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**Comptroller General
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**United States Government Accountability Office
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Decision

Matter of: Sallie Mae, Inc.

File: B-400486

Date: November 21, 2008

William L. Walsh, Jr., Esq., J. Scott Hommer, III, Esq., Anthony J. Pagano, Esq., Peter A. Riesen, Esq., and Patrick R. Quigley, Esq., Venable LLP, for the protester. Frank Peterson for ACS Education Solutions, LLC, an intervenor. Jeffrey Morhardt, Esq., and Antoiner White, Esq., Department of Education, for the agency. Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that modification of contract for management of student loans to include the servicing of loans the government will acquire pursuant to recent legislation is denied where protester fails to demonstrate that contract, as originally awarded, did not contemplate the servicing of the type of loans to be acquired.

DECISION

Sallie Mae, Inc. of Reston, Virginia protests the Department of Education's modification of contract No. ED-04-CO-0004, awarded to ACS Education Solutions, LLC of Rockville, Maryland for the management of student loans, to include the servicing of loans that the Department will acquire as a result of recently enacted legislation to bolster the student loan credit market. The protester contends that the modification represents an out-of-scope change to the awarded contract and that it results in an improper sole-source award to ACS.

We deny the protest.

BACKGROUND

The Department of Education awarded contract No. ED-04-CO-0004 (the Common Services to Borrowers (or CSB) contract) to ACS on November 20, 2003, after a competition in which Sallie Mae participated. The contract was awarded pursuant to request for proposals (RFP) No. ED-03-R-0010, which sought an integrated solution for the management of three areas of the federal student loan program, *i.e.*,

servicing, consolidation, and collections. The contract is a fixed-price indefinite-delivery/indefinite-quantity contract for a base period of 5 years and five 1-year options. According to the agency, ACS expects to service approximately [deleted] borrowers with a total of approximately [deleted] loans under the CSB contract in 2009. Agency Report (AR) at 2-3. The agency projects that the cost of servicing these loans in 2009 will be [deleted]. Id. at 3.

During the spring of 2008, in an effort to encourage lenders to make student loans available for the 2008-2009 academic year, Congress enacted the Ensuring Continuing Access to Student Loans Act of 2008 (ECASLA), Pub. L. No. 110-227, 122 Stat. 740, which authorizes the Secretary of Education, in consultation with the Secretary of the Treasury, to purchase or enter into forward commitments to purchase loans made under sections 428 (subsidized Stafford loans), 428B (Parent Loan for Undergraduate Students (PLUS) loans), and 428H (unsubsidized Stafford loans) of the Higher Education Act of 1965. The legislation directed the above two Secretaries and the Director of the Office of Management and Budget to publish notice in the Federal Register establishing the terms and conditions governing such purchases. The notice was published on July 1, 2008. One of the conditions that the notice establishes is that “upon purchase of any Eligible Loan, the Department [of Education] shall obtain all rights to service such Eligible Loan and may in its sole discretion require deconversion of such Eligible Loan in order to service the loan itself or through a third-party servicer of its designation.” Loan Purchase Commitment Program for Eligible Federal Family Education Loan Program (FFELP) Loans Summary of Terms and Conditions, 73 Fed. Reg. 37431, 37436.

On July 9, 2008, the Department of Education asked ACS for a proposal to “provide documentation on [ACS’s] current FFEL processes for client set up, loan receipt and loading, servicing and reporting.” CCR [Change Control Request] 1416-1 (Process Mapping) at 2, AR, Tab M. The request indicated that it was for the first of several parts of what would become Task Order 48 under the CSB contract. The CCR explained that the agency was requesting support “for activities related to the receipt and servicing of FFEL loan volume for the FSA FFEL portfolio.” Id. at 1. The CCR further explained that the loans serviced “would be received from Guaranty Agencies (GAs) as part of the Lender of Last Resort program and [might] be received from FSA loan purchases of FFEL loans.”¹ Id. The agency issued Modification No. 0057 to the CSB contract on July 24, which, among other things, added [deleted] funding to the contract to provide for Task Order 48.² AR, Tab K.

¹ In the proposal that it submitted to the agency on July 18, ACS [deleted]. AR, Tab M.

² Modification No. 0057 also made other changes to the CSB contract that are not relevant to this protest.

The July 1 Federal Register notice advised lenders that to participate in the loan purchase program, each was required to submit a Notice of Intent to Participate, which would vest in the lender the option to “put” eligible loans to the Department for purchase, but not commit the lender to putting the loans. 73 Fed. Reg. 37431. The agency reports to us that as of late September, it had received notices of intent to participate from a number of lenders, including [deleted], and the number of loans that these lenders had a vested option to put to the government was [deleted]. A detailed breakdown of the loans by lender and by month showed that [deleted] were from [deleted], and that all of the [deleted] were to be put in September 2009. AR, Tab O.

On August 21, Sallie Mae filed a protest with our Office alleging that it had recently learned that “the Department had dramatically expanded the scope of ACS’s work under the CSB to include servicing of the FFELP loans sold to the Department under the LPCP [Loan Purchase Commitment Program], without engaging in the required competitive bidding process.” Protest at 7. According to the protester, it first learned of the expansion of the scope of ACS’s work in a letter that it received from ACS dated August 11, in which ACS stated that it had been “working closely” with the Department of Education “as they are preparing to expand their capacity to purchase and service loans sold under their liquidity program.” *Id.* The agency filed a report with our Office on September 22 in which it argued that the servicing of the loans that would be put to the government as a result of the recently enacted legislation was within the scope of ACS’s CSB contract. In responding to the protest, the agency noted that Modification No. 0057 “basically implements the Loan Purchase Program” and that the modification had “not been finalized at this time.” Department of Education Response to Protester’s Supplementary Request for Document Production at 1. In other words, the agency acknowledged that further modification of ACS’s CSB contract to provide for the servicing of the loans to be acquired by the government was anticipated.

On October 16, the Department of Education notified us that it had decided to take corrective action in response to the protest. The agency explained that it intended to issue a solicitation for contractor support to service the student loans purchased by the Department under the Loan Purchase Program. The agency noted that it was in the process of conducting market research (using firms with General Services Administration schedule contracts) and developing a statement of work, and that it expected to issue the solicitation some time in January 2009. The agency stated that Sallie Mae would be welcome to compete for the work. The agency further noted that it expected the award process to take 3-4 months, meaning that award would be made in late March or April 2009, and that after “possible system development work,” the contractor would be able to begin receiving loans in the August/September 2009 timeframe. Agency Notice of Corrective Action, Oct. 16, 2008, at 1. Based on its stated intention to issue a solicitation for the loan servicing work, the agency asked us to dismiss Sallie Mae’s protest as academic.

Sallie Mae opposed the agency's request, arguing that the proposed corrective action did not render its protest academic since ACS would continue to perform services pursuant to the allegedly out-of-scope modification while the competition was conducted. We agreed with the protester that the agency's proposed corrective action was insufficient to render the protest academic given that the agency intended to continue to procure the services under protest from ACS under the CSB contract until the new award was made. Accordingly, we declined to dismiss the protest.

DISCUSSION

Sallie Mae argues that the CSB contract, as originally competed and awarded, did not contemplate the servicing of non-defaulted FFELP loans, and that modification of the contract to encompass the servicing of the non-defaulted FFELP loans "put" to the government pursuant to the loan purchase program is accordingly beyond its original scope.

The Competition in Contracting Act (CICA) requires "full and open competition" in government procurements as obtained through the use of competitive procedures. 41 U.S.C. § 253a(a)(1)(A) (2000). Once a contract is awarded, however, our Office will generally not review modifications to that contract, because such matters are related to contract administration and are beyond the scope of our bid protest function. Bid Protest Regulations, 4 C.F.R. § 21.5(a) (2008); DOR Biodefense, Inc.; Emergent BioSolutions, B-296358.3; B-298358.4, Jan. 31, 2006, 2006 CPD ¶ 35 at 6. An exception to this rule is where it is alleged that a contract modification is beyond the scope of the original contract because, absent a valid sole-source determination, the work covered by the modification would be subject to the statutory requirements for competition. Engineering & Prof'l Servs., Inc., B-289331, Jan. 28, 2002, 2002 CPD ¶ 24 at 3.

In determining whether a modification triggers the competition requirements in CICA, we look to whether there is a material difference between the modified contract and the contract that was originally awarded. MCI Telecomms. Corp., B-276659.2, Sept. 29, 1997, 97-2 CPD ¶ 90 at 7. Evidence of a material difference between the modification and the original contract is found by examining any changes in the type of work, performance period, and costs between the contract as awarded and as modified. Atlantic Coast Contracting, Inc., B-288969.4, June 21, 2002, 2002 CPD ¶ 104 at 4. We also consider whether the solicitation for the original contract adequately advised offerors of the potential for the type of change found in the modification, and thus whether the modification would have changed the field of competition. DOR Biodefense, Inc.; Emergent BioSolutions, *supra*.

In support of its argument that the servicing of non-defaulted FFELP loans is beyond the scope of ACS's CSB contract, the protester notes that the Statement of Objectives (SOO) in the CSB solicitation did not describe the servicing of non-defaulted FFELP loans and that the Student Credit Management Volumes chart

provided as an appendix to the SOO did not furnish a figure for non-defaulted FFELP loans. Sallie Mae maintains that offerors could not possibly have contemplated that the CSB contract would include the servicing of the non-defaulted FFELP loans that are expected to be put to the government given that the legislation authorizing the loan purchase program was not enacted until May 2008. The protester also points out that the ECASLA authorizes the Secretary of Education to contract with eligible lenders for the servicing of the loans purchased from them and argues that there would have been no need for the statute to include such authorization if it were intended that the loans put to the government be serviced under ACS's CSB contract.³

In response, the agency maintains that the SOO in the CSB solicitation described the kinds of obligations that the contractor would be responsible for servicing quite broadly, providing that “[t]he CSB solution will have the capability to manage all types of student aid obligations,” and that “[t]hese obligations include Direct Loans, defaulted debts assigned to the Department of Education from [FFEL] or other lenders, rehabilitated loans, and any other type of Title IV student loan obligation.”⁴ SOO, § 1.2, as cited in AR at 3-4. (Emphasis added by agency.)

While we agree with the protester that at the time the CSB contract was awarded, agency officials and offerors could not have anticipated that the government would acquire the number of FFELP loans that lenders now have the option to put to it pursuant to the loan purchase program, we do not think

³ The statutory section to which the protester refers provides as follows:

MAINTAINING SERVICING ARRANGEMENTS.--The Secretary may, if agreed upon by an eligible lender selling loans under this section, contract with such lender for the servicing of the loans purchased, provided that--

- (1) the cost of such servicing arrangement does not exceed the cost the Federal Government would otherwise incur for the servicing of loans purchased, as determined under subsection (a); and
- (2) such servicing arrangement is in the best interest of the borrowers whose loans are purchased.

Pub. L. No. 110-227, § 7(b), to be codified at 20 U.S.C. § 459A(c).

⁴ “Direct loans” are loans made by the U.S. Government to students and parent borrowers. FFEL loans are loans made by private lenders such as banks and credit unions. The FFEL program offers Stafford Subsidized, Stafford Unsubsidized, PLUS, and consolidation loans. SOO, App. G (Glossary of Terms) at G-5.

that this leads to the conclusion that modification of the CSB contract to encompass the servicing of these loans would be beyond the contract's scope. In our view, the SOO in the CSB solicitation clearly placed offerors on notice that the agency intended to award a contract for the management--i.e., the servicing, the consolidating, and the collecting--of all types of Title IV student loans, including the types of FFELP loans that the ECASLA has authorized the government to purchase from lenders, i.e., Stafford subsidized, Stafford unsubsidized, and PLUS loans. In this connection, we note that not only did the SOO state that the CSB solution was to be capable of managing "all types of student aid obligations," including direct, defaulted FFELP, and rehabilitated loans and "any other type of Title IV student aid obligation," but it also specifically identified the Stafford and PLUS loan programs as among the Title IV programs.⁵ Furthermore, the SOO specifically instructed that the CSB solution was to be flexible enough to handle new requirements generated by Congress and to respond to legislative mandates and policy changes. SOO at 33.

We also disagree with the protester's argument that the inclusion in the ECASLA of language authorizing the Secretary of Education to contract with lenders for the servicing of loans that they sell to the government demonstrates that Congress contemplated that these loans would not be serviced under the CSB. We simply have no basis to conclude that this language may reasonably be interpreted as signaling that Congress intended to preclude the Secretary from contracting for the services from a source or sources other than the lenders.

Sallie Mae further argues that the modification of ACS's CSB contract to encompass the servicing of the FFELP loans that the agency will acquire represents an out-of-scope change in the original contract because it will dramatically increase the scope of the loan portfolio that ACS is servicing for the government.

As previously noted, the agency reported to us that ACS expects to service approximately [deleted]. According to the agency, if all of the loans that lenders were vested with the option to put to the government in mid-September are in fact

⁵ On page 20 of its comments on the agency report, the protester argued that "[w]hile it is true that the SOO purported to require the management of 'all types of student aid obligations,' . . . , offerors such as awardee ACS clearly understood that the scope of the solicitation was restricted to the listed programs" Since, as noted above, the listed programs included both the Stafford Loan program and the PLUS program--that is, the solicitation specifically included within the scope of the CSB solution the types of FFELP loans that the ECASLA authorizes the government to purchase from lenders--the protester's argument in fact supports our conclusion that the CSB contract was intended to encompass the servicing of these categories of Title IV loans.

put, about [deleted] new borrowers would be added to the ACS portfolio, and the projected cost of servicing these additional borrowers in 2009 would be approximately [deleted].⁶ AR at 3. These figures were substantially decreased by the agency decision to take corrective action, however. As previously noted, the agency expects to award a new contract for servicing of the FFEL loans by March or April of 2009, and anticipates that the contractor will be able to begin servicing the loans by August or September 2009. According to the chart summarizing the loans to be put to the government by borrower and month included in the agency report at Tab O, [deleted] loans that lenders have a vested option to put to the government during fiscal year 2009 are to be put in August, and [deleted] are to be put in September 2009.⁷ In other words, [deleted] of the loans will potentially be serviced by the new contractor. The addition of the remaining [deleted] that may be put to the government prior to August represents an increase of only approximately [deleted] to ACS's existing portfolio of [deleted] loans. Such an increase clearly cannot be characterized as--to use the protester's wording--dramatic. Moreover, even assuming that all [deleted] loans do end up being serviced under ACS's CSB contract, this represents an increase of approximately [deleted] percent to ACS's existing portfolio. Such an increase in workload volume does not, in and of itself, signal a modification beyond the scope of the original contract. See Caltech Serv. Corp., B-240726.6, Jan. 22, 1992, 92-1 CPD ¶ 94 at 5 (30 percent increase in workload volume not beyond scope of original contract).

The protest is denied.

Gary L. Kepplinger
General Counsel

⁶ On page 3 of its report on the protest, the Department of Education reported that if all of the loans that lenders had a vested option to put to the government were put, ACS would have to service approximately [deleted]; on page 13 of the same report, it stated that if all of the loans were put, the increase in the number of borrowers would be [deleted]. (The agency furnished no explanation for the inconsistency.) In both cases, the agency reported that the projected cost of servicing the new borrowers would be about [deleted].

⁷ While, as noted on page of 3 of this decision, the agency reported to us that as of late September, the number of loans that lenders had a vested option to put to the government was [deleted], see AR at 2, the chart at Tab O contained a slightly different number, i.e., [deleted].