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**Comptroller General
of the United States****United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: ESCgov, Inc.**File:** B-407107.2**Date:** October 9, 2012

DECISION

ESCgov, Inc., of McLean, Virginia, protests the award of a contract to Deloitte Consulting, LLP, of Arlington, Virginia, under request for proposals No. HC1028-12-R-0025, issued by the Department of Defense, Defense Information Systems Agency (DISA) to acquire "software as a service" commercial-off-the-shelf access and security configuration and control implementation using BMC BladeLogic software. ESCgov maintains that the agency improperly terminated its contract for these services and made award to Deloitte, despite the fact that it possesses the necessary software licenses required under the RFP; that, allegedly, Deloitte cannot provide the "seamless transition" services required under the solicitation; and that Deloitte, allegedly, has an impermissible organizational conflict of interest.

We dismiss the protest as untimely.

Prior to ESCgov's current protest, Deloitte filed a protest challenging the award of a contract to ESCgov on August 1, 2012 under this solicitation, maintaining that ESCgov did not possess the necessary software licenses from BMC BladeLogic. By letter dated August 16, the agency advised our Office that it intended to take corrective action in response to Deloitte's protest by: (1) terminating the contract awarded to ESCgov for the convenience of the government because ESCgov did not have the required software licenses; and (2) making award to Deloitte.

On August 17, ESCgov filed a letter in our Office objecting to the agency's proposed corrective action maintaining that, in fact, it was eligible for award. Notwithstanding ESCgov's August 17 letter, we dismissed Deloitte's protest by decision dated August 17. In that decision, we specifically advised the parties as follows:

ESCgov objects to DISA's decision to take corrective action, arguing that the agency's rationale is not factually accurate. To the extent that the intervenor objects to the corrective action, it may file a protest challenging the agency's actions.

Deloitte Consulting, LLP, B-407107, Aug. 17, 2012 (unpublished) at 2, n1.

ESCgov did not file its protest in our Office within 10 days of August 17, but instead filed on September 4, more than 10 days after learning of the agency's corrective action and our dismissal of the Deloitte protest.

ESCgov maintains that its protest is timely because it was filed within 10 days of the agency's actual award of the contract to Deloitte, which occurred on August 31. The protester therefore maintains that its protest was timely because it was filed within 10 days of that date. We disagree.

Our Bid Protest Regulations, 4 C.F.R. § 21.2 (a)(2) (2012) require protesters to file within 10 days of when they know or should know of their basis for protest. ESCgov was expressly advised of the agency's intended course of action on August 16, when the agency submitted its corrective action letter. The agency's letter was specific regarding the agency's corrective action: the agency advised that it was going to terminate the ESCgov contract and make award to Deloitte. At that point ESCgov knew everything necessary to file a protest objecting to the agency's corrective action, but the firm elected not to protest within 10 days of being advised of the agency's intended course of action.¹

ESCgov maintains that it was entitled to wait until after receiving a requested and required debriefing in the wake of the agency's August 31 official award announcement to file its protest, even though it knew of the agency's corrective action more than 10 days prior to when it filed its protest.² In this connection, ESCgov directs our attention to our Bid Protest Regulations, 4 C.F.R. § 21.2 (a)(2) and our decision in The Boeing Co., B-311344, et al, June 18, 2008, 2008 CPD ¶ 114 in support of its position that a protester may await the completion of a "required debriefing" to file a basis of protest that it knew earlier, even though the underlying basis for the protest was known more than 10 days prior to when it is filed.

¹ ESCgov suggests that its August 17 letter objecting to the agency's corrective action essentially constituted a protest because it included all elements of a protest. However, ESCgov was on express notice by virtue of the terms of our decision (quoted above) that we did not regard its August 17 letter as a protest, but considered it only an objection to the dismissal request. To the extent that ESCgov thought our dismissal in the face of its objection letter was improper, it was required, under our Bid Protest Regulations, 4 C.F.R. § 21.14(b), to request reconsideration of our dismissal within 10 days of receiving our August 17 decision. ESCgov did not request reconsideration of our prior dismissal.

² ESCgov states that it requested a debriefing, but that its request was denied by the agency.

Our decision in The Boeing Co., supra., does not provide a basis for us to find ESCgov's protest timely. In that decision, we found that a protest basis relating to the propriety of the agency's evaluation of the Boeing proposal was timely, even though Boeing had been apprised of the underlying facts giving rise to its protest during the course of the acquisition, but did not advance its allegation until after receiving its debriefing, more than 10 days after learning the factual basis for the allegation. As we noted in that decision, the underlying purpose of the debriefing exception to our general timeliness requirements is to prevent the filing of "defensive protests" every time an offeror becomes aware of an evaluation judgment made by the agency with which it disagrees. Such "defensive protests" are inconsistent with the broad policy of unnecessarily avoiding the disruption of agency procurements with bid protests, where possible, until an agency has made a final source selection determination. Id. at 27-28.

Here, in contrast, the agency did not simply make an evaluation judgment with which ESCgov disagreed. Rather, the agency specifically advised that it was terminating ESCgov's contract and making award to Deloitte. The agency's action therefore constituted a final source selection determination. As such, the time for ESCgov to have filed its protest was within 10 days of learning of the agency's final award decision.

The protest is dismissed.

Lynn H. Gibson
General Counsel