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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Palmetto GBA, LLC

File: B-299154

Date: December 19, 2006

W. Jay DeVecchio, Esq., Kevin C. Dwyer, Esq., Kathy C. Weinberg, Esq., Edward Jackson, Esq., Richard W. Arnholt, Esq., and Bradley A. Areheart, Esq., Jenner & Block LLP for the protester.

David S. Cohen, Esq., Bryan T. Bunting, Esq., Victor G. Klingelhofer, Esq., John J. O'Brien, Esq., and Catherine K. Kroll, Esq., Cohen Mohr, LLP for Pearson Government Solutions, Inc., an intervenor.

Jamie B. Insley, Esq. and Christine Simpson, Esq., Department of Health and Human Services, for the agency.

Jonathan L. Kang, Esq., and Glenn G. Wolcott, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging issuance of a task order under a multiple-award indefinite-delivery/indefinite-quantity contract is dismissed where the task order does not foreclose vendors' opportunity to compete for future orders under the contract, and therefore the issuance of the order does not constitute a "downselection" and is not subject to GAO's bid protest jurisdiction.

DECISION

Palmetto GBA, LLC protests the issuance of a task order to Pearson Government Solutions, Inc. under a multiple-award indefinite-delivery/indefinite-quantity (ID/IQ) contract for Contract Center Operations (CCO) awarded by the Department of Health and Human Services, Centers for Medicare & Medicaid Services, under request for proposals (RFP) No. RFP-CMS-2005-0027. The protester challenges the agency's issuance of the task order under the CCO contract based on alleged flaws in the agency's cost evaluation and the conduct of discussions. The agency contends that our Office lacks jurisdiction to hear the protest.

We dismiss the protest.

BACKGROUND

The RFP sought proposals to meet the agency's requirements to serve approximately 40 million Medicare beneficiaries by "disseminat[ing] information to people with Medicare (and prospective people with Medicare) on the coverage options available, prescription drug information and General Medicare information." RFP, CCO Statement of Work (SOW), at 1. The RFP requires provision of "customer service functions in support of a contact center environment within CMS' Contact Center Customer Service (CCCS) program, . . . [which will] guide the creation and consolidation of beneficiary inquiry contact centers."¹ The RFP anticipated multiple awards of ID/IQ contracts, with a 1-year base performance period, and nine 1-year option periods. The contracts have a maximum potential award value of \$9 billion.

The RFP stated that, in addition to proposals for the ID/IQ contract, offerors were required to submit proposals for task order 0001, for a beneficiary contact center (BCC) that will "accept and respond to inquires from its beneficiaries and their family members or caretakers." RFP, BCC SOW, at 1. The BCC task order requires the vendor to provide all "necessary services, personnel, materials, equipment, and facilities" required for the BCC. *Id.* The RFP advised offerors that the agency intended to evaluate offerors' proposals for the task order both for the immediate issuance of that order, and as a sample task for purposes of determining offerors' capabilities, experience and realistic costs. The RFP also stated that offerors' were required to submit proposals for "BCC Task Order Optional Requirements." RFP § M.3, ¶ 8. The RFP stated that task orders for these optional requirements would be issued only to vendors who received a BCC task order. *Id.* The optional BCC requirements are: reference center, print fulfillment, email, web chat, customer satisfaction surveys, and standard operating procedures. RFP § M.5, ¶ b.2.

The agency awarded ID/IQ contracts to six offerors, including Palmetto and Pearson, on October 26, 2006. Shortly after the award notices for the contracts, the agency issued the BCC task order to Pearson. The BCC task order is for a 4-month base performance period, with two 1-year option periods; the value of the base plus option periods is \$453,931,409. Following its debriefing, the protester filed this protest of the issuance of the BCC task order.

¹ The CCO contract is part of the agency's overall reform initiative to upgrade Medicare programs under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003. Pub. L. No. 108-173, 117 Stat. 2066 (Dec. 8, 2003). RFP, BCC SOW, ¶ 1.1.

DISCUSSION

The agency requests that we dismiss the protest, arguing that our Office lacks jurisdiction to hear the protest because it concerns the issuance of a task order under a multiple-award ID/IQ contract.² 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.

Here, the protester does not challenge the issuance of the BCC task order under the scope, period, or maximum value exception for our Office's jurisdiction. Rather, the protester contends that the task order constitutes a "downselection" of vendors for the work required under that task order, and therefore provides an exception to FASA's prohibition on the protests of task or delivery orders.

Our decisions have held 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. See Electro-Voice, Inc., B-278319, Jan. 15, 1998, 98-1 CPD ¶ 23; Teledyne-Commodore, LLC--Recon., *supra*. We have recognized downselections in circumstances not only where all work under a contract will be foreclosed from future competition, but also where specific categories of work will

² The agency also argues that the protest is untimely as a whole, because the RFP disclosed the fact that the RFP required offerors to submit proposals for the BCC task order, and advised that the agency might issue an order to only one offeror. Because we lack jurisdiction to hear the protest of the task order, we need not address the timeliness issue. The protester has, however, raised additional untimely arguments in support of its assertion that the issuance of the BCC task order was a downselection. In its response to questions from our Office, the protester argues that the task order is not "indefinite" in nature because it represented a "known" agency requirement, and is therefore not an order subject to the FASA protest bar. Protester's Response to GAO Questions, Dec. 11, 2006, at 6. The nature of the task order and the agency's requirements were clearly disclosed in the RFP and, thus, the challenge is now untimely. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2006). In any event, the protester's argument that BCC task order resembles the one in Teledyne-Commodore, LLC--Recon., B-278408.4, Nov. 23, 1998, 98-2 CPD ¶ 121 is unavailing, as that decision addressed an agency's issuance of an order for all of the future work under a multiple-award ID/IQ contract. The agency's determination in Teledyne to select a single vendor's technical solution for all future requirements rendered those requirements "definite," and not subject to future competition. Here, the BCC task order does not constitute such a one-time issuance of an order for work that renders "definitive" all agency requirements anticipated under the contract.

be similarly foreclosed for the duration of the contract. See Global Commc'ns Solutions, Inc., B-291113, Nov. 15, 2002, 2002 CPD ¶ 194; L-3 Commc'ns Co., B-295166, Dec. 10, 2004, 2004 CPD ¶ 245.

Our view is based on the legislative history for 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.103258, 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 issues a task- or delivery-order solicitation that essentially abandons the multiple-award, fair-consideration scheme envisioned under FASA in favor of selecting a single contractor for future task or delivery orders under the ID/IQ contract, we will find that there has been a downselection and review a challenge to the resulting award.

The protester argues that the issuance of the BCC task order should be considered a downselection because only Pearson will perform the work required under the task order for the duration of that order. However, the term of the BCC task order is 4 months, with two 1-year option periods, whereas the ID/IQ contract has a 10-year performance period. The agency states that after the task order expires, with or without the exercise of the options, the agency will be required to take further actions to obtain BCC requirements.³ Agency Response to GAO Questions, Dec. 13, 2006, at 1-2.

Nothing in the record indicates that the BCC task order precludes the agency from issuing other orders during the duration of the BCC task order, or at any other time during the term of the contract, that pertain to the categories of work required under the BCC task order. In this regard, the agency explains that “CMS is currently anticipating including work outside the BCC Task Order 001 to include electronic mail expansion, special studies, Web Chat expansion, a long term care initiative, and other work to fulfill specialized needs under the MAC environment, as it develops.” Agency Motion to Dismiss at 8. The agency additionally anticipates that its requirements for beneficiary contact services are expected to grow over time due to expanded mandates, such as the prescription drug benefit added to the Medicare Program under the Medicare Prescription Drug, Improvement, and Modernization

³ As the agency acknowledges, it has the option to issue orders without offering vendors a fair opportunity to compete under certain circumstances. See FAR § 16.505(b)(2). However, such a possibility exists with all task and delivery orders, and does not create a downselection.

Act of 2003. Decl. of Contracting Officer at 2. Furthermore, the agency states that it could issue additional orders for BCC requirements, to run concurrently with the BCC task order, if the agency's requirements increase beyond the scope of that order. Agency Response to GAO Questions, Dec. 13, 2006, at 4.

Based on these facts, it is clear that offerors will have an opportunity to compete for orders for requirements now covered by the BCC task order for the remaining seven and a half years remaining under the contract, and may also have an opportunity to compete for additional BCC task orders for agency requirements that are concurrent to the performance of the existing order.⁴ Thus, we believe, the BCC task order does not foreclose other vendors' fair opportunity to compete under the contract and was not a downselection. See L-3 Commc'ns, supra (issuance of a task order was not a downselection where solicitation did not clearly reserve future orders for recipient of protested order).

The protester next argues that we should expand our definition of downselections to apply to circumstances where, as here, the issuance of a task or delivery order forecloses the possibility of competition for a certain type of work for a particular period of time. 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. 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 fair consideration of the other vendors for those future orders. See L-3 Commc'ns, supra. In any event, as discussed above, the record also indicates that the agency could also issue concurrent orders for additional BCC requirements.

⁴ The protester appears to suggest that because the agency has not specifically identified its requirements, there is no "assurance" that the agency will issue future task orders and therefore the agency has failed to overcome a presumption that the BCC task order is a downselection. In our decisions where we have identified a downselection, however, we have relied upon clear statements in the RFP and orders that indicate that there will be no future competition for either all requirements, or a specific category of requirements. An inherent feature of all ID/IQ contracts is that agencies may choose to issue no orders, beyond the guaranteed contract minimum; however, a downselection only occurs when an agency forecloses the possibility of future competition for a particular category of work. In the absence of clear evidence that an agency has foreclosed vendors' fair opportunity to compete, we presume that agencies will administer their multiple-award ID/IQ contracts in a manner consistent with their obligations under FASA.

The protester finally argues that because Pearson is the only vendor to receive a BCC task order, only Pearson is eligible to receive task orders for the optional BCC requirements. The RFP, however, advised offerors that task orders for optional BCC requirements would be issued only to the vendor or vendors who received the BCC task order. Thus, it cannot be fairly said that Palmetto did not have an opportunity to compete for the optional BCC requirements, as that competition was clearly linked to the BCC task order under the terms of the RFP.⁵ Moreover, we do not believe that there is a downselection here because offerors will have an opportunity to compete for future BCC task orders, and thus will also have the opportunity to compete for orders for the optional BCC requirements.⁶

In sum, we conclude that our Office lacks jurisdiction to hear this challenge to the issuance of a task order under a multiple-award ID/IQ contract.

The protest is dismissed.

Gary L. Kepplinger
General Counsel

⁵ In this regard, a task order for the optional BCC requirements could also be considered a “logical follow-on to an order already issued under the contract,” and thus not subject to the rules for fair opportunity for consideration. FAR § 16.505(b)(2)(iii).

⁶ The record also does not support the protester’s argument that only the BCC vendor may perform the optional BCC requirements in any capacity under the contract, *i.e.*, that only the BCC contractor may provide “email” or “print fulfillment” requirements. Rather, the RFP identifies “Optional BCC Requirements,” and states that only a BCC vendor will receive the optional work that may be required to support the BCC.