



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Ervin and Associates, Inc.

File: B-279083; B-279219

Date: April 30, 1998

John J. Ervin for the protester.

Michael J. Farley, Esq., Department of Housing and Urban Development, for the agency.

Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protests that task orders improperly exceed the scope of the contracts originally awarded are denied; since relevant language in the solicitation's statement of work sets forth the anticipated services in broad, general, and flexible terms, potential offerors would reasonably have anticipated being asked to perform nearly any type of management support services, including those set forth in these task orders.
 2. General Accounting Office declines to invoke the significant issue exception to its timeliness rules where there has recently been a change to the legal framework applicable to the issue presented--the alleged overbreadth of the statement of work in a solicitation for an indefinite-quantity task order contract; as a result, resolution of the issue would have limited application to future procurements and thus is not of widespread interest to the procurement community.
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DECISION

Ervin and Associates, Inc. protests the Department of Housing and Urban Development's (HUD) decision to compete two task orders among its seven management studies contractors, all of whose contracts were awarded under request for proposals (RFP) No. DU100C000018431. Ervin argues that both task orders--one requesting operations analysis of HUD's Office of Housing and one requesting management studies and budget formulation for HUD's portfolio reengineering program--are beyond the scope of the management studies contracts.

We deny the protests.

BACKGROUND

Management Studies Contracts

The solicitation, issued July 12, 1995, anticipated the award of multiple indefinite-quantity contracts for management studies and analytical services. Each contractor was to receive orders worth a minimum of \$100,000 and a maximum of \$25 million over the 48-month life of the contract. RFP at B-1, F-1. Specific services were to be requested and defined through the issuance of task orders; the government reserved the right to compete each task order among the awardee(s). Id. at B-2.

The objectives section of the statement of work (SOW) advised offerors that HUD sought to identify contractors to "conceptualize, organize, conduct sophisticated research studies and analyses, and to provide professional assistance in the areas under review." RFP § C.II. Contractors were to perform tasks while providing analytical support to the Secretary, Deputy Secretary, and "all other organizational components of HUD," which will result in "information, advice, or recommendations relating to efficient and effective management and delivery of HUD programs and services." Id.

The SOW set forth several objectives for which it required the contractors' assistance, such as "initiate study efforts shortly after they are defined"; "quickly and effectively respond to requests for studies, special analyses and reviews covering a wide variety of topics"; "carry out necessary evaluations and analyses of the Department's internal controls, financial management systems and analysis, computer security and other quality assurance activities"; "accommodate a broad range of service requests utilizing an established pool of contractor resources"; and "develop measures which can be used to assess the performance of a given function or to compare the performance of a given function by one organization to the performance of that function by another organization." Contractors also were to help HUD to provide "training, technical assistance or other support services to assist managers in solving the root cause of problems which impede effective and efficient program operations and in implementing plans for increasing the effectiveness of their organizations." Id.

The scope of work section of the SOW advised offerors that the services under the management studies contracts might cover "any of the functions for which the Department is responsible" RFP § C.III.A. Task orders might take "many forms," but the majority of tasks were to involve "evaluations, reviews, and assistance" in the areas of "general management and organizations; information resources management; human resources; customer service; financial management; and other systems and internal controls and procedures." These studies will "provide the basis for recommendations concerning how best to assure that the needs of the Department are met in a timely, cost-effective and technically sound

manner." The contractor might also be required to "assist in implementing" these recommendations. RFP § C.III.B.

The rest of the scope of work section consists of "representative samples" of the types of studies and services that might be ordered under the management studies contracts, organized under four categories: financial management systems and internal control; general management and organizations; information resources management; and human resources. Id. Many of these sample services are couched in the most general of terms.¹ Any specific request for services might require combinations of the techniques set forth under these four categories. RFP § C.III.C. The solicitation contained no other substantive information about the services that might be requested.

HUD received 29 proposals in response to the solicitation by the August 28, 1995 closing date, including one from Ervin. Fifteen firms were included in the competitive range; Ervin's technical proposal was deemed technically unacceptable and eliminated from the competitive range. Supplemental Agency Report (AR) at 3. In the spring of 1996, HUD awarded management studies contracts to seven firms.²

Operations Analysis Task Order Solicitation

On November 28, 1997, HUD sent the management studies contractors a copy of a task order solicitation to provide operations analysis to HUD's Office of Housing over an 18-month period. Section I of the solicitation explains that the Office of Housing requires a contractor's assistance to enhance management and internal controls over the use of personnel and contract resources within the Office; to better track and measure use of those resources; and to evaluate and improve program performance based on utilization of those resources. Section III of the solicitation sets forth six services to be performed by the contractor, four of which

¹Examples of these broadly-worded sample services include "[d]evelop methods to quantify risks of weak or ineffective controls"; "[d]evelop performance measures and tracking/reporting mechanisms"; "[e]valuate the effectiveness of the Department's management planning and evaluation processes"; "[p]erform reviews of new, current, and proposed programs and financial systems to determine weak policies, procedures, and safeguards in delivery processes"; and "[r]eview management systems for coordination and issuance of program directives and changes."

²These firms are Abacus Technology Corporation; Ernst & Young, L.L.P.; Booz-Allen & Hamilton, Inc.; Anderson Consulting; Maria Elena Torano Associates, Inc.; Soza & Company; and Price Waterhouse, L.L.P.

are at issue here:³ (1) develop a protocol for developing a profile of HUD's multifamily housing inventory, and develop the initial profile; (2) prepare detailed maps of the lifeline of particular property types within the multifamily inventory; (3) document the Office's utilization of contract resources, recommend a protocol for evaluating the annual returns from contracting activity, and apply the protocol to conduct analyses; and (4) provide technical assistance to HUD staff to help it use the protocols developed under this task order.

On December 31, Ervin filed an agency-level protest in which it argued, among other things, that this proposed task order was improperly beyond the scope of the management studies contracts. HUD denied the protest on February 4, 1998, and Ervin filed a similar protest in our Office on February 9. HUD states that it is currently reviewing the proposals submitted for this work, whose estimated value is \$500,000.

Portfolio Reengineering Task Order Solicitation

On January 9, 1998, HUD sent the management studies contractors a copy of a task order solicitation to perform management studies and budget formulation for HUD's portfolio reengineering program over a 12-month period. HUD has been conducting a demonstration program, known as portfolio reengineering, to restructure mortgages insured by the Federal Housing Administration for projects that receive above-market rental assistance under HUD's Section 8 program.⁴ The demonstration program has given HUD the opportunity to test various restructuring methods in meeting the program goals and objectives and to consider lessons learned in developing a permanent program. See Portfolio Reengineering Task Order Solicitation Part I.A. The task order's objective is to provide the Office of Housing with technical assistance associated with the program, as set forth under five services: (1) review and document HUD's current policy and program for accomplishing restructurings, as well as the new, current, and proposed programs, and prepare operating procedures guides; (2) using these operating procedures guides, help HUD assess and document its organizational structure, staffing levels, and staff position descriptions for the portfolio reengineering program; (3) help HUD develop and implement a technical assistance/briefing program that will

³Since Ervin apparently believes that two of the six task order services are within the scope of the management studies contracts, Protest B-279219 at 5, 7 n.4, we need not address them here.

⁴A detailed discussion of this program can be found in Multifamily Housing: Effects of HUD's Portfolio Reengineering Proposal (GAO/RCED-97-7, Nov. 1, 1996); Multifamily Housing: HUD's Mark-to-Market Proposal (GAO/T-RCED-95-230), June 15, 1995); see also Ervin and Assocs., Inc., B-278850, Mar. 23, 1998, 98-1 CPD ¶ 89 at 3-4.

familiarize staff with the process identified in the operating procedures guides; (4) evaluate HUD's existing computerized tracking system, financial model, and network system to assess the adequacy of the data collection and the financial model results; and (5) help HUD develop budget scoring and credit subsidy positions for discussions with various agencies. Id. at Part II.

Prompted by rumors he had heard that HUD planned to issue this task order under the management studies contracts, on January 14 Ervin wrote a letter to HUD's Secretary expressing concern. After receiving no reply, Ervin filed the instant protest on January 23.⁵ HUD states that it is currently reviewing the proposals submitted for this work, whose estimated value is \$1,728,000.

Protest Allegations

Ervin argues that both task orders are "far beyond the scope" of work allowed or contemplated in the management studies contracts. In support of this contention, Ervin asserts that the work requested in the solicitation's SOW concerns the general management of HUD as an organization, not the specific programmatic matters covered by the task orders, and that HUD is using this "overly broad" SOW to justify either "poor procurement planning" or to "squeez[e] unrelated work in a favored contractor's contract."⁶ Protest B-279083 at 8; Protest B-279219 at 4.

⁵While HUD argues that Ervin's protest should be dismissed as untimely because Ervin possessed its basis for protest when it heard these rumors, a protest grounded upon mere speculation or rumor provides no basis for questioning the propriety of a procurement. See King-Fisher Co., B-256849, July 28, 1994, 94-2 CPD ¶ 62 at 3. The record shows that after Ervin heard these rumors it took diligent efforts to ascertain information forming the basis for its protest, and filed the protest when it became clear that no information was immediately forthcoming. That Ervin was eventually forced to file a protest based upon these rumors does not make the protest untimely. Ervin and Assocs., Inc., supra, at 7.

⁶Ervin makes numerous claims of alleged improprieties on the part of HUD in connection with the portfolio reengineering program, some of which relate to one of the management studies contractors. All of these are related to allegations raised in two lawsuits filed by Ervin. Ervin and Assocs., Inc. v. Helen Dunlap, Civil Action No. 96-CV1253 (D.D.C. filed June 5, 1996); Ervin and Assocs., Inc. v. United States, No. 96-504C (Fed. Cl. filed Sept. 24, 1997). As we have advised Ervin, our Office generally will not consider any protest when the matter involved is the subject of litigation before a court of competent jurisdiction. 4 C.F.R. § 21.11(b) (1997); Robinson Enters.--Request for Recon., B-238594.2, Apr. 19, 1990, 90-1 CPD ¶ 402 at 2. Ervin's allegation that HUD intends to direct a sole-source "contract" to a particular management studies contractor based upon that firm's political

(continued...)

DISCUSSION

The Competition in Contracting Act (CICA) requires "full and open competition" in government procurements as obtained through the use of competitive procedures. 41 U.S.C. § 253(a)(1)(A) (1994). Once a contract is awarded, GAO generally will not review modifications to that contract, such as a task order, because such matters are related to contract administration and are beyond the scope of GAO's bid protest function. 4 C.F.R. § 21.5(a); MCI Telecomms. Corp., B-276659.2, Sept. 29, 1997, 97-2 CPD ¶ 90 at 7. An exception to this rule is where it is alleged that the task order is beyond the scope of the original contract, since the work covered by the task order would otherwise be subject to the statutory requirements for competition (absent a valid determination that the work is appropriate for procurement on a sole source basis). Indian and Native Am. Employment and Training Coalition, B-216421, Apr. 16, 1985, 85-1 CPD ¶ 432 at 2; Ervin and Assocs., Inc., *supra*, at 7-8.

In determining whether a task order is beyond the scope of the contract originally ordered, GAO looks to whether there is a material difference between the task order and that contract. MCI Telecomms. Corp., *supra*; see AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d 1201, 1205 (Fed. Cir. 1993). Evidence of such a material difference is found by reviewing the circumstances attending the procurement that was conducted; examining any changes in the type of work, performance period, and costs between the contract as awarded and as modified by the task order; and considering whether the original contract solicitation adequately advised offerors of the potential for the type of task order issued. Ervin and Assocs., Inc., *supra*, at 8. The overall inquiry is "whether the modification is of a nature which potential offerors would reasonably have anticipated." Neal R. Gross & Co., Inc., B-237434, Feb. 23, 1990, 90-1 CPD ¶ 212 at 3, *cited in* AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d at 1207.

Ervin's protests require us to ascertain whether the types of services requested under the task orders represent a material change from those requested under the original solicitation; that is, whether a potential offeror on notice of the types of services described in the SOW would reasonably have anticipated being asked to provide the types of services set forth in these task orders.⁷ In the context of Ervin's protests, a comparison of the types of services requested under the original

⁶(...continued)

contributions is both speculative and premature and will not be considered. VSE Corp.--Recon. and Entitlement to Costs, B-258204.3, B-258204.4, Dec. 28, 1994, 94-2 CPD ¶ 260 at 2.

⁷It is undisputed that neither task order represents a material change from the cost or period of performance of the original contracts.

contracts and these task orders requires an examination of the organizational components for which services may be requested; the programs for which services may be requested; the categories of services that may be requested; and the degree of flexibility built into the services as described under the contracts. See CCL, Inc. v. United States, No. 97-721C, 1997 Fed. Cl. LEXIS 297, at *13 (Fed. Cl. Dec. 23, 1997).

The SOW does not specify any particular organizational components or programs for which services may be requested. On the contrary, contractors may be asked to provide support to the Secretary, Deputy Secretary, and "all other organizational components of HUD," and "[t]he services under this contract may cover any of the functions for which the Department is responsible." RFP §§ C.II, C.III.A. As a result, while Ervin correctly asserts that the SOW does not specifically state that services may be performed in support of HUD's Office of Housing and its multifamily housing inventory program or portfolio reengineering program, the SOW plainly leaves open the possibility that such services may be required.

The SOW does not limit the categories of services that might be requested, but adopts an all-encompassing approach to their description. Contractors may be asked to provide "evaluations, reviews, and assistance" resulting in studies that lead to recommendations, and contractors may be asked to "assist in implementing" these recommendations. RFP § C.III.B. In addition, these categories of services may be requested in connection with a wide array of disciplines: "general management and organizations; information resources management; human resources; customer service; financial management; and other systems and internal controls and procedures." Id.

To ascertain whether the services in the contracts are described in a sufficiently flexible manner to bring the task order services within their scope, we have reviewed the language of both task orders and the management studies solicitation. Our review of the sample services in the SOW in particular leads us to conclude that the anticipated services are described in such broad, general, and flexible terms that none of the task order services can be said to be beyond the scope of the contracts. The following comparison of several task order services with relevant sample services from the SOW illustrates our conclusion that the breadth of the SOW brings the task order services within the scope of the contracts.

Under the operations analysis task order, the contractor is to document the Office of Housing's utilization of contract resources and develop a protocol for evaluating the annual returns from contracting activity. The protocol is to include a process for systematic internal evaluation of contracting results and cost benefits, and the contractor must apply the protocol to conduct analyses. Operations Analysis Task Order at § III.E. In support of its claim that this service is within the scope of the contracts, HUD cites a sample service from the financial management systems and internal control category--"develop performance measures and tracking/reporting

mechanisms." Since the task order service concerns a financial management system and/or an internal control, and since it constitutes both a measurement of performance and a tracking mechanism, we conclude that it is within the scope of the contracts.

As an additional example, the task order requires the contractor to provide technical assistance to HUD staff to enable them to use the protocols developed under the task order. Id. at § III.F. This service is within the scope of two sample services from the human resource category--"provide supervisory training and technical assistance to support implementation of approved study recommendations" and "provide guidance to managers on methods for enhancing quality and productivity improvements."

With respect to the portfolio reengineering task order, the contractor is required to help HUD review and document its current policy and program requirements in accomplishing restructurings. The documentation will result in operating procedures guides that address such things as asset allocation, underwriting, financing, closing, and servicing. The contractor also is to review the new, current, and proposed programs to determine weak policies, procedures, and safeguards in delivery processes, and recommend improvements for incorporation into the documentation. The contractor also is to develop an audit guide to identify internal control objectives and tests that can be used to determine if the program goals, objectives and requirements are being met. Portfolio Reengineering Task Order at Part II.A.

In support of its position that this service is within the scope of the contracts, HUD cites two sample services from the financial management systems and internal control category--"perform reviews of new, current, and proposed programs and financial systems to determine weak policies, procedures, and safeguards in delivery processes" and "develop performance measures and tracking/reporting mechanisms"--as well as a sample service from the general management and organizations category--"review management systems for coordination and issuance of program directives and changes." Since at least a portion of this service falls under the category of internal controls and is a review of the new, current, and proposed portfolio reengineering program, and since the service is a review of the systems in place for managing restructuring in order to issue program directives and changes, it is within the scope of the contracts.

In addition, the contractor is required to use these operating procedures guides as a basis to help HUD assess and document the organizational structures for the portfolio reengineering program, staffing levels, and staff position descriptions. The contractor is to prepare a guide covering these areas, and conduct management reviews of specified HUD field offices to evaluate these areas. Id. at Part II.B. We agree with HUD that two sample services from the general management and

organizations category--"recommend policies and methodologies to determine and allocate staffing requirements for programs and services of the Department" and "conduct management reviews of specified field and regional office organizations and provide evaluations of the use of staff and . . . recommendations for process improvements and required staffing levels"--are sufficiently similar to this service to bring it within the scope of the contracts.

In sum, since relevant language in the SOW sets forth the anticipated services in such broad, general, and flexible terms, we must conclude that potential offerors would reasonably have anticipated being asked to perform nearly any type of management support services, including those set forth in these solicitations. As a result, neither challenged task order can be said to exceed the scope of the management studies contracts.

This conclusion requires us to address Ervin's allegation that the SOW is overly broad.⁸ Ervin asserts that HUD believes "any program service . . . that has to be managed fits under the scope of work" in the management studies contracts, and complains that "[e]xtending this logic to its extreme easily leads to the conclusion that virtually every service HUD has to procure between now and the new millennium can and should be assigned to one of seven contractors under their [m]anagement [s]tudies contracts." Comments B-279219 at 1.

HUD contends that this allegation is a challenge to the solicitation's terms which should have been raised prior to the August 28, 1995 closing date for the receipt of the management studies proposals. See 4 C.F.R. § 21.2(a)(1) (protests based upon alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals must be filed prior to that time). Since Ervin waited more than 2 years after submitting a proposal to make this allegation, HUD asks us to dismiss the allegation as untimely. Ervin does not dispute HUD's argument that the allegation is untimely, but asserts generally that we should consider its allegation under the significant issue exception to our timeliness regulations.

Ervin's allegation is clearly untimely. The alleged overbreadth of the management studies solicitation is plain upon its face and Ervin not only failed to file a timely protest, but elected to compete under the allegedly defective solicitation. We are aware that a broadly-defined task order solicitation may appear to present the potential for expanded business opportunities, and that this potential may diminish a firm's incentive to timely challenge its terms. However, firms seeking to do business with the government must understand that, as a rule, their decision to

⁸There is no evidence to support Ervin's claim that HUD is using this allegedly overbroad SOW to justify poor procurement planning or to direct unrelated work to a favored contractor.

compete under such a solicitation precludes their complaint about such a solicitation at any later date. See 4 C.F.R. § 21.2(a)(1).

Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Cook Constr. Co., Inc., B-248970.2, Mar. 5, 1993, 93-1 CPD ¶ 208 at 6-7. To prevent those rules from becoming meaningless, exceptions are strictly construed and rarely used. Schleicher Community Corrections Ctr., Inc., B-270499.3 et al., April 18, 1996, 96-1 CPD ¶ 192 at 7. Our Bid Protest Regulations, 4 C.F.R. § 21.2(c), set forth two exceptions to our timeliness rules, including the significant issue exception.⁹ This exception is limited to untimely protests that have not been considered on the merits in a prior decision and that raise issues of widespread interest to the procurement community. DynCorp, B-240980.2, Oct. 17, 1990, 90-2 CPD ¶ 310 at 2-4.

We are not persuaded by HUD's assertion, citing three decisions, that we have previously considered this issue on the merits. The services to be provided under the solicitations in those decisions were quite specifically described save for allegedly general or vague portions. Sunbelt Properties, Inc., B-249469 et al., Nov. 17, 1992, 92-2 CPD ¶ 353 (solicitation for real estate asset management services contained allegedly general references to services "as necessary" or "as conditions warrant"); Toxicology Testing Serv., Inc., B-219131.2, Oct. 28, 1985, 85-2 CPD ¶ 469 (solicitation for urinalysis testing contained allegedly general reference to the offices to which reports were submitted); University Research Corp., B-216461, Feb. 19, 1985, 85-1 CPD ¶ 210 (solicitation requesting reception, orientation, and hospitality services contained general references to certain details). In contrast, the issue presented by Ervin's protests is the alleged overbreadth of the entire statement of work in a solicitation for an indefinite-quantity task order contract. We have not previously decided this issue on the merits.

Our determination that an issue is of widespread interest to the procurement community rests upon a conclusion that consideration of the issue would be in the interest of the procurement system. Dyncorp, supra, at 3. As a general matter, the resolution of an issue that relates only to the protested solicitation does not fall within the exception because it would have no useful application to future procurements. Id.; see also Premiere Vending, B-256560, July 5, 1994, 94-2 CPD ¶ 8 at 2 n.2; Gene Quigley, Jr., B-241565, Feb. 19, 1991, 91-1 CPD ¶ 182 at 3. In our view, the resolution of the issue presented in these protests would have limited application to future procurements because the solicitation predates the current legal framework governing task order contracts.

⁹The other exception, which is clearly not applicable here, may be invoked where there is good cause for the untimely filing. Id.

The Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, 108 Stat. 3243 (1994), revised the legal framework under which task order contracts such as this one may be awarded. In section 1054 of FASA, 108 Stat. 3243, 3261, Congress codified authorization for the use of task and delivery order contracts by amending Title III of the Federal Property and Administrative Services Act of 1949, 41 U.S.C. §§ 251 et seq., to insert new provisions regarding such contracts. This amendment was made effective October 1, 1995. FASA, § 10001(b)(3), 108 Stat. 3243, 3404; 60 Fed. Reg. 49723, 49725 (1995).¹⁰

Among other things, solicitations for task and delivery order contracts must include "[a] statement of work, specification, or other description that reasonably describes the general scope, nature, complexity, and purpose of the services or property to be procured under the contract." 41 U.S.C. § 253h(b)(3). The implementing regulatory provision, Federal Acquisition Regulation § 16.504(a)(4)(iii), requires a solicitation for task or delivery order contracts to include a "statement of work, specifications, or other description, that reasonably describes the general scope, nature, complexity, and purpose of the supplies or services to be acquired under the contract in a manner that will enable a prospective offeror to decide whether to submit an offer." We discussed the issue of overly broad work statements in task and delivery order contracts in a Letter to the Acting Secretary of the Army, B-277979, Jan. 26, 1998, 98-1 CPD ¶ 51. Congress also established a preference for awarding, to the maximum extent practicable, multiple task or delivery order contracts for the same or similar services or property, 41 U.S.C. § 253h(d)(3)(A), and stated that all contractors awarded such contracts generally shall be provided a fair opportunity to be considered for all orders in excess of \$2500 issued under the contracts. 41 U.S.C. § 253j(b).

Procurements utilizing a task order contract vehicle subject to the above provisions must be considered under those provisions. However, as HUD points out, the management studies solicitation was issued, and initial proposals were submitted, prior to October 1, 1995, the effective date of these provisions. Since the resolution of the issue presented by these protests would not reflect an analysis of the current legal framework, which is somewhat different from the prior legal framework, it would not be in the interest of the procurement system for us to invoke the significant issue exception here.

The protests are denied.

Comptroller General
of the United States

¹⁰Section 10001(c) of FASA, 108 Stat. 3243, 3404, enumerates specific provisions of the Act which apply immediately upon the date of enactment; section 1054 is not one of them.