



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Teledyne-Commodore, LLC--Reconsideration

File: B-278408.4

Date: November 23, 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., 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

On reconsideration, General Accounting Office reverses prior dismissal of protest concerning task orders issued under multiple award contracts and will exercise jurisdiction under the Competition in Contracting Act of 1984 over the protest where, notwithstanding the issuance of task orders, the nature of the procurement demonstrates that the agency is essentially conducting only one competitive source selection, which is not subject to the restriction on protests of orders placed under a task order contract contained in 10 U.S.C. § 2304c(d).

DECISION

Teledyne-Commodore, LLC requests that we reconsider our decision in Teledyne-Commodore, LLC, B-278408.3, Sept. 15, 1998, 98-2 CPD ¶ 70, in which we dismissed its protest of 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, under multiple-award contracts awarded under request for proposals (RFP) No. DAAM01-97-R-0031. The RFP is for identification of technologies other than incineration for demilitarization of assembled chemical weapons. The Army issued the task orders to proceed with the technology demonstration phase of the Assembled Chemical Weapon Assessment Program. We dismissed the protest because of the statutory restriction on protests in connection with task orders. See 10 U.S.C. § 2304c(d) (1994).

On reconsideration, we reverse our prior dismissal and reinstate Teledyne-Commodore's protest.

On July 28, 1997, the agency issued the RFP, for the selection and demonstration of approaches, other than the "baseline" incineration approach, for demilitarization and disposal of stockpiled assembled chemical weapons. RFP § C.1. The RFP contemplated the award of multiple task order contracts. RFP § A. The RFP

divided the work into the following three 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 basis, to perform demonstration testing. 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. Following a debriefing by the agency, Teledyne-Commodore filed a protest in our Office challenging 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.

We dismissed the protest based on our conclusion 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." In requesting reconsideration, the protester argues that the dismissal was inappropriate and that the protest should be reinstated.

The restriction on protests regarding task orders was included in the Federal Acquisition Streamlining Act of 1994 (FASA), § 1004, Pub. L. No. 103-355, 108 Stat. 3243, 3252-53 (1994), as part of FASA's treatment of task and delivery order contracts. The legislative history concerning the provisions of FASA treating task and delivery order contracts indicates that they were intended to encourage the use of multiple-award task or delivery order contracts, rather than single-award task or delivery order contracts, in order to promote an ongoing competitive environment in which each awardee was 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. We have held 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 without further competition under the remaining terms of the contract. Electro-Voice, Inc., B-278319, B-278319.2, Jan. 15, 1998, 98-1 CPD ¶ 23 at 5.

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. We exercised our bid protest jurisdiction in Electro-Voice because the downselect decision precluded the protester from competing for future task orders under the remaining terms of the contract. Although the procurement here is not structured to result in a downselection for "production" quantities, as in Electro-Voice, we conclude that the nature of the procurement is such that the restriction on protests of the placement of orders contained in 10 U.S.C. § 2304c(d) is not intended to bar Teledyne-Commodore's protest.

Federal Acquisition Regulation (FAR) § 16.501-2(a) describes three types of indefinite-delivery contracts: definite-quantity contracts, requirements contracts, and indefinite-quantity contracts. The appropriate type of indefinite-delivery contract may be used to acquire supplies and/or services when the exact times or quantities of future deliveries are not known at the time of contract award. Id. An indefinite-quantity contract is appropriate when the government cannot predetermine, above a specified minimum, the precise quantities of supplies or services that will be required during the contract period, and should be used only when a recurring need is anticipated. See FAR § 16.504(b).

Here, the contracts do not involve an indefinite quantity for any individual contractor, nor are they based on any recurring need of the agency. Section A of the RFP states that the minimum ordering quantity under any individual contract is

task order No. 0001 for the data gap resolution work, while the maximum ordering quantity will be task orders for all three phases of the work (data gap resolution, demonstration work plan, and technology demonstration). However, contrary to the agency's position, the work described in the RFP is not "indefinite." Indeed, under each of the three phases of the work contemplated by the contract, the RFP specifically defined the effort required of each contractor. Thus, under each phase the Army knew its specific needs and its requirements were precisely predetermined. Further, the work described in the RFP does not involve unknown quantities and does not anticipate any recurring needs. While the Army is permitted under the RFP to issue more than one task order under each phase to the contractors, there is nothing in the RFP to indicate that the agency has any recurring need for more than one technology demonstration from any individual contractor. That is, once the technology demonstration phase is completed under task order No. 0003, there are no recurring needs contemplated under the contract.¹

Another reason leading us to conclude that the statutory limitation on protests of task orders does not apply here is that the RFP contemplates only one competitive source selection. In this regard, the RFP anticipates using task orders for CLINs 0001 and 0002 essentially as preliminary screening phases to lead up to the ultimate source selection for the alternative technology demonstration, CLIN 0003. The first task orders were issued to all firms that were awarded a contract and did not involve a competition separate from the umbrella contracts; the second task orders simply covered preparation of a demonstration work plan for the technology demonstration; and the third task orders are for the technology demonstration itself. The agency--quite reasonably--took a sequential approach to issuing the task orders and to the procurement overall--moving from the preliminary screening steps involved in the first two task orders to the final step of conducting the actual technology demonstrations. As such, the nature of the procurement demonstrates that the agency is essentially conducting a single source selection, rather than the multiple source selections that arise under indefinite-delivery, indefinite-quantity contracts.

¹Replying to questions for the record posed by our Office in response to the request for reconsideration, the Army recognizes that "[t]he solicitation was not specifically structured in terms of 'recurring need.'" Army's Supplemental Response, Nov. 13, 1998, at 4. Lending further support to our conclusion that the RFP does not contemplate indefinite quantities, the contracting officer (CO) states that "[t]he work effort was described in [the RFP] as a three phased effort." CO's Memorandum for GAO, Nov. 13, 1998, at ¶ 14. In our view, the fact that the agency did not know the precise nature of the technologies that would ultimately be demonstrated under the third phase (task order No. 0003), as the CO states, does not make the contract one for an "indefinite quantity."

In sum, although the task orders contested by the protester were issued under the aegis of what purports to be indefinite-quantity, indefinite-delivery contracts, those contracts involved neither recurring work nor an indefinite quantity of work for an individual contractor, and the agency is essentially conducting one competitive source selection to perform the required work in this procurement. We do not understand the restriction in 10 U.S.C. 2304c(d) to apply in circumstances such as these. We therefore conclude that the restriction on protests of orders placed under a task order contract contained in 10 U.S.C. § 2304c(d) does not bar our Office from exercising bid protest jurisdiction under CICA over Teledyne-Commodore's protest.

We reverse our prior dismissal and reinstate Teledyne-Commodore's protest.

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