



GAO

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Doug Boyd Enterprises, LLC

File: B-298237.2

Date: August 6, 2007

Eric J. Marcotte, Esq., Krista L. Pages, Esq., Mark A. Smith, Esq., and Nathan C. Guerrero, Esq., Winston & Strawn LLP, for the protester.
John A. Thompson, Esq., Federal Emergency Management Agency, for the agency.
Jonathan L. Kang, Esq., and Ralph O. White, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the issuance of a task order under a multiple-award indefinite-delivery, indefinite-quantity contract is dismissed as the award of such task orders are not subject to GAO's bid protest jurisdiction, and the order here cannot be termed a "downselection."

DECISION

Doug Boyd Enterprises, LLC (DBE) protests the decision by the Federal Emergency Management Agency (FEMA) not to issue DBE a task order under multiple-award, indefinite-delivery/indefinite-quantity (ID/IQ) task order contract No. HSFEHQ-06-D-0431.

We dismiss the protest.

DBE is one of 10 small business contractors who were awarded ID/IQ contracts by FEMA in May 2006 for maintenance and deactivation of manufactured homes and travel trailers in the southern region of Mississippi. Each ID/IQ contract has a 5-year term, with a \$50,000 minimum guaranteed value and a \$100,000,000 maximum value. On March 7, 2007, FEMA issued a task order proposal request (TOPR) for the issuance of orders to vendors for the agency's "Year 2" maintenance and deactivation requirements under the ID/IQ contract. The TOPR anticipated issuance of task orders with a 6-month base term, and one 6-month option. DBE submitted a quotation in response to the TOPR, but was not selected for issuance of a task order by FEMA. Following the agency's notice that it was not selected, DBE filed this protest.

The protest argues that FEMA improperly evaluated DBE's quotation in response to the TOPR under the price, past performance, and management evaluation factors, and did not conduct a reasonable source selection determination. The agency requests that we dismiss the protest because it concerns the issuance of a task order under a multiple-award ID/IQ contract, and is therefore not subject to our Office's jurisdiction.¹

The Federal Acquisition Streamlining Act of 1994 (FASA), 41 U.S.C. § 253j(d), provides that protests may not be filed against the issuance or proposed issuance of orders under multiple-award task- or delivery-order contracts, except where it is alleged that the order increases the scope, period, or maximum value of the contract under which the order is issued. While DBE argues that the Year 2 order competition constituted a "downselection" of vendors for the work required under that task order, and therefore provides an exception to FASA's bar against protests of task or delivery orders, we do not agree.²

Our decisions have held that a task or delivery order that precludes competition for future orders for the duration of the contract performance period may constitute a downselection, and that a protest may be filed against the issuance of such an order. See Electro-Voice, Inc., B-278319, B-278319.2, Jan. 15, 1998, 98-1 CPD ¶ 23 at 5-6; Palmetto GBA, LLC, B-299154, Dec. 19, 2006, 2006 CPD ¶ 200 at 3-4. Our view is based on the legislative history of FASA, which indicates that the provisions addressing task- and delivery-order contracts were intended to encourage the use of multiple-award, rather than single-award contracts, in order to promote an ongoing competitive environment in which each awardee would be 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. In this regard, the Federal Acquisition Regulation (FAR) requires agencies to provide all awardees "fair opportunity to be considered for each order exceeding \$3,000 issued under multiple delivery-order contracts or multiple task-order contracts." FAR § 16.505(b)(1)(i). Where an agency conducts a competition that essentially abandons the multiple-award, fair-consideration scheme envisioned under FASA in favor of selecting a single contractor for future orders under the ID/IQ contract, we will find that there has been a downselection and review a challenge to the resulting award.

¹ The agency also argues that the protest should be dismissed as untimely and because it challenges matters of contract administration. Because, as discussed below, we dismiss the protest based on lack of jurisdiction, we need not address the agency's other arguments.

² The protester does not challenge the issuance of the task order under the scope, period, or maximum value exception for our Office's jurisdiction.

DBE raises two arguments that the competition for the Year 2 orders here constituted a downselection. First, DBE argues that the TOPR competition was a downselection because it denied the protester an opportunity to compete for work for the duration of the Year 2 task order. Second, DBE argues that it will suffer economic hardship if it cannot receive work from FEMA during the time covered by the Year 2 task order, and that our Office should expand its definition of downselections to consider such circumstances. For the reasons discussed below, we reject both of the protester's arguments.

As to its first argument, DBE contends that the TOPR competition foreclosed the protester's opportunity to compete for work for at least the duration of the Year 2 order, and possibly for future orders as well. DBE argues that the TOPR performance work statement covers the full scope of the ID/IQ contract statement of work, and therefore it is likely that DBE will have no further opportunities to compete for work during the duration of those orders. DBE further contends that several statements made by FEMA regarding the Year 2 orders suggest that the agency intended to use the TOPR as a means to narrow, or "streamline," the number of vendors from whom the agency would obtain its future requirements under the ID/IQ contract.³ Amend. Protest at 12-14. In this regard, the protester also argues that the agency has not affirmatively identified what work it may require after the Year 2 orders expire, thus leaving in doubt the potential future opportunities for vendors who did not receive Year 2 orders.

Even assuming that DBE is correct in its characterization of the record, we think the facts here differ from those in the decisions in which our Office has found a downselection because the issuance of the Year 2 orders does not foreclose the ID/IQ contractors from the opportunity to compete for this work for the duration of the contract. See Electro-Voice, *supra*, Teledyne-Commodore, LLC-Recon., B-278408.4, Nov. 23, 1998, 98-2 CPD ¶ 121 at 3-4. The ID/IQ contract here has a 5-year term, and the Year 2 orders have a six-month base term and six-month option term. Thus, the Year 2 orders cover a maximum of 1 year, and FEMA will remain obligated to provide these vendors with a fair opportunity to compete for the agency's requirements after the instant orders expire. Put differently, once the Year 2 order expires after 6 or 12 months, FEMA will be required to give DBE a fair opportunity to compete for any requirements in the remaining 36 to 42 months of the underlying ID/IQ contract.

³ DBE cites several other statements made by the agency that the protester contends evidences an intent to exclude vendors who did not receive a Year 2 order from receiving future orders. We have reviewed all of the arguments raised by DBE and find that none supports a conclusion that the Year 2 orders constituted a downselection.

DBE's argument that the issuance of an order must be viewed as a downselection unless the agency identifies what future opportunities exist for orders under the ID/IQ contract misstates our decisions regarding downselections. Our decisions have characterized a competition as a downselection only where the terms of an order precludes vendors from a fair opportunity to compete for any and all future orders. Palmetto, supra, at 5 n.2. Our Office's decisions have not held that a downselection occurs merely because vendors will not have an opportunity to compete for a particular category of work for a period of time under the contract.⁴ Palmetto, supra, at 5; The Intrados Group, B-280130, June 22, 1998, 98-1 CPD ¶ 168 at 2-3; L-3 Commc'ns Co., B-295166, Dec. 10, 2004, 2004 CPD ¶ 245 at 2-3. Rather, our decisions have found downselections only where vendors' future opportunities to compete for orders are foreclosed for the duration of the underlying ID/IQ contract, for example where the successful vendor is expressly designated as the recipient of all future orders that might arise under the category of work competed, with no provision for the fair consideration of the other vendors for those future orders. Palmetto, supra, at 5.

As to its second argument, DBE contends that even if the issuance of the Year 2 task order did not constitute a de jure downselection (as our decisions have defined them), it was nonetheless a de facto downselection by virtue of imposing economic hardship on the protester. In this regard, DBE argues that because it is a veteran-owned small business, it will be "put out of business" if it does not receive work from FEMA under the ID/IQ contract during the duration of the Year 2 order, and will therefore not have a fair opportunity to compete for future orders. Decl. of DBE Senior Vice President, at 5.

⁴ The protester also argues that the competition for the Year 2 orders was a downselection because, DBE contends, the agency is not likely to issue any additional orders that would run concurrently with the disputed orders. In this regard, DBE argues that our decision in Palmetto relied on two considerations: (1) the limited period of time for the task order, and (2) the prospect for additional work being competed concurrently with the disputed task order. In Palmetto, we reiterated our Office's view that "a task or delivery order that precludes competition for future task or delivery orders for the duration of the contract performance period may constitute a downselection." Palmetto, supra, at 3. Although we found that both considerations cited above supported the conclusion that the issuance of the disputed task order was not a downselection, we did not articulate a new test or standard that requires the agency to demonstrate that it would conduct competitions for work to be performed concurrently with the disputed order. To the extent that DBE interprets our decision in Palmetto as requiring an agency to specifically demonstrate that there is the prospect of additional work to be competed concurrently with the disputed task order, the protester is incorrect.

Our Office's downselection exception to FASA's prohibition on task order protests is based on agencies' statutory obligation to provide vendors a fair opportunity to compete for task orders, and our understanding of the legislative intent behind that obligation. See Electro-Voice, supra. The protester cites no statutory or regulatory authority to support its contention that the statutory requirement for a fair opportunity to compete requires an agency to ensure that a vendor receives sufficient orders during the course of the ID/IQ contract term to maintain its financial-well being.⁵ Nor does the protester cite any legislative history that would indicate that FASA intended to ensure the ongoing financial health of an ID/IQ contract vendor for the duration of the contract.

The protest is dismissed.

Gary L. Kepplinger
General Counsel

⁵ As FEMA notes, the ID/IQ contract has a guaranteed minimum of \$50,000, which DBE has already received through prior orders. Decl. of Contracting Officer (CO) at 2. All DBE was guaranteed upon award of the ID/IQ contract was that minimum amount and a fair opportunity to compete for orders. As discussed above, we conclude that the issuance of the task orders here do not preclude DBE from receiving a fair opportunity to compete for future orders under the ID/IQ contract.