Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

# Decision

**Matter of:** Floro & Associates

**File:** B-285451.3; B-285451.4

**Date:** October 25, 2000

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Terry E. Thomason, Esq., and Jonathan A. Swanson, Esq., Carlsmith Ball, for the protester.
Adele Ross Vine, Esq., General Services Administration; Raymond M. Saunders, Esq., Department of the Army; and Laura J. Mann, Esq., Small Business Administration, for the agencies.
Charles W. Morrow, Esq., and James Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Task order for management support services improperly exceeded the scope of multiple award, indefinite-delivery/indefinite-quantity, section 8(a) contract for noncomplex integration services where the work required by the task order is materially different from the scope of work set forth or reasonably contemplated under the contract.

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## DECISION

Floro & Associates protests task order No. T0600BN2014 for management services for the Department of the Army, Tripler Army Medical Center, Hawaii, issued by the General Services Administration (GSA) to SMF Systems Corporation under SMF's section 8(a), multiple award, indefinite-delivery/indefinite-quantity (MAIDIQ) contract No. GS00K97AFD2187 with GSA and the Small Business Administration (SBA).[1] Floro contends that the Army violated the Economy Act, 31 U.S.C. § 1535 (1994), by having GSA acquire the services without proper authority and that the task order was beyond the scope of SMF's MAIDIQ contract.

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[1] Section 8(a) of the Small Business Act authorizes the SBA to contract with government agencies and arrange for the performance of such contracts by awarding subcontracts to socially and economically disadvantaged small businesses. 15 U.S.C. § 637(a) (1994).

We sustain the protest.

Since February 1997, the Pacific e-Health Innovation Center (P-EIC), Tripler Army Medical Center, has obtained information technology resources pursuant to an interagency agreement with GSA, which authorizes GSA to procure information technology for the Army from third parties.[2] GSA Agency Report, exh. 23, Service Agreement. In early March 2000, the Army enlisted the services of GSA, based on this agreement, to procure a "new government requirement" for "collaboration and distance learning/mentorship management" services for P-EIC. See Army Agency Report, Program Manager's Memorandum for Record, Aug. 14, 2000, at ¶ 2.

The statement of work (SOW) for this requirement stated the scope as follows:

> The Contractor shall provide management services in support of the P-EIC's Collaboration and Distance Learning and Mentorship product lines. P-EIC's projects represent both prototyping and research projects and emerging technology projects which have a concentration in technology development and demonstration/validation, and maturation.

GSA Agency Report, exh. 3, SOW ¶ 2.3. The two major specific tasks of the SOW were:

> **Task 2: E-health New Initiatives and Collaboration Product Line Management.** The Contractor shall provide one half of a full-time equivalent (FTE) of a senior level project manager to support the P-EIC Program Manager in planning and executing the E-health New Initiatives and Collaboration Product Line. This shall include identification of potential collaboration and partnership opportunities for the P-EIC, coordinating and effecting discussions and agreements with collaborative/partner organizations, including federal, state and private organizations, and developing project plans for resulting projects. The Contractor shall define plan of approach, process, and established criteria for engaging in new business opportunities and collaborations.

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[2] The Clinger-Cohen Act of 1996 (originally called the Information Technology Management Reform Act of 1996), 40 U.S.C. § 1412 (e) (Supp. IV 1998), authorizes the Director of the Office of Management and Budget (OMB) to designate "one or more heads of executive agencies as executive agent for Government-wide acquisitions of information technology." GSA cites OMB's letters dated August 2, 1996 and September 23, 1998, which designated GSA as such an agent, as the authority for the agreement. GSA Agency Report, exhs. 19a, 19b.

. . . . .

> **Task 3: Distance Learning and Mentorship Product Line Management.** The Contractor shall provide one half of a FTE of a senior level project manager to support the P-EIC Program Manager in planning and executing the Distance Learning and Mentorship Product Line. The contractor shall develop and demonstrate programs to provide for evolving technology-based learning programs and leveraging of existing programs related to healthcare technology learning/mentorship. The predominant outcome of activities within this pillar shall be education and training. These programs shall include federal, state and other Hawaii-based organizations. The focus of the efforts will be evolving technology-based learning programs and leveraging of existing programs.

Id., ¶¶ 3.2, 3.3. Each of these tasks had numerous subtasks.[3]

To fulfill the Army's requirements, GSA, by letter dated March 3, 2000, solicited proposals from Federal Supply Schedule (FSS) vendors and non-FSS vendors. The letter explained that the evaluation of proposals would be based on the vendor's capacity, technical proposal, past performance, and price, with award to be based on the best value. Floro, which was under contract with the Army for similar services, and SMF were among vendors who submitted quotes by the March 17 due date.[4] Protest (May 22, 2000), encl. at 17. After evaluating the quotes, on April 3, GSA issued a task order to SMF at a price of $141,600 on the basis that SMF's proposal represented the best value of the proposals received. GSA Agency Report, exh. 4, Purchase Order.

Following an agency debriefing, Floro filed a protest at this Office challenging the order. Floro contended that the procurement was an illegal interagency contract, was conducted under the FSS program to obtain a non-FSS item, and that GSA had improperly evaluated Floro's proposal. Protest (May 22, 2000) at 3-6. On June 7, GSA notified this Office that the competition was inadvertently conducted between FSS and non-FSS contract holders, and that GSA would cancel the award to SMF and

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[3] Task 1 of the SOW was for task order management that included work apparently ancillary to the performance of the other SOW tasks. GSA Agency Report, exh. 3, SOW ¶ 3.1.

[4] The record does not show whether SMF or Floro held an FSS contract against which this specific requirement could be ordered. The record shows that GSA considered SMF to be an FSS contractor, although the record does not indicate whether the solicited services could be obtained under an FSS contract. GSA Letter (June 7, 2000).

"review the needs of the Department of the Army for support services to determine the most appropriate procurement method to be utilized." GSA Letter (June 7, 2000). We therefore dismissed the protest on June 8.

On June 13, Floro requested reinstatement of its earlier protest because SMF had continued work under the order, notwithstanding GSA's promised corrective action. On June 20, GSA explained that because "[t]he contracting officer responsible for the procurement was absent from the office for several days following" the June 7 letter, the promised corrective action had not been implemented, and provided evidence that it terminated SMF's order effective June 20. Consequently, our Office dismissed Floro's request for reinstatement. On June 23, Floro submitted a request that we recommend that Floro be reimbursed its costs of pursuing these protests.

On June 28, GSA again issued a task order to SMF for the Army's requirement, in the amount of $119,760, this time under SMF's 8(a) MAIDIQ contract with GSA.[5] GSA Agency Report, exh. 12. In 1997, GSA had entered into the competitively awarded MAIDIQ contract with SMF under the SBA's section 8(a) program under the Federal Acquisition Services for Technology (FAST) program. The scope of the SMF MAIDIQ contract states:

> The Contractor shall provide non-complex systems integration services under SIC 7373 for GSA client agencies.[6]

GSA Agency Report, exh. 26, § C.3. The SOW for SMF's MAIDIQ contract provides

> The Contractor shall integrate commercially available off-the-shelf hardware and software resulting in a turnkey system for the GSA client agency. Tasks that may be required of the Contractor include but are not limited to the following:
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> o Documentation preparation
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> o System Design
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> o Evaluation of alternative implementations

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[5] The Army states that following Floro's earlier protests and prior to the termination of SMF's task order, GSA asked the Army: "was [the Army] requirement still required; was [the Army] pleased with SMF's performance to date; and would [the Army] desire SMF to continue the work." The Army responded "yes" to these questions and that it could "absorb no more than a 1-week break in service." Army Agency Report, Memorandum for Record ¶ 4.

[6] SIC Code 7373 is entitled Computer Integrated Systems Design. 13 C.F.R § 121.201 (2000).

o Develop integration plans

o Acquire hardware/software

o Component integration

o Test components and systems

o Installation of non-complex systems

o Maintenance and repair of non-complex systems

o Training on installed non-complex systems

Id. § C.4.1.

Floro first contends that the procurement conducted by GSA on behalf of the Army constituted an "illegal off-load" by the Army that violated the Economy Act because the Army neglected to prepare a determination and finding documenting that the requirement could not be obtained as conveniently or economically by contracting directly with a private source, as required by Federal Acquisition Regulation (FAR) § 17.503(a)(2). Protest at 5-6.

Under the Economy Act, an agency may enter into an inter-agency agreement to fulfill its requirements under another agency's contract, provided the requirements of the Act are met. 31 U.S.C. § 1535; N&N Travel Tours et al., B-285164.2, B-285164.3, Aug. 31, 2000, 2000 CPD ¶___ at 5. The Economy Act applies to inter-agency acquisitions unless there is more specific authority for such transactions. See FAR § 17.500(b).

GSA argues that the Economy Act did not apply to the transaction because GSA had specific authority to conduct the procurement under the Clinger-Cohen Act, pursuant to which OMB has authorized GSA to purchase information technology on behalf of agencies such as the Army. GSA Agency Report at 3-6. Floro responds that the Clinger-Cohen Act does not provide GSA with specific authority to avoid the applicability of the Economy Act because the Clinger-Cohen Act is only applicable where GSA is acquiring "information technology," as defined in the Clinger-Cohen Act, and this requirement does not fall under that definition.[7] Protester's Comments at 7-10.

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[7] The Act provides that the term "information technology" "means any equipment or interconnected system or subsystem of equipment, that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information," including "computers, ancillary equipment, software, firmware and similar procedures,

(continued...)

We need not resolve whether the Army's requirement constitutes information technology, as defined by the Clinger-Cohen Act, or whether the authority contained in that Act is otherwise applicable to this transaction, because GSA has the authority to conduct this procurement to fulfill the Army's requirements under the Federal Property and Administrative Services Act of 1949, under which GSA is authorized to "procure and supply personal property and nonpersonal services for the use of executive agencies in the proper discharge of their responsibilities." See 40 U.S.C. § 481(a)(3) (1994). We think this broad authority encompasses the requirement being procured here, so that the Economy Act is not applicable to this transaction. See N&N Travel & Tours, Inc. et al., supra.

Floro also protests that the recent task order issued by GSA exceeds the scope of SMF's 8(a) MAIDIQ contract.[8] We agree.

While 41 U.S.C. § 253j(d) (1994) generally precludes protests in connection with issuance or proposed issuance of a task order placed against an indefinite-delivery/indefinite quantity contract, protests, such as Floro's, on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued are authorized. In determining whether a task order is beyond the scope of the original contract, this Office considers whether there is a material difference between the task order and that contract. Evidence of such a material difference is found by reviewing the circumstances attending the procurement that was conducted; examining any changes in the type of work, performance period, and costs between the contract as awarded and as modified by the task order; and considering whether the original contract solicitation adequately advised offerors of the potential for the type of task order issued. The overall inquiry is "whether the modification is of a nature which potential offerors would reasonably have anticipated." Makro Janitorial Servs., Inc., B-282690, Aug. 18, 1999, 99-2 CPD ¶ 39 at 3; Ervin and Assocs., Inc., B-278850, Mar. 23, 1998, 98-1 CPD ¶ 89 at 7.

We find the task order went beyond the scope of SMF's MAIDIQ contract for "noncomplex integration services" of commercially available off-the-shelf hardware

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(...continued)
services (including support services), and related resources." 40 U.S.C. § 1401(3) (Supp. IV 1998).

[8] While GSA argues that this protest contention is untimely, it was based upon documents first obtained in the agency report and raised in Floro's comments filed within 10 days of its receipt of the report, Protester's Comments at 10; thus, we consider Floro's protest to be timely filed. 4 C.F.R. § 21.2(a)(2) (2000). GSA also argues that Floro is not an interested party because it is not an 8(a) concern and the order was placed under a 8(a) contract; this contention is meritless because Floro's argument is that the order was beyond the scope of the 8(a) contract.

and software resulting in turnkey systems for GSA's client agencies. This task order, on its face, does not call for or apparently include hardware/software integration services.[9] Instead, under this task order, the contractor is required to provide management services to assist P-EIC in support of the P-EIC's Collaboration and Distance Learning Mentorship product lines. There is no indication that this task order entails integrating hardware and software, but by its terms it includes such activities as assisting in publicity; identifying federal, state and private opportunities for potential collaboration/partnership with the P-EIC; and monitoring, tracking, and overseeing the execution of new initiatives involving e-health. See GSA Agency Report, exh. 3, Task Order, at 2-4. While it may be that the P-EIC's projects involve the use/application of information technology to improve healthcare or access to healthcare, as posited by GSA, and that the management support under the task order relates to information technology because the project involves web-based tools, from our review we find no tasks or subtasks included in the SOW for this order that are susceptible of being classified as non-complex integration services. In sum, we conclude that the work delineated under the task order is materially different from the work contemplated under SMF's MAIDIQ contract and therefore exceeds that contract's scope.

The protest is sustained.

We recommend that GSA terminate the task order issued to SMF and that this requirement be procured in accordance with the statutory and regulatory competition requirements. We also recommend that the protester be reimbursed the reasonable cost of filing and pursuing its protests, including attorneys' fees.[10]

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[9] Systems integration generally involves combining diverse elements of hardware and software often acquired from different vendors into a unified system. See Computer Dictionary 195 (3rd ed. 1992); Dictionary of Computers, Information Processing & Telecommunications 629 (2nd ed. 1987); Webster's New World Dictionary of Computer Terms 211 (4th ed. 1992).

[10] In addition to Floro's costs of pursuing the present protest, we recommend that Floro be reimbursed the costs of pursuing its earlier protests of GSA's actions in procuring these services from SMF. We make this recommendation because the agency's purported corrective action in response to those protests was to improperly add the work to SMF's contract and because nothing in the record suggests that the work could have been ordered from SMF's FSS contract as GSA originally did. See Louisiana Clearwater, Inc.—Reconsideration and Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ __ at 5-6 (protester entitled to initial protest costs where corrective action in response to that protest fails to address a meritorious issue that prompted the corrective action); Commercial Energies, Inc.—Recon. and Declaration of Entitlement to Costs, B-243718.2, Dec. 3, 1991, 91-2 CPD ¶ 499 at 5-6 (protester entitled to protest costs where agency does not take reasonable corrective action as it promised).

4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days of receiving this decision.

Anthony H. Gamboa
Acting General Counsel