



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Teledyne-Commodore, LLC

File: B-278408.3

Date: September 15, 1998

Harvey G. Sherzer, Esq., Scott Arnold, Esq., Harriet Mountcastle-Walsh, Esq., and Douglas S. Many, Esq., Howrey & Simon, for the protester.
Jeffrey I. Kessler, Esq., and Lisa R. Simon, Esq., U.S. Army Materiel Command, for the agency.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that contracting agency improperly issued task orders under indefinite-quantity, indefinite-delivery, multiple award contracts is dismissed pursuant to 10 U.S.C. § 2304c(d) (1994), which 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," where the enumerated exceptions do not apply.
2. Restriction on protests of orders placed under a task order contract contained in 10 U.S.C. § 2304c(d) applies where the contract contemplates the issuance of a limited number of task orders for only three contract line items reflecting three distinct phases of the work contemplated under the contract, and the protested task orders do not implement a downselection, but merely represent the final phase of the work contemplated under the contract.

DECISION

Teledyne-Commodore, LLC protests the issuance of task orders to General Atomics, Burns and Roe Enterprises, Inc., and Parsons Infrastructure and Tech Group/Allied Signal by the Department of the Army, to proceed with the technology demonstration phase of the Assembled Chemical Weapon Assessment (ACWA) Program under indefinite-quantity, indefinite-delivery, multiple award contracts awarded under request for proposals (RFP) No. DAAM01-97-R-0031.¹ The Army issued the RFP for identification of technologies other than incineration for demilitarization of assembled chemical weapons.

¹The RFP was issued by the U.S. Army Chemical and Biological Defense Command, now the U.S. Army Materiel Command Acquisition Center.

We dismiss the protest.

On July 28, 1997, the agency issued the RFP here, for the selection and demonstration of approaches, other than the "baseline" incineration approach, for demilitarization and disposal of stockpiled assembled chemical weapons.² RFP § C.1. The RFP contemplated the award of multiple task order contracts. RFP § A. The solicitation advised offerors that the ACWA Program here was separate from the chemical stockpile disposal program, in constituting an effort to find whether there existed "mature technology" alternatives to incineration. RFP § C.1.2. The culmination of the ACWA Program will be a recommendation sent to Congress detailing the results of the technologies evaluated and demonstrated. RFP § C.1.2.2.

The RFP divided the work into the following three distinct contract line item numbers (CLIN), each corresponding to a particular phase of the contract effort: CLIN 0001, data gap resolution; CLIN 0002, demonstration work plan; and CLIN 0003, technology demonstration. RFP §§ A (executive summary), B, C.4, and M.2. The RFP explained that each of the three requirements would be accomplished under separate task orders. RFP §§ B.1, C.4.

The RFP stated that all offerors which met the threshold "go/no go" criteria listed in section M.6.1.2 of the RFP and whose proposals were responsive to the solicitation requirements would be awarded a contract and issued a task order for CLIN 0001 in the amount of \$50,000 to prepare a data gap resolution work plan. RFP §§ C.1.2.4, C.1.2.5, M.4, and M.5.1. The RFP further explained that the agency would issue task orders for CLIN 0002 based on the evaluation of proposals against criteria described in section M.6.2 of the RFP. Based on the relative technical rankings of proposals a program evaluation team (PET) would recommend, to the extent possible, a minimum of two technologies for demonstration testing. RFP § C.1.2.6. Those contractors recommended for demonstration testing were to receive a second task order under CLIN 0002 in the amount of \$50,000 to prepare a demonstration work plan. Id. The PET would then evaluate the demonstration work plans in accordance with criteria announced in the solicitation, and recommend contractors who would be issued a third task order under CLIN 0003, on a cost-plus-fixed-fee

²The agency issued the RFP in response to the National Defense Appropriations Act for 1997, Pub. L. No. 104-208, § 8065, 110 Stat. 3009, 3009-101-3009-102 (1996), which provides for "the conduct of a pilot program to identify and demonstrate not less than two alternatives to the baseline incineration process for the demilitarization of assembled chemical munitions . . . [and evaluation of] the effectiveness of each alternative chemical munitions demilitarization technology identified and demonstrated under the pilot program" The statute essentially suspends construction activities on additional facilities for incineration until the agency has identified, analyzed, and reported to Congress on promising alternative technologies.

basis, to perform demonstration testing.³ RFP § C.1.2.7. Contractors that were not issued a task order under CLIN 0002 would not be considered for a task order under CLIN 0003. RFP § M.5.2.

The agency awarded contracts and issued CLIN 0001 task orders to seven firms. The agency subsequently issued task orders under CLIN 0002 to six contractors (including Teledyne-Commodore). By letter dated July 29, 1998, the agency informed the protester that it had issued task orders under CLIN 0003 to General Atomics, Burns & Roe, and Parsons/Allied Signal. This protest followed a debriefing by the agency. Teledyne-Commodore challenges the agency's decision not to issue the firm a task order under CLIN 0003 on various grounds, including that the agency improperly made cost rather than technical merit the predominant source selection factor; the agency failed to perform a cost realism analysis; the agency conducted improper discussions; and the agency's evaluation of its proposal was flawed.

The agency argues that our consideration of the protest is precluded by 10 U.S.C. § 2304c(d), which 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." The agency points out that none of the protest issues concern allegations that the task orders issued under CLIN 0003 are beyond the scope, period or maximum value of the contract.

The protester argues that our Office has jurisdiction to consider this protest consistent with our decision in Electro-Voice, Inc., B-278319, B-278319.2, Jan. 15, 1998, 98-1 CPD ¶ 23. In that case, we concluded that the statutory restriction on protests of orders placed under task or delivery order contracts does not apply to protests of "downselections" implemented by the placement of a task or delivery order under a multiple award task or delivery order contract where the task order results in the elimination of one of the contractors from consideration for future orders under the remaining terms of the contract. Teledyne-Commodore argues that issuance of the task orders protested here constitutes a downselection. The protester takes the position that the Army used the basic contracts and the task orders issued under CLINs 0001 and 0002 to conduct a "downselection" for the technology demonstration phase (CLIN 0003). According to Teledyne-Commodore, once the downselection was made, "there will be no further opportunity for Teledyne-Commodore to do any work under the contract, just as in Electro-Voice, Inc." Protester's Sept. 8, 1998 opposition to the Army's supplement to its summary dismissal request, at 8. The protester further maintains that its failure to receive a task order under CLIN 0003 means that the firm "will be eliminated from further

³The RFP advised that the number of contractors selected for demonstration testing was subject to the availability of both program funds and government-approved demonstration test facilities. RFP § C.1.2.7.

participation in the ACWA Program." Protester's Aug. 14, 1998 response to agency's motion to dismiss, at 2. The protester thus concludes that, based on our decision in Electro-Voice, Inc., our Office has jurisdiction to review the issuance of the protested task order under CLIN 0003.

The Army responds that this was not a downselection, but rather the issuance of task orders representing the final work effort contemplated by the contracts. The agency thus argues that unlike the protester in Electro-Voice, Inc., Teledyne-Commodore has not been eliminated from competing on future work under its contract here, because there will be none.

In further support of its position, the agency points to additional factors regarding the overall posture of acquisitions relating to the development of alternatives to current baseline technologies for the destruction of assembled chemical weapons. The agency states that the work effort under the contracts awarded under the instant solicitation is just part of the overall process. For example, the agency states that, contrary to the protester's argument, the failure of Teledyne-Commodore to receive a CLIN 0003 task order does not preclude the firm from participating in subsequent steps in the process. In this regard, the Army explains that while not all studies of the available technologies have been completed,⁴ it is the agency's intent to issue competitive solicitations for its future needs. The agency thus maintains that Teledyne-Commodore has not "lost out" on future competitions due to its failure to receive a task order under CLIN 0003, because the agency anticipates filling its future needs through competitive acquisitions under which the protester will have an opportunity to participate.⁵

⁴The RFP states that concurrent with the Department of Defense's technology assessment here, the National Research Council (NRC) will perform independent assessments of all proposals which pass the threshold "go/no go" evaluation. RFP § H.11. At the conclusion of those assessments, the NRC will submit its findings and recommendations to the ACWA Program Manager, the Secretary of the Army, the Secretary of Defense, and Congress. RFP § C.1.2.9. Since the protester's proposal passed the threshold evaluation, the agency thus asserts that it is possible that Teledyne-Commodore's proposed technology will receive favorable recommendations by the NRC, which could result in placing the protester's technology in contention in future competitive procurements.

⁵The protester maintains that the agency's argument that Teledyne-Commodore may be eligible to compete in future procurements for pilot efforts is inconsistent with the Army's conduct of earlier procurements to develop alternative technologies, where it restricted eligibility for pilot testing to technologies that had completed demonstration testing. The agency states, however, that the NRC is reviewing the technologies of all seven firms that were awarded contracts and were issued task
(continued...)

In our view, the Electro-Voice, Inc. decision is not applicable here and the restriction on protests of orders placed under a task order contract contained in 10 U.S.C. § 2304c(d) applies. In Electro-Voice, the protester and another contractor were issued an order for an initial delivery of product demonstration models consistent with the agency's intent of conducting a downselect between the two competitors. Once the downselection was made, only the selected contractor would receive task orders for the production requirements; there would be no ongoing competition for orders among the multiple award contractors as envisioned by the law. Id. at 5. We exercised our bid protest jurisdiction in that case because the downselect decision precluded the protester from competing for future task orders under the remaining terms of the contract.

Here, the protester's argument that failure to receive a task order under CLIN 0003 means that it is precluded from competing for further work under the contract is unpersuasive. The contracts clearly contemplated the award of task orders under only three CLINs, representing three distinct phases of the work covered by the contract. Contrary to the protester's argument--and unlike the facts in Electro-Voice--under the express terms of the contracts awarded here, there will be no other work to be performed within the scope of the contracts. The overriding concern underlying the Electro-Voice decision--to protect the interests of the protester in competing for future task orders under the contract--is therefore not present here. Simply stated, the issuance of task orders under CLIN 0003 does not implement a downselection which eliminates Teledyne-Commodore from consideration for future work under its contract because there is no further work contemplated under its contract. Moreover, since the agency anticipates filling its future needs through competitive acquisitions under which the protester will have an opportunity to participate, Teledyne-Commodore is not precluded from future participation in the

⁵(...continued)

orders under CLIN 0001. If one or more alternative technologies are successfully demonstrated and the NRC recommends one or more alternative technologies as "viable," it is the ACWA Program Manager's intent to compete any subsequent pilot effort under full and open competition based upon a performance-type specification or other form of statement of work which will permit competition. The agency states that it is not its intent to limit the follow-on work effort to the three firms which have received CLIN 0003 task orders.

ACWA Program. Accordingly, we conclude that the restriction on protests of orders placed under a task order contract as contained in 10 U.S.C. § 2304c(d) precludes our Office from exercising bid protest jurisdiction over Teledyne-Commodore's protest.

The protest is dismissed.

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