



G A O

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**Comptroller General
of the United States**

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

Decision

Matter of: Professional Performance Development Group, Inc.

File: B-294054.3

Date: September 30, 2004

John S. Pachter, Esq., and Erin R. Karsman, Esq., Smith Pachter McWhorter & Allen PLC, for the protester.

David T. Copenhaver, Esq., Bureau of the Public Debt, Department of the Treasury, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's challenge to an agency's decision about which vendors under a multiple-award contract will be eligible to compete for which task orders--a decision based on the agency's interpretation of a contract clause that apportions eligibility for the award of task orders among vendors--is not for review by the Government Accountability Office.

DECISION

Professional Performance Development Group, Inc. (PPDG) protests a decision by the Bureau of the Public Debt, Department of the Treasury, to limit the competition for certain task orders under multiple-award contract No. TPD-04-C-0018 to small disadvantaged and Historically Underutilized Business Zone (HUBZone) small businesses. PPDG argues that, under the terms of the RFP, the agency was required to provide a fair opportunity for all of the multiple-award contract holders (hereinafter, the vendors) to compete for these task orders, rather than limiting eligibility for receipt of these orders to small business vendors.

We dismiss the protest.

The Bureau of the Public Debt awards contracts on behalf of the Department of the Treasury's nine FedSource branch offices, which operate as part of the Treasury's

“franchise fund.”¹ The branch offices essentially market and provide a wide range of support services to other agencies on a reimbursable basis.

The contract at issue here was awarded October 30, 2003, to nine vendors—six of which, including PPDG, are large businesses, and three of which are small businesses (one small business, one 8(a) small business, and one HUBZone small business). This contract replaced contract No. TPD-99-C-0009, which was awarded on October 1, 1998, and expires in October 2004. PPDG is a vendor under both contracts, and task orders first awarded under the 1998 contract are being transitioned to the 2003 contract.

The 2003 contract contains a clause that governs which of the vendors will be allowed to compete for which task orders. Subsection (a) of the clause is set forth below, with relevant portions underlined:

G.14 COMPETITION OF TASK ORDERS AMONG CONTRACTORS

a. Since the Government may award multiple contracts, the following procedures and selection criteria will be used to provide Contractors a fair opportunity to be considered for each task order (FAR 16.505(b), Ordering). Each task proposal request will specify whether the task order is being awarded based upon lowest price or a combination of price and technical merit representing the best value to the Government. FedSource identified requirements will be competed among 8(a) and HUBZone Contractors. If no reasonable proposal can be awarded among this group, then non-8(a)/HUBZone Contractors may compete.

When the Contractor solicits for and brings business to the FedSource for task order request[s] under the terms of this Contract the following procedures will apply:

1) If the Contractor is an 8(a) or HUBZone business and the estimated value of the requirement is less than \$3 million, that Contractor will be given the opportunity to negotiate a sole-source task order award, pending a price reasonableness determination.

¹ The Government Management Reform Act of 1994, Pub. L. No. 103-356, 31 U.S.C. § 501 note (2000), authorized the establishment of six franchise fund pilot programs to provide common support services to federal agencies on a reimbursable basis. The Department of Treasury operates one of the six franchise funds.

2) If the [C]ontractor is an 8(a) or HUBZone business and the estimated requirement exceeds \$3 million, competition among 8(a) and HUBZone [C]ontractors will be conducted in accordance with G.10.

3) If the Contractor is a non-8(a)/HUBZone business, competition among all awarded Contractors will be conducted in accordance with G.10, unless determination is made that [issuance of a task order on a basis other than full and open competition is justified].

*Note: Large business opportunity for this incentive will not exceed 25% of the total value of orders awarded in the contract period/option year in which task award is made.

Contract No. TPD-04-C-0018, § G.14 (emphasis added).

PPDG learned in late August 2004 that several requirements it brought to FedSource between 1998 and 2001, which resulted in the award of task orders under the 1998 contract, were being awarded to the HUBZone small business vendor without PPDG having an opportunity to compete for the business. This protest followed.

PPDG argues that the agency is not providing all vendors with a fair opportunity to compete for orders, in violation of section G.14 of the 2003 contract. Specifically, PPDG contends that under the terms of the contract, a vendor was to be provided an opportunity to compete for any business it brought to FedSource, regardless of whether the business was initially brought under the 2003 contract, or under the contract awarded in 1998. In the agency's view, the clause above governs only new business first brought to FedSource under the 2003 contract; the agency considers business brought under the 1998 contract, and subsequently transitioned to this contract (or reordered here), as FedSource-identified work. Thus, under the terms of the contract, the agency is limiting eligibility for award of previously-identified work to the small business vendors.

The agency seeks dismissal of this protest on the ground that challenges to the proposed award of task orders under an indefinite-delivery/indefinite-quantity (ID/IQ) contract are not authorized by the Federal Acquisition Streamlining Act of 1994 (FASA), § 1004, Pub. L. No. 103-355, 108 Stat. 3243, 3252-53 (1994). This provision states 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.

41 U.S.C. § 253j(d) (2000). We have noted that the provisions of FASA regarding task and delivery order contracts were intended to encourage the use of multiple-award task order contracts, rather than single-award task order contracts, in order to

promote an ongoing competitive environment in which each awardee is fairly considered for each order issued. Teledyne-Commodore, LLC-Recon., B-278408.4, Nov. 23, 1998, 98-2 CPD ¶ 121 at 3; Electro-Voice, Inc., B-278319, B-278319.2, Jan. 15, 1998, 98-1 CPD ¶ 23 at 5.

In this case, PPDG acknowledges FASA's restriction on protest review of task or delivery orders, but argues that the agency here is not promoting an ongoing competitive environment with its actions, as FASA intended. Instead, the protester contends the agency is conducting a partial downselection, the result of which will be to exclude PPDG from future opportunities to compete for business it brought to the 1998 contract. In this regard, PPDG contends that the situation here is analogous to those we reviewed in Electro-Voice and Teledyne-Commodore.

We disagree. In Electro-Voice, the agency issued orders to two contractors for the production and delivery of four product demonstration models for further testing. The results of the testing were to be used in selecting which of the two contractors would receive all remaining orders under the contract. See Electro-Voice, Inc., supra, at 5. Under these circumstances, we concluded that the restriction on protests of delivery orders contained in FASA did not bar our review of a protest of the downselection decision. Id. Similarly, the facts in Teledyne-Commodore led us to conclude that the agency was essentially conducting a single source selection that would effectively bar the protester from competing for any future task orders. See Teledyne-Commodore, LLC-Recon., supra, at 4-5.

Nothing of the sort is happening here. This is not a situation where PPDG will have no opportunity to compete for orders in the future, which was an essential element of the two downselection decisions. Rather, under the terms of clause G.14, PPDG will be able to compete for any new business brought to this contract by any of the six large business vendors. In fact, an inherent component of using a task order to make a downselection is the opportunity to compete--albeit for the last time--for the work covered by the overall multiple-award contract. Here, PPDG gets no opportunity to compete for what the agency now views as FedSource-identified requirements. Instead, PPDG--and all the large business vendors--are excluded from eligibility for award by operation of the contract, as they would be in any set-aside environment.

In our view, PPDG is complaining about a matter of contract interpretation. The terms of this contract apportion each task order to one of two previously defined pools of vendors--either the small business vendors, or all vendors--depending upon where the requirement originated. Put simply, when FedSource is responsible for generating a requirement, the contract limits eligibility for award of a task order to the small business vendors; when a vendor is responsible for the requirement, the contract governs which vendor(s) among the entire range of vendors will be eligible for the award, depending on the size of the order, and the size status of the vendor that generated the requirement. The only dispute here is the agency's interpretation

of the clause to mean that all business identified under the 1998 contract will be viewed as FedSource-identified business under this contract.

We also disagree with PPDG's contention that the situation here is analogous to the situation we addressed in LBM, Inc., B-290682, Sept. 18, 2002, 2002 CPD ¶ 157. In LBM, the protester argued that a task order placed under a multiple-award ID/IQ contract had previously been set aside exclusively for small businesses, and could not be transferred to the multiple-award ID/IQ contract without regard to the Federal Acquisition Regulation § 19.502-2(b) requirements pertaining to small business set-asides. We concluded that the limitation on our bid protest jurisdiction was not intended to preclude a protest raising a challenge to the transfer and inclusion of work in ID/IQ contracts without complying with applicable small business laws and regulations. Id. at 4-5.

An essential element of LBM, and of the cases it follows that reached similar conclusions regarding the statutory limitation on our jurisdiction to hear protests of task and delivery orders under multiple-award ID/IQ contracts--N&N Travel & Tours, Inc. et al., B-285162.2, B-285162.3, Aug. 31, 2000, 2000 CPD ¶ 146 and Ocuto Blacktop & Paving Co., Inc., B-284165, Mar. 1, 2000, 2000 CPD ¶ 32--is that the protester did not hold one of the ID/IQ contracts under the umbrella contract, and was unable to reasonably foresee that work included in the challenged task or delivery order would be purchased using the multiple-award contract.² PPDG elected to participate in this contract with full knowledge of the fact that the contract included a scheme to apportion task orders among vendors based on the source of the work. PPDG is not arguing that these task orders are being improperly placed under this contract, in violation of the Small Business Act, or any other statute or regulation, as was the case in LBM. Rather, PPDG's argument is with the agency's apportionment of task orders to small business vendors, or to all vendors, under the terms of the contract. These arguments provide no basis to conclude that the limitation on our bid protest jurisdiction should not apply to this situation.³

The protest is dismissed.

Anthony H. Gamboa
General Counsel

² LBM, supra, at 6; N&N Travel, supra, at 6-7; and Ocuto, supra, at 5-6.

³ We note for the record that the statutory scheme for the administration of task and delivery order contracts provides for a task and delivery order ombudsman responsible for reviewing complaints from contractors, and for ensuring that all of the contractors are afforded a fair opportunity to be considered for task and delivery orders. 41 U.S.C. § 253j(e). Under the statutory scheme for these contracts, the task and delivery order ombudsman should be available to PPDG for review of this issue.