



## Decision

**Matter of:** U.S. Bank

**File:** B-404169.3

**Date:** February 15, 2011

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Jonathan D. Shaffer, Esq., John S. Pachter, Esq., Mary Pat Buckenmeyer, Esq., and Richard H. Snyder, Esq., Smith Pachter McWhorter PLC, for Citibank, the intervenor. Virginia Grebasch, Esq., General Services Administration, for the agency.

Jonathan L. Kang, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

For purposes of determining GAO jurisdiction over challenges to the award of task and delivery order, the term "value" for a no cost task order for third party payment services for transportation service providers (TSP) includes the anticipated transaction fees that the contractor will recover from the TSPs during the term of the contract, including options. However, GAO has no jurisdiction where the anticipated transaction fees of the selected contractor are less than \$10 million based on the estimated dollar volume of the total transactions under the order as stated in the solicitation and where the protester did not timely challenge the estimated dollar volume.

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### DECISION

U.S. Bank, of Minneapolis, Minnesota, protests the issuance of a task order to Citibank, of New York, New York, by the General Services Administration (GSA) under request for quotes (RFQ) No. FCXC-G1-060001-N for third party payment services. The protester argues that the agency unreasonably evaluated the vendors' costs and technical approaches.

We dismiss the protest.

This decision addresses whether our Office has jurisdiction to hear a challenge to the issuance of a task order under an indefinite-delivery/indefinite-quantity (ID/IQ)

contract. The jurisdiction of our Office to hear protests concerning task and delivery orders under ID/IQ contracts is limited as follows:

(1) A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for--

(A) a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued; or

(B) a protest of an order valued in excess of \$10,000,000.

41 U.S.C. § 253j(e) (2006). U.S. Bank's protest does not argue that the scope, period, or maximum value of the contract was increased, but argues that the value of the task order is valued in excess of \$10 million.

## BACKGROUND

The RFQ, issued on April 16, 2010, sought quotes to provide third-party payment services (3PPS) to facilitate transactions for GSA's transportation management services solution (TMSS) under a task order. The competition was limited to vendors holding GSA Smart Pay 2 ID/IQ contracts.

The TMSS is a system that provides freight shipping for federal agencies through contractors known as transportation service providers (TSP).<sup>1</sup> The 3PPS is intended to enable federal agencies to quickly and efficiently pay bills, to permit GSA to better track the transportation services, and to ensure that GSA receives the industrial funding fee (IFF) amounts it is entitled to collect for the transactions. As relevant here, the 3PPS vendor receives funds from the customer agencies and pays the TSP for the shipping work. Use of the 3PPS for payment of shipping transactions will not be mandatory for non-GSA user agencies or TSPs. Amendment No. 1 to the RFP contained a spreadsheet, which indicated the estimated volume of freight and household goods shipments for fiscal year 2009 totaled \$174 million.

The RFQ anticipated the issuance of a task order with a 1-year base period with eight 1-year options. The 3PPS task order was to be awarded on a no-cost basis. The successful vendor would be permitted to charge transaction fees to the TSPs who participate in the payment functions of the 3PPS. These fees are the only funds that will be earned by the 3PPS vendor in the performance of the task order.

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<sup>1</sup> The TMSS may be eventually replaced by a new system, the transportation management service (TMS). The 3PPS vendor is required to transition the payment services from TMSS to TMS, if the new system is implemented during the course of the 3PPS task order. RFQ at 3.

GSA issued the task order to Citibank on September 30. On October 7, U.S. Bank filed a protest with our Office, arguing that the award to Citibank was flawed because the agency unreasonably evaluated the vendors' costs and technical approaches. GSA requested that our Office dismiss the protest, arguing that our Office did not have jurisdiction because the value of the order was less than \$10 million. The agency argued that for purposes of establishing jurisdiction, the value of the task order was approximately \$500,000, which was the anticipated amount of revenue that GSA would receive from assessment of the IFF. Our Office advised the parties that we would not dismiss the protest because, as discussed below, we viewed the amount of fees to be earned by the 3PPS vendor to be the "value" of the task order, and U.S. Bank had provided evidence that, based on \$174 million figure stated in Amendment No. 1 to the RFQ, the total fees would likely be greater than \$10 million.

On November 2, GSA advised our Office that it would take corrective action by canceling the order issued to Citibank and issuing a revised solicitation that better reflected the agency's understanding of the transaction volumes anticipated by the agency for the duration of the task order. On November 5, GSA issued Amendment No. 2 to the RFQ, which stated the agency's estimate of the volume of transactions anticipated to be processed during performance of the 3PPS task order and which permitted vendors to submit revised quotes by November 9.

On December 23, GSA again awarded the task order to Citibank. On December 29, U.S. Bank protested to our Office, arguing that the new award to Citibank was improper based on flaws in the agency's evaluation of the vendors' cost and technical quotes.

## DISCUSSION

GSA argues that our Office does not have jurisdiction to hear the protester because it concerns a task order valued at less than \$10 million. We agree.

As discussed above, our Office has jurisdiction to hear challenges to the award of task and delivery orders valued at more than \$10 million. 41 U.S.C.A. § 253j(e). Our Office has held that although the term "value" is often used synonymously with price or cost, the term value as used in 41 U.S.C. § 253j(e) may also refer to the funds earned or recovered by a contractor during performance of the order. See ESCO Marine, Inc., B-401438, Sept. 4, 2009, 2009 CPD ¶ 234 at 5-6 (concluding that value of the scrap metal to be retained by contractor should be included in the value of the order for purposes of determining jurisdiction over a task order protest). In this regard, we found that the value of a task order may include the total funds to be recovered by a contractor, regardless of whether those funds derive from appropriated sources. Id. at 6.

Here, U.S. Bank and GSA agree that that the value of the task order is the total of the anticipated fees that the vendor will charge the TSPs over the term of the contract,

including options. Protest at 1-2 n.2; GSA Request for Dismissal at 4. We also think that this is the appropriate measure of the value of the task order, as it represents the funds that will be recovered by the successful 3PPS vendor during contract performance, and also represents the value of the services to be provided by the vendor to the government. The protester and agency disagree, however, as to the total fees that the vendor will earn over the course of contract performance, and whether those fees will be more or less than \$10 million.

As discussed above, Amendment No. 1 to the RFQ indicated that the cost of shipping freight and household goods through GSA's transportation program in fiscal year 2009 was \$174 million. Amendment No. 2 to the RFQ stated that the \$174 million figure should not be viewed as a likely amount for the task order because that figure included \$24 million in shipments by the Department of State, which subsequently established a separate agreement for payment of processing services and would not be using the 3PPS system. RFQ amend. 2 at 2. U.S. Bank contends that, based on an extrapolation of the resulting \$150 million volume over the course of 9 years, and applying Citibank's proposed fee of 1.01 percent, the value of the task order will be \$13,635,000.

In Amendment No. 2, however, the agency further advised that the 2009 transaction volume did not reflect the agency's estimates for transactions under the new 3PPS system. Specifically, the agency stated that it anticipated "adoption [of the 3PPS system] by customer agencies to be slow during the base and first option periods, as the awardee markets the 3PPS alternative to customer agencies." Id. In this regard, as discussed above, use of the 3PPS for purposes of payment is not mandatory for non-GSA customers and TSPs who provide services to non-GSA agencies; TSPs who do not agree to use the 3PPS for payment by agencies will not be required to pay fees to the 3PPS vendor. For those reasons, the agency provided the following estimates in the revised RFQ:

GSA estimates that the dollar volume for 3PPS in the first year will be \$5,000,000. This amount may be slightly higher depending on when 3PPS actually becomes operational. The dollar value for 3PPS estimated for the first option period is approximately \$20,000,000. GSA has estimated that customer agency adoption of 3PPS, beginning in the second option period, will grow in increments of approximately 33% per year.

Id.

Based on this information, the total volume of transactions anticipated by GSA for the 9-year task order would be \$537,770,000. Agency Request for Dismissal at 8. Applying Citibank's transaction fee of 1.01 percent to this amount yields a task order value of \$5,431,465.

U.S. Bank argues that GSA's estimates set forth in the solicitation are not reasonable or accurate because the agency did not provide the basis for its estimates in the revised RFQ. However, to the extent that the protester argues that we should reject the agency's estimates for the volume of transactions anticipated for the 3PPS program, we consider this argument to be untimely raised under our Bid Protest Regulations. This is so because a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals or quotations must be filed before that time. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2010). Where alleged improprieties which do not exist in the initial solicitation are subsequently incorporated into the solicitation, they must be protested not later than the next closing time for receipt of proposals following the incorporation. *Id.* This requirement is intended to provide parties with a fair opportunity to present their cases and to enable the contracting agency to take affective corrective action when it is most practicable and where the circumstances warrant. A challenge to the validity of an estimate set forth in an amended solicitation must be raised prior to the time for receipt of revised proposals or quotations. See *K-Mar Indus., Inc.*, B-400487, Nov. 3, 2008, 2009 CPD ¶ 159 at 7.

U.S. Bank argues that it was not required to challenge the estimates in the solicitation because its challenge to the evaluation of the vendors' quotes is not based on those estimates. Instead, the protester argues that the estimates are relevant solely to the issue of jurisdiction, and that it was not required to file a "defensive" protest to challenge those estimates. We see no reason to depart from our general rule that requires the terms of a solicitation, including an agency's estimate of the volume of work to be performed, to be challenged prior to the time for receipt of proposals or quotes.<sup>2</sup>

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<sup>2</sup> The protester also argues that the estimates in Amendment No. 2 are not accurate, based on information provided by the agency in connection with a solicitation issued on December 16 for the TMS. This challenge is also untimely. Even though the TMS solicitation was issued after the time for receipt of the 3PPS proposals, U.S. Bank was required to file its protest challenging the agency's estimates in the 3PPS solicitation within 10 days of when it knew or should have known of the information in the TMS solicitation. 4 C.F.R. § 21.2(a)(2); *Armorworks Enters., LLC*, B-400394, B-400394.2, Sept. 23, 2008, 2008 CPD ¶ 176 at 7. The protester did not file its challenge to the award of the order to Citibank until December 29, and did not specifically raise its arguments regarding the information disclosed in the TMS solicitation until its response to the agency's request for dismissal on January 27, 2011.

In sum, based on the estimates set forth in the solicitation, we conclude that the value of the task order here is less than \$10 million and that we lack jurisdiction to hear the protest.

The protest is dismissed.

Lynn H. Gibson  
General Counsel