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**Comptroller General
of the United States**

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

Decision

Matter of: Del-Jen Education & Training Group

File: B-401787.3

Date: May 4, 2010

Richard O’Keeffe, Esq., Brian G. Walsh, Esq., and William A. Roberts III, Esq., Wiley Rein, for the protester.

Jonathan Shaffer, Esq., and Mary Pat Buckenmeyer, Esq., Smith Pachter, for Res-Care, Inc., the intervenor.

Dennis Adelson, Esq., Department of Labor, for the agency.

David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly permitted original awardee to continue performance during agency’s corrective action following protest of award is denied; where there was a need for continued performance under protested contract, agency properly permitted awardee to continue performance (after any applicable stay was lifted) pending implementation of corrective action, and any competitive advantage gained as a result of continued performance is not an improper advantage for which agency is required to compensate.

DECISION

Del-Jen Education & Training Group, of Phoenix, Arizona, protests the determination by the Department of Labor (DOL) not to exclude Res-Care, Inc., of Louisville, Kentucky, from the competition under solicitation No. DOLJ09UA00025, for establishment and operation of the Pinellas Job Corps Center in St. Petersburg, Florida. Del-Jen essentially asserts that Res-Care had an unfair competitive advantage by virtue of its being permitted to continue performing the contract initially awarded it under the solicitation, while the agency prepared to implement corrective action following a protest challenging the award of that contract. It asserts that Res-Care should be excluded from the reopened competition.

We deny the protest.

The solicitation, issued August 1, 2008, provided for award of a contract, for a 2-year base period, with 3 option years, for establishment and operation of the new Pinellas Job Corps Center. Six offerors, including Del-Jen and Res-Care, submitted proposals. On August 19, 2009, after learning that award had been made to Res-Care, Del-Jen filed a protest with our Office asserting that the evaluation of proposals was unreasonable. DOL subsequently proposed corrective action, which would include providing Del-Jen and all other competitive range offerors with discussion questions, requesting final proposal revisions, and making a new source selection. We dismissed Del-Jen's protest as academic (B-401787, B-401787.2, Sept. 8, 2009).

Although DOL initially suspended performance under Res-Care's contract after Del-Jen's August 19 protest, after dismissal of the protest, the agency authorized Res-Care to resume performance (on September 9) while DOL implemented the corrective action. According to DOL, it was necessary to have a contractor in place to work with the construction companies to ensure that construction of the center would continue in accordance with the specifications and schedule, to order and receive furniture and equipment, and to prepare the center to receive students. Contracting Officer's Statement, Mar. 1, 2010; Contracting Officer's Statement, Jan. 20, 2010. On December 21, upon learning of Res-Care's resumption of performance, Del-Jen filed an agency-level protest challenging Res-Care's continued performance and requesting the disqualification of Res-Care from the reopened competition. On December 28, DOL notified Res-Care that its contract would be terminated for convenience effective January 17, 2010, and awarded an interim contract to a firm that had not submitted a proposal under the solicitation; however, DOL declined to disqualify Res-Care from the reopened competition and denied its protest. Del-Jen then filed this protest with our Office.

Del-Jen asserts that permitting Res-Care to continue performance from September 2009 to January 2010 during the agency's corrective action amounted to the award of an improper sole-source contract, which resulted in Res-Care's obtaining an "unfair and immitigable competitive advantage" through the opportunity to become "embedded" with key Job Corps personnel and local authorities." Protest at 13-14. Del-Jen further asserts that DOL improperly failed to undertake measures to avoid the creation of an organizational conflict of interest through unequal access to information.

These arguments are without merit. Where, under circumstances such as those here, there is a need for continued performance under a protested contract, an agency generally may permit the original awardee to continue performance (after the lifting of any applicable stay) pending the implementation of corrective action undertaken in response to the protest. See Cox & Assocs. CPAs, B-287272.2, B-287272.3, June 7, 2001, 2001 CPD ¶ 102 at 4. It follows that, in our view, a competitive advantage accruing to the original awardee as a result of continued performance does not

constitute an unfair advantage for which the agency is required to compensate. See generally University Research Corp., B-228895, Dec. 29, 1987, 87-2 CPD ¶ 636 at 5 (government not required to compensate for competitive advantage derived from firm's status as incumbent contractor, unless advantage resulted from improper preferential treatment or unfair action).

As for Del-Jen's concern that Res-Care may have benefited from unequal access to inside information, the contracting officer has stated in a sworn declaration that Res-Care was not furnished any sensitive, procurement-related information; it has had access only to information that is available to any Job Corps center contractor by virtue of operating a Job Corps center. Contracting Officer's Statement, Jan. 20, 2010; Agency Supplemental Report, Mar. 18, 2010, at 4-5.¹ Del-Jen has furnished no basis for questioning the agency's representation in this regard.²

The protest is denied.

Lynn H. Gibson
Acting General Counsel

¹ Indeed, Del-Jen itself operates Job Corps centers. Agency Comments, Mar. 18, 2010, at 4.

² Del-Jen also questions whether the agency will implement the on-going corrective action in a reasonable manner, including whether it will conduct adequate discussions and perform a reasonable evaluation. This assertion essentially anticipates improper action in connection with the new source selection. As such, it is speculative and premature, and we will not consider it. See Sun Chem. Corp., B-288466 et al., Oct. 17, 2001, 2001 CPD ¶ 185 at 13.