bundling.

We dismiss the protest.

BACKGROUND

In 1999, the Department of Transportation awarded the Information Technology Omnibus Procurement (ITOP) II contract, a multiple-award, ID/IQ government-wide acquisition contract (GWAC)¹ for a broad range of information technology (IT) hardware, software, and services.² Specifically, ITOP II was awarded to a total of 35 large, small, and small-disadvantaged businesses, including QSS (a small disadvantaged business), with a base period of 7 years and a not-to-exceed ceiling of \$10 billion.³ Additionally, ITOP II permitted individual agencies across the federal government to meet their various IT requirements through the issuance of fixed-price, time-and-materials, and/or cost-reimbursement task orders to the contract holders.⁴ See ITOP II Overview (available at <http://www.gsa.gov>); see also GAO-02-734, Contract Management: Interagency Contract Program Fees Need More Oversight (Washington, D.C., July 2002), App. XI: Governmentwide Acquisition Contract Data Sheet--Department of Transportation.

On June 9, 2005, the Coast Guard issued task order No. HSCGG3-05-F-TWV436 to QSS under the vendor's ITOP II contract for systems engineering and technical services (hereinafter, SETS II) at a total estimated cost of \$204,628,568.⁵ The SETS II task order included a 1-month transition period and a 6-month base period, together with four 1-year options and one 5-month option, for a total performance period of

¹ A GWAC is defined as a task-order or delivery-order contract for information technology established by one agency for governmentwide use. Federal Acquisition Regulation (FAR) § 2.101.

² ITOP II divided the range of available IT solutions into three functional support areas--information systems engineering, systems operations and management, and information systems security support services. Under each of the functional areas, the ITOP II statement of work listed various tasks. Administrative oversight and management of ITOP II was transferred from the Department of Transportation to the General Services Administration (GSA) in September 2004.

³ ITOP II "expired" (i.e., precluded the placement of additional new orders) on January 13, 2006, and all existing task and delivery orders could not have a performance period of more than 5 years beyond the ITOP II expiration date.

⁴ ITOP II also established a not-to-exceed amount of \$300 million for individual task or delivery orders.

⁵ The issuance of the SETS II task order to QSS was the result of a competitive procurement among ITOP II contract holders. Specifically, on March 3, 2005 the agency issued a task order request for proposals, set aside for small disadvantaged ITOP II contractors, and after the evaluation of task order proposals, issued the SETS II task order to QSS. Contracting Officer's Statement, Dec. 19, 2007, at 3.

5 years. The statement of work described the general scope of the task order as “software engineering and technical services that apply to existing and future computer systems and communications networks designated by the [agency] for SETS II support under this Task Order,” and listed numerous types of IT services to be provided under the SETS II task order. Agency Report (AR), Tab 10, SETS II Task Order, § C, at 1. The SETS II statement of work also described the specific types of IT services to be performed (e.g., software development and maintenance, system administration, database administration) as well as the current Coast Guard systems upon which these IT services were to be provided. Id. at 19-88.

Prior to September 25, 2007, the Coast Guard had not procured its federal financial IT support services by means of the SETS II task order. Rather, the agency had separately procured these services from GCE, a small business concern, for a period of years.⁶ Starting in January 2007, however, the Coast Guard began planning for the internal transfer of its federal financial IT support services from the agency’s Chief Financial Officer (CFO) to its Chief Information Officer (CIO). Ultimately, the Coast Guard completed an acquisition plan for its federal financial IT support services that gave the agency’s CIO responsibility to obtain and manage these services. AR, Tab 19, Agency Acquisition Plan for Financial System Support. As a result, on September 25, the Coast Guard issued Modification No. P0030 adding federal financial IT support services to QSS’s SETS II task order.⁷ Id., Tab 10, SETS II Task Order, Mod. No. P0030.

GCE subsequently learned that the Coast Guard had internally transferred responsibility for its federal financial IT support services and decided to modify QSS’s SETS II task order to include the work being performed by GCE.⁸ These protests followed.

⁶ Specifically, GCE has provided financial systems integration services to the Coast Guard through a series of contracts since 2000. AR, Tab 28, Memorandum from GCE to the Coast Guard, Oct. 25, 2007, at 2. By means of a task order issued against its GSA Federal Supply Schedule contract, GCE currently provides federal financial IT support services to the Coast Guard for the period from August 16, 2007 to March 31, 2008. Id., Tab 20, GCE Task Order No. HSCG23-07-F-FCV014.

⁷ Modification No. P0030 provided for the transition of federal financial IT support services from GCE to QSS during the period from September 25, 2007 to March 31, 2008. The Coast Guard subsequently issued another modification to the SETS II task order which required QSS to perform federal financial IT support services for the period from January 1, 2008 to December 31, 2008. AR, Tab 50, SETS II Task Order, Mod. No. P0032.

⁸ The Coast Guard argues that GCE’s protest is untimely, since the protester previously became aware of what action the agency was considering and did not file its protest within 10 days thereof. AR, Dec. 19, 2008, at 8. Because we lack
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DISCUSSION

GCE's protest raises various challenges to the Coast Guard's decision to modify the SETS II task order to include federal financial IT support services. The protester principally argues that the services are beyond the scope of the SETS II task order and should have been separately and competitively procured. In support of its position, the protester argues that the federal financial IT support services are materially different from those in the statement of work in the original SETS II task order. Importantly, GCE does not argue that the task order modifications here are beyond the scope of the ITOP II ID/IQ contract. GCE also protests that the agency's decision to modify QSS's SETS II task order violated the Small Business Act by improperly bundling work requirements that had previously been performed by separate small business concerns. Protest, Nov. 16, 2007, at 11-13; Protest, Jan. 9, 2008, at 2, 29-30. For the reasons set forth below, we conclude that we do not have jurisdiction to consider GCE's challenges and, therefore, we dismiss the protest.

Our Office is generally precluded from considering protests challenging the issuance of task or delivery orders under ID/IQ contracts. In this regard, the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, § 1004, 108 Stat. 3243, 3252-53 (1994), codified at 41 U.S.C. § 253j(d) (2000), 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." Here, GCE does not allege that the modifications issued by the Coast Guard adding federal financial IT support services increase the scope, period, or maximum value of the ITOP II ID/IQ contract; rather, the protester asserts only that the modifications at issue are outside the scope of the SETS II task order. Accordingly, as GCE's protest here does not fit within the exceptions provided in the statute, we lack jurisdiction to review the matter.⁹ See Cartographics, LLC, B-297121, Nov. 15, 2005, 2005 CPD

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jurisdiction to hear GCE's protests, we need not address the timeliness issue. We note, however, that while the Coast Guard issued Modification No. P0030 to QSS on September 25, it did not inform GCE of its decision until November 8, and did not provide GCE with a copy of the modification until November 20, after receipt of a Freedom of Information Act request.

⁹ GCE also protests that the agency's action violates both the Chief Financial Officers Act of 1990, 31 U.S.C. §§ 901(b)(1)(G), 902(a)(5) (2000), and section 539(a) of the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161 § 539(a), 121 Stat. 1844 (2007). GCE's Comments, Dec. 31, 2007, at 23-25; Protest, Jan. 9, 2008, at 2, 29-30. These assertions likewise do not fit within any of the jurisdictional exceptions provided in the statute.

¶ 207 at 2; United Info. Sys., Inc., B-282895, B-282896, June 22, 1999, 99-1 CPD ¶ 115 at 1-2.

GCE does not dispute that its protest is premised on the assertion that the modifications regarding federal financial IT support services are beyond the scope of the SETS II task order. Instead, the protester argues that consideration of its protest here is not statutorily precluded. Specifically, GCE argues that the express language of FASA refers to and prohibits two types of protests: 1) those involving the proposed issuance of task and delivery orders; and 2) those involving the issuance of original task and delivery orders. GCE Comments, Jan. 18, 2008, at 5 (emphasis added). By contrast, the modification of an existing task order, GCE maintains, involves neither the issuance nor the proposed issuance of a task order and is, therefore, not barred from protest. GCE argues that Congress did not intend the FASA bar on protests to encompass task order modifications: the statute does not mention task order modifications, and if Congress had intended the statute to apply as well to task order modifications, it would have added specific language to this effect.¹⁰ Id.

We recognize that the FASA protest bar does not expressly address the issue of modifications of task and delivery orders issued under ID/IQ contracts. We think, however, that the restriction on protests of orders placed under a task order contract as contained in 41 U.S.C. § 253j(d) also applies here.

Congress passed FASA as part of an effort to reform federal procurement activities “by greatly streamlining and simplifying [the federal government’s] buying practices.” 140 Cong. Rec. H9240, H9240 (1994) (statement of Rep. Conyers). Bid protests were one area targeted by FASA for reform. In particular, FASA established that, when agencies utilize ID/IQ contracts—with a statutory preference for the use of multiple-award ID/IQ contracts, thereby creating a competitive pool of contractors for individual work projects—the issuance of individual task and delivery orders to these contractors would not be subject to protests. The intent of Congress “was to [generally] exempt from protest the issuance of individual task orders to contractors who had already received awards, subject to protest, of their master ID/IQ contracts.” A & D Fire Protection Inc. v. U.S., 72 Fed. Cl. 126, 134 (2006).

The protester essentially argues that although protests regarding an agency’s issuance of task orders under ID/IQ contracts are precluded, protests regarding an agency’s modification of such task orders are permitted. We find this position to be

¹⁰ The protester also argues that although a GWAC is a form of ID/IQ contract, and FASA provides for a general statutory bar on protests involving task and delivery orders issued under ID/IQ contracts, Congress did not intend for the FASA bar to protests to encompass GWACs. Id. at 5-6. GCE provides (and we are aware of) no legal support for this assertion.

inconsistent with both the language of FASA and the underlying congressional intent. Moreover, we see no logic in holding that an agency's decision to modify an existing task order could be subject to protest when it is clear that an agency's decision to perform the very same action by means of a new task order would not be subject to protest; that is, had the Coast Guard issued a separate task order to QSS for federal financial IT support services rather than modifying the existing SETS II task order, it is undisputed that this action would not be subject to protest. In our view, accepting GCE's position—which would permit protests regarding task order modifications but not the task orders themselves—would elevate form over substance. In sum, we conclude that FASA's bar on protests in connection with the issuance or proposed issuance of task orders encompasses protests concerning the issuance or proposed issuance of task order modifications.

GCE also protests that the agency's decision to modify QSS's SETS II task order to include federal financial IT support services constitutes improper bundling in violation of the Small Business Act, 15 U.S.C. § 631(j)(3) (2000). Specifically, the protester argues that combining federal financial IT support services with the original SETS II work results in a bundled requirement that inhibits small business competition. GCE also argues that the Coast Guard failed to perform a bundling analysis as required by both statute and regulation, and failed to comply with the requirements of FAR § 19.202-1(e) by providing notice of its bundled requirement to the Small Business Administration (SBA). Protest, Nov. 16, 2007, at 12-13; Protest, Jan. 9, 2008, at 30. In support of its argument that our Office has jurisdiction to consider its protest on these grounds, notwithstanding the general bar on task order protests as discussed above, GCE cites our decision in LBM, Inc., B-290682, Sept. 18, 2002, 2002 CPD ¶ 157.

In LBM, the Army created a multiple-award ID/IQ contract for a wide range of logistical functions and supporting tasks, and subsequently decided to place the transportation motor pool services for Fort Polk, Louisiana, which had previously been set aside exclusively for small businesses, under this ID/IQ contract. LBM, a small business concern, protested the Army's decision to withdraw these services from exclusive small business participation and to transfer the services to the ID/IQ contract. We decided that FASA's limitation on our bid protest jurisdiction regarding task orders did not apply in this case, as LBM's protest was a challenge to the terms of the underlying ID/IQ contract solicitation.¹¹ Id. at 4.

¹¹ LBM also protested that transferring the Fort Polk motor pool services to the ID/IQ contract constituted improper bundling under the Small Business Act and that the Army had improperly bundled without notifying the SBA. Given that there were multiple small business concerns that held the ID/IQ contracts and that could compete for these services, we were unable to find that consolidating these services into the ID/IQ contracts was improper bundling, or that the Army was required to notify the SBA of the addition of the services to the ID/IQ contracts. Id. at 9 n.7.

We find our decision in LBM inapposite to the circumstances here. In LBM, the protester challenged the propriety of the agency's decision to transfer certain requirements to the multiple award ID/IQ contracts. By contrast, GCE challenges only the agency's decision to combine federal financial IT support services with other work originally required under the SETS II task order. Unlike the circumstances in LBM, GCE has not shown or even alleged that these services represent work not already encompassed by the ITOP II ID/IQ contract.¹² As GCE's protest here again constitutes a challenge to the SETS II task order and does not fit within the exceptions provided in the statute, we lack jurisdiction to review the matter.

The protest is dismissed.

Gary L. Kepplinger
General Counsel

¹² To the extent that GCE argues that what it is actually protesting is the transfer and inclusion in ITOP II of federal financial IT support services without complying with applicable laws and regulations, see Protester's Comments, Jan. 18, 2007, at 2, this is a mischaracterization of its protests. GCE's protests never contested the propriety of the agency's action with regard to the ITOP II ID/IQ contract (only with regard to the SETS II task order). In fact, GCE did not even obtain a copy of the ITOP II ID/IQ contract before January 17, 2008, well after its protests here had been filed with our Office.