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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: L-3 Communications Company

File: B-295166

Date: December 10, 2004

W. Jay DeVecchio, Esq., Kathleen E. Karelis, Esq., and Edward Jackson, Esq., Miller & Chevalier, for the protester.

James J. McCullough, Esq., Deneen J. Melander, Esq., and Steven A. Alerding, Esq., Fried, Frank, Harris, Shriver & Jacobson, for Science Applications International Corporation, an intervenor.

Duncan Butts, Esq., Naval Air Warfare Center, for the agency.

Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where solicitation issued under indefinite-delivery, indefinite-quantity (ID/IQ), multiple award contract called for issuance of delivery order for driver trainers, and also provided that agency “may” award future delivery orders for driver trainers to same contractor, selection of contractor for receipt of delivery order did not constitute “downselection,” and therefore is not subject to Government Accountability Office jurisdiction; solicitation did not definitively provide for award of future orders or that other multiple award contractors would not be given fair consideration before future awards, and there is some indication in record that future driver trainer requirements could constitute “follow-on” requirement, one of the FASA exceptions under which the agency would not be required to give fair consideration to other contractors.

DECISION

L-3 Communications Company protests the issuance of a delivery order to Science Applications International Corp. (SAIC) under the STRICOM Omnibus Contract (STOC), an indefinite-delivery/indefinite-quantity (ID/IQ) multiple-award contract that covers numerous Department of the Army virtual simulation training requirements.

We dismiss the protest.

The Naval Air Systems Command Training Systems Division, the contracting authority for the Army's Program Executive Office for Simulation, Training and Instrumentation, issued a solicitation to contractors under the STOC that identified the Army's need for a common line of driver simulators for various tracked wheeled and heavy equipment vehicles. The Navy requested offers for the design, integration and production of common driver trainers that could be reconfigurable for the various Army vehicles, as well as a driver trainer for the first vehicle variant, the Stryker. The solicitation also provided that, upon successful completion of the critical design review, and subject to the availability of funds and negotiation of a fair and reasonable price, the government "may" award the contractor delivery orders for additional trainers for the Stryker and other vehicle variants. The delivery order was issued to SAIC on a "best value" basis. L-3 protests the selection of SAIC.

The Navy argues that we lack jurisdiction to consider the protest, since it concerns the award of a delivery order under a multiple-award delivery-order contract, which falls outside our bid protest jurisdiction. In this regard, the Federal Acquisition Streamlining Act (FASA) of 1994, 10 U.S.C. § 2304c(d) (2000), provides that a protest is not authorized in connection with the issuance or proposed issuance of a task or delivery under a multiple-award task- or delivery-order contract, except where it is alleged that the order increases the scope, period, or maximum value of the contract under which the order is issued.

L-3 maintains that our Office does have jurisdiction in this case, noting that we have recognized an exception to our general lack of jurisdiction under FASA where the issuance of the challenged order represents a "downselection" among the ID/IQ contractors.

We agree with the Navy that our jurisdiction does not extend to this case. As L-3 notes, we have held that, where a task- or delivery-order solicitation issued under an ID/IQ contract contemplates only a single source selection among the ID/IQ contractors--that is, a downselection--such that all contractors except the one that is "downselected" in that single competition will be excluded from consideration for future task or delivery orders, our jurisdiction is not precluded. Electro-Voice, Inc., B-278319, B-278319.2, Jan. 15, 1998, 98-1 CPD ¶ 23 at 5. Our view is based on the legislative history for FASA, which indicates that the provisions addressing task- and delivery-order contracts were intended to encourage the use of multiple-award, rather than single-award contracts, in order to promote an ongoing competitive environment in which each awardee would be fairly considered for each order issued. H.R. Conf. Rep. No. 103-712, at 178 (1994), reprinted in 1994 U.S.C.C.A.N. 2607, 2608; S. Rep. No. 103-258, at 15-16 (1994), reprinted in 1994 U.S.C.C.A.N. 2561, 2575-76. In light of this context, where an agency issues a task- or delivery-order solicitation that essentially abandons the multiple-award, fair-consideration scheme envisioned under FASA in favor of selecting a single contractor for future task or delivery orders under the ID/IQ contract, we will find that there has been a downselection and review a challenge to the resulting award.

While we recognize that the solicitation language here suggests the possibility of a downselection, we conclude, for a number of reasons, that the agency here has not departed from the multiple-award, fair-consideration scheme contemplated by FASA. First, the solicitation did not definitively provide that the selected contractor would be awarded delivery orders for additional trainers, or that other multiple award contractors would not be given fair consideration before any future delivery orders were awarded; rather, the solicitation stated only that the selected contractor “may” be awarded future delivery orders. Further, there is some indication in the record that the current and any future driver trainer requirements could be sufficiently related such that the future requirements could be determined by the agency to constitute a “follow-on” requirement, one of the FASA exceptions under which the agency would not be required to give fair consideration to other contractors. 10 U.S.C. § 2304(c)(b)(3) (2000). Under these circumstances, we cannot say that there has been a downselection.

We note that L-3 cites in support of its position an opinion letter issued by our Office, The Federal Acquisition Streamlining Act (FASA) of 1994–Fair opportunity procedures under multiple award task order contracts, B-302499, July 21, 2004. There, however, the successful contractor was expressly designated as the recipient of all future task orders that might arise under the category of work competed, with no provision for fair consideration of the other contractors for those future orders (or any indication that the future orders may be found to fall under one of the FASA exceptions). Here, in contrast, as discussed above, future delivery orders have not been improperly reserved for the selected contractor, so that the agency’s action was consistent with FASA’s statutory scheme. We therefore conclude that our Office lacks jurisdiction to hear the challenge to the conduct of the competition for the delivery order at issue here.

The protest is dismissed.

Anthony H. Gamboa
General Counsel