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**Comptroller General  
of the United States**

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

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## Decision

**Matter of:** Armed Forces Hospitality, LLC

**File:** B-298978.2; B-298978.3

**Date:** October 1, 2009

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Rebecca E. Pearson, Esq., James Y. Boland, and Dismas Locaria, Esq., Venable LLP, for the protester.

J. Michael Littlejohn, Esq., and Hal J. Perloff, Esq., Akerman Senterfitt LLP, for Actus Lend Lease, LLC, an intervenor.

Matthew R. Keiser, Esq., Department of the Army, for the agency.

Louis A. Chiarella, Esq., and Edward T. Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Protest jurisdiction of the Government Accountability Office (GAO) extends to protest of a no-cost contractual agreement for the provision of lodging services to transient soldiers, as part of the Department of the Army's privatization of Army lodging program, because the contract concerns a procurement for services by a federal agency and results in a benefit to the government.

2. Protest challenging agency's alleged modification of a contract as an improper relaxation of requirements is denied where there was no change to the scope of work anticipated by the underlying solicitation.

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### DECISION

Armed Forces Hospitality, LLC (AFH), of Bethesda, Maryland, protests the modification of the contract awarded to Actus Lend Lease, LLC, of Nashville, Tennessee, by the Department of the Army, Corps of Engineers, regarding the privatization of Army lodging (Group A) project. AFH argues that the Army improperly relaxed the performance requirements in the contract beyond what was reasonably contemplated by the scope of work of the underlying solicitation.

We deny the protest.

## BACKGROUND

In 1996, Congress enacted legislation authorizing the Military Housing Privatization Initiative, with the goal of improving Department of Defense military family housing, as well as transient housing (*i.e.*, temporary lodging), by using an approach considered to be more economical and quicker than the traditional military construction processes. This initiative allows private sector financing, ownership, and operation and maintenance of military housing. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-06, § 2801 *et seq.*, 110 Stat. 186 *et seq.*, codified at 10 U.S.C. §§ 2871-85 (2006), as amended. The Army's transient housing program under this initiative is the Privatization of Army Lodging (PAL) program.

Under the PAL program, the Army selects a private-sector firm to construct, renovate, manage, and maintain lodging facilities at Army installations. The firm will be responsible for owning, developing, managing, maintaining, and marketing lodging facilities at one or more Army installations for use by transient guests (*e.g.*, soldiers and their families on temporary duty or permanent change of station travel, civilians on official travel, military retirees on leisure travel). The PAL program seeks to apply private-sector expertise, resources, and market-based incentives to improve the quality of life for soldiers and their family members while in a transient status. The program's objective is to provide quality, on-post hotel accommodations that meet the varying needs of a mobile military community through improvements to the on-post lodging inventory and/or new construction, and to appropriately maintain these facilities throughout a long-term business relationship with the selected private-sector firm. Agency Report (AR), July 16, 2009, at 1.

On October 28, 2005, the Army issued the underlying request for qualifications (RFQ) No. W912DR-04-R-0082 for the PAL program. The RFQ informed firms that the Army intended to privatize its transient lodging facilities at certain specified military installations (referred to as Group A) using a two-phase process.<sup>1</sup> The RFQ established that phase 1 involved the award of a \$350,000 firm-fixed price contract, as a result of the competitive selection process, for the preparation of a lodging development and management plan (LDMP), which was to be the business plan for the PAL project. RFQ at 10. In phase 2, the Army would authorize implementation of the LDMP, subject to several approval authorities, as follows:

During Phase 2, the awardee will implement the LDMP, provided the Headquarters, Department of the Army (HQDA), Office of the

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<sup>1</sup> Group A included installation lodging facilities located at: Redstone Arsenal and Fort Rucker, Alabama; Fort Leavenworth and Fort Riley, Kansas; Fort Polk, Louisiana; Fort Sill, Oklahoma; Fort Hood and Fort Sam Houston, Texas; Yuma Proving Ground, Arizona; Fort Myer, Virginia/Fort McNair, DC; and Fort Shafter/Tripler Army Medical Center, Hawaii.

Secretary of Defense (OSD), Office of Management and Budget (OMB), and the Congress approve the plan. Once approval is obtained the transition and transfer of assets and operations will begin.<sup>2</sup>

RFQ at 6.

Importantly, while it was the Army's desire to have the firm selected for phase 1 also implement the LDMP once approved, id., the RFQ expressly stated that:

In return for this payment, the Army will be granted full and unlimited rights to use the LDMP, including the right to provide the LDMP to others in this or other lodging privatization projects. At this point, the contract will be complete and the awardee will have no right, title, or interest in Phase 2 by virtue of its participation in Phase 1.

Id.

The Phase 2 LDMP implementation effort—including the Army's transference of ownership of the existing lodging facilities and provision of a long-term (50 years) lease interest in the underlying land—would be conducted by means of a separate, no-cost, mutual agreement between the phase 1 awardee (or other business concern) and the Army following final acceptance of the LDMP. Id. at 6, 11.

In addition to establishing the two-phase process, the RFQ included a statement of work (SOW), instructions to offerors regarding their submissions, and selection evaluation criteria. The SOW addressed both LDMP development and implementation in very general terms. Regarding preparation of the LDMP, the SOW indicated that the selected firm would “work closely with the Army to craft a LDMP that is acceptable to the Government and offers the best value for transient lodging for each installation included in the project group.” Id. at 9. The SOW further provided that the LDMP would consist of several general components (e.g., development plan, financial plan and transactional instruments, operations, maintenance, and property management plan, asset management plan) and that “the Army and awardee will establish specific elements for each component jointly during Phase 1 of the project.” Id. Regarding the phase 2 implementation, the SOW merely stated that “the Army expects transition to project implementation to occur within 2 to 4 months,” and the Army would transfer ownership of existing assets and

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<sup>2</sup> The phase 2 project implementation was itself further broken down into periods: a transition period of approximately 2 to 4 months during which the property transfer (lease negotiations) would occur; an initial development period, anticipated to last between 2 and 5 years after property transfer during which facility renovation and new construction would primarily occur; and the stabilized operating period. RFQ at 25.

provide an appropriate interest in underlying land to facilitate implementation consistent with the LDMP. Id. at 10.

As it relates to the protest, the SOW did not establish any minimum requirements with respect to project financing amounts, the extent of the capital improvements (new construction and renovation) to be made, the number of new rooms to be constructed, the total number of rooms to be renovated and/or constructed, or timeframes under which the renovation and new construction were to occur. While offerors were required to provide a “preliminary project concept” as part of their submissions that described their general approach to achieving program objectives, the details regarding project implementation were to occur after the competitive selection process was completed, as part of the LDMP development effort. This is further evidenced by the Army’s answers to offerors’ questions as follows:

Question 19: Will recently commenced [Community and Family Support Center/Department of the Army] funded upgrades (whether renovation or construction) be completed and transferred cost-free to the winners) of the PAL process? Will funded projects that have not yet broken ground be completed prior to the asset transfers?

Answer 19: Assets will be transferred based on mutual agreement between the Army and the awardee. The disposition of specific assets will be addressed during the LDMP process, to include those assets currently under construction or renovation.

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Question 38: For selected facilities, would the Army prefer demolition based on condition and/or location factors in lieu of return to inventory, or should the offeror assume that the buildings [will] be returned in their existing condition?

Answer 38: For purposes of responding to this solicitation, the Army expects offerors to use their judgment to determine the best use and disposition of existing lodging facilities. Preliminary project concept of the awardee and negotiations during the LDMP will determine final disposition of existing Army lodging assets.

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Question 47: Does the RFQ require that the firm implementing the LDMP manage and execute environmental remediation (out of program funds) even if the remediation has previously been funded under the Defense Environmental Restoration Account (DERA)?

Answer 47: Responsibility for environmental remediation will be addressed, as applicable, during the LDMP process.

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Question 25: Do we need to have secure communications capabilities for [distinguished visitors] staying in lodging, or will this be provided by the post?

Answer 25: This will be determined during the LDMP process.

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Question 47: How are the fire and police expenses bill[ed]? Is it on a % of replacement cost, % of square footage, etc. or a combination of all of the metrics?

Answer 47: The municipal services agreement is negotiated during the LDMP. . . .

Amend. 002 at 6, 10, 12; Amend. 004 at 4, 8.

On no fewer than twenty instances, the Army's responses to offerors' questions regarding the PAL project stated that the PAL project details would be determined during the LDMP development process, after the selection of the phase 1 awardee.

Six offerors, including Actus and AFH, provided submissions by the December 13 closing date. On September 26, 2006, after the evaluation of offerors' submissions, the Army awarded contract No. W912DR-06-C-0049 to Actus in the amount of \$350,000 for the phase 1 LDMP development effort. AR, Tab 8, Actus Contract. On June 23, 2008, the Army accepted delivery of Actus' LDMP and authorized contract payment. There were no modifications issued by the Army to the Actus contract.

On June 15, 2009, the Army issued an announcement regarding the planned implementation of the PAL (Group A) program. Specifically, the announcement stated: 1) that the Army would transfer existing lodging facilities to Actus on August 15; 2) that during the first 2 years of the project Actus would fully renovate 933 rooms, as well as bring lodging facilities generally into compliance with off-post hotel code standards and repair critical mechanical, electrical, and plumbing infrastructure systems; and 3) that Actus would work to secure the additional financing required to construct the new hotels and complete the remaining renovations. After receiving notice of the agency's plan for implementation of the PAL (Group A) program, AFH filed this protest.

## DISCUSSION

AFH raises various challenges to the Army's decision to proceed with PAL (Group A) project implementation with Actus. The protester's primary assertion is that the Army improperly relaxed the performance requirements of its contract with Actus, thereby changing the scope of work anticipated by the RFQ and resulting in an improper sole-source contract of the modified work. As detailed below, we find that the planned implementation of the PAL (Group A) project is consistent with the RFQ's statement of work.<sup>3</sup>

### Jurisdiction

As a preliminary matter, the Army contends that the protest should be dismissed as beyond the bid protest jurisdiction of our Office. The Army argues that while the phase 1 LDMP development effort was a procurement, as evidenced by the \$350,000 contract awarded to Actus, the phase 2 LDMP implementation is not a procurement. According to the Army, the implementation phase is separate from the contract awarded for development of the LDMP, and that it is a no-cost real estate transaction in which the Army is merely conveying existing lodging facilities and leasing real property to a private concern.

Under the Competition in Contracting Act of 1984 (CICA) and our Office's Bid Protest Regulations, we review protests concerning alleged violations of procurement statutes or regulations by federal agencies in the award or proposed award of contracts for procurement of goods and services, and solicitations leading to such awards. 31 U.S.C. §§ 3551, 3552; 4 C.F.R. § 21.1(a) (2009). As a general matter, our jurisdiction does not extend to challenges concerning the sale or lease of government property since these activities, by their nature, are not procurements. Meyers Cos., Inc., B-275963 et al., Apr. 23, 1997, 97-1 CPD ¶ 148 at 4 (lease of federal land is not a procurement of property or services encompassed by GAO's bid protest jurisdiction, notwithstanding the lease requirement to erect and maintain fencing); Fifeco, B-246925, Dec. 11, 1991, 91-2 CPD ¶ 534.

In discerning the nature of a contractual transaction, we have found that the government need not commit to the payment of funds or incur any monetary liability in order for there to be a procurement. See Century 21--AAIM Realty, Inc., B-246760, Apr. 3, 1992, 92-1 CPD ¶ 345 at 3-4. Likewise, the agency need not receive money in order for a contractual transaction to constitute a sale. See Government of Harford County, Maryland, B-283259, B-283259.3, Oct. 28, 1999, 99-2 CPD ¶ 81 at 4. We also recognize that certain transactions, including concession contracts, can involve both

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<sup>3</sup> Although we do not specifically address all of AFH's remaining issues and arguments, we have fully considered all of them and find they provide no basis on which to sustain the protest.

a sale and a procurement. For example, in Government of Harford County, Maryland, supra, the Army's privatization of utility systems constituted such a mixed, or bundled, transaction and simultaneously involved both the sale of government property and the procurement of services. Id.

Here, the underlying RFQ was not an offer to sell or lease government-owned property for a monetary payment. Rather, the RFQ was essentially the solicitation of submissions under which the Army would obtain the much-needed revitalization of lodging facilities, with little to no appropriated fund outlay, by leveraging existing lodging and real property assets.<sup>4</sup> While project implementation involves the Army conveying existing lodging facilities and leasing real property, the Army's decision to convey and lease property is predicated upon Actus' promise to renovate, manage, and maintain existing lodging facilities, as well as build, manage, and maintain new lodging facilities. Quite simply, the agreement between the Army and Actus for PAL project implementation involves the Army simultaneously selling property interests and obtaining the benefit of lodging facility services.

In reaching this conclusion, we find the reasoning set forth in our decisions regarding the award of concession contracts analogous to the issue presented in this case. With respect to concession contracts, we have held that our Office lacks jurisdiction to consider a protest challenging the award of a "pure" concession contract, that is, a no-cost contract that merely authorizes a concessionaire to provide goods or services to the public, as opposed to the government. Public Commc'ns Servs., Inc., B-400058, B-400058.3, July 18, 2008, 2009 CPD ¶ 154 at 7. We have long recognized, however, that where a concession or similar type contract also results in a benefit to the government, the contract is, at least in part, one for the procurement of property or services and therefore is encompassed by our bid protest jurisdiction. Id.; see also, Shields & Dean Concessions, Inc., B-292901.2, B-292901.3, Feb. 23, 2004, 2004 CPD ¶ 42, recon. denied, B-292901.4, Mar. 19, 2004, 2004 CPD ¶ 71; Starfleet Marine Transp., Inc., B-290181, July 5, 2002, 2002 CPD ¶ 113; Century 21-AAIM Realty, Inc., supra. It has consistently been our Office's view that a mixed transaction, one that both provides a business opportunity to a private-sector firm, and which also includes the delivery of goods or services of more than de minimis value/benefit to the government, is a procurement within the meaning of CICA. See Public Commc'ns Servs., Inc., supra.

In determining whether the government will receive a benefit from the goods or services provided in connection with a concession, our Office examines whether the transaction in question reduces the agency's workload, or whether the effort is

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<sup>4</sup> As explained by the RFQ, during project implementation, the Army does not obligate or expend any appropriated funds. Rather, the entity implementing the LDMP will earn revenue from military service members and others on official or unofficial travel who use their own money to pay room rates. RFQ at 6.

somehow rendered, either directly or indirectly, in support of the agency's mission requirements. Id. For example, we have found that a benefit was conferred to the government through a concession for haircuts for new Air Force recruits, because "the concession agreement is a contract for services under which the [agency] will satisfy its need to obtain initial haircuts for its recruits—which the agency insists is an important aspect of the training experience." Gino Morena Enters., Feb. 5, 1987, B-224235, 87-1 CPD ¶ 121 at 4. Similarly, we have found that a benefit was conferred on the government through a concession for photocopy services at a U.S. District Court because the use of a concession-type contract aided the court's mission by reducing its workload and also providing a benefit to the public of more effective access to court records. West Coast Copy, Inc.; Pacific Photocopy & Research Servs., B-254044, B-254044.2, Nov. 16, 1993, 93-2 CPD ¶ 283 at 5-6; see also, New York Tel. Co.; New England Tel. & Tel. Co.; Bell Atlantic Network Servs., Inc., B-236023, B-236097, Nov. 7, 1989, 89-2 CPD ¶ 435 at 2-3 (concession to provide pay phone services to employees and visitors at a General Services Administration facility was subject to GAO protest jurisdiction where the services were intended to satisfy agency mission needs).

Here, we conclude that the lodging construction, renovation, management, and maintenance that the contractor is to perform as part of PAL project implementation, provides a benefit to the Army. Specifically, the RFQ states that "[t]he Army needs to improve the quality of life for soldiers and their families while in a transient status," and that the purpose of the project is "to provide quality, on-post hotel accommodations that meet the varying needs of a mobile military community through improvements to the on-post lodging inventory and/or new construction, and to appropriately maintain these facilities . . . ." RFQ at 4. On this record, we conclude that the requirements for the contractor to provide transient lodging construction, renovation, management, and maintenance services is designed to directly meet the needs of the Army by directly furthering its mission in support of its soldiers. By leveraging the private sector through the PAL program, the Army reduces its own workload since it will no longer have to perform services that it would otherwise would have needed to perform, or procured under a separate contract. The fact that the Army created separate contractual instruments for the project's development and implementation efforts does not alter the fact that the agency is receiving benefits at both plan development and implementation. Thus, we conclude that our Office has jurisdiction to hear this protest because it concerns a procurement conducted by the Army to obtain services for the benefit of government.

#### Alleged Reduction in Requirements

AFH argues that the Army's agreement with Actus to implement the PAL (Group A) project amounts to a material and substantial change in the requirements set forth in the solicitation. Specifically, the protester contends that by both delaying performance and reducing the number of rooms required to be renovated and/or



constructed, in light of Actus' apparent inability to secure the requisite financing, the Army improperly relaxed the performance requirements, thereby resulting in an improper sole-source contract of the modified work, which is contrary to CICA. For the various reasons detailed below, we find the protester's arguments to be without merit.

While CICA generally requires "full and open competition" in government procurements as obtained through the use of competitive procedures, 10 U.S.C. § 2304(a)(1)(A), CICA does not govern procurements in which a military agency, as here, does not use appropriated funds to pay for services. See *id.*, § 2303. As noted above, the Army is not utilizing any appropriated funds to pay for the services that it is receiving from Actus as part of the phase 2 implementation effort. Thus, the protester's reliance on CICA's competition requirements is misplaced.

Where CICA does not apply, however, we review the actions taken by an agency to determine whether they were reasonable. *Century 21-AAIM Realty, Inc.*, *supra*. To the extent the protester argues that it was unreasonable for the Army not to conduct a new competition based on the alleged out of scope reduction in the agency's requirements, we disagree with the underlying premise of the protester's contention. Fundamentally, we conclude that the Army's agreement with Actus to implement the PAL (Group A) project did not materially and substantially deviate from what was originally contemplated by the RFQ since the SOW put offerors firmly on notice that the specific requirements regarding PAL project implementation were to be made after contract award.

According to AFH, the Army relaxed the original solicitation requirements, primarily by significantly reducing the number of rooms to be renovated and by extending performance (*i.e.*, implementation of the PAL project is occurring nearly 2 years behind schedule). As previously discussed, however, the SOW did not contain any mandatory requirements, including any minimum requirements as to the number of rooms to be renovated and/or built; the SOW also did not establish a mandatory timetable for implementation, instead providing estimates for each aspect of the project. The solicitation made clear that awardee selection would be based on offerors' qualifications (hence the name, "request for qualifications"), and left the specifics for project implementation to be determined only after award of the LDMP development contract. We find the lack of definitiveness in the original SOW provided the Army with additional contractual flexibility and latitude to adjust the LDMP development and implementation efforts to unforeseen circumstances and emerging conditions. See *DOR Biodefense, Inc.; Emergent BioSolutions*, B-296358.3, B-296358.4, Jan. 31, 2006, 2006 CPD ¶ 35 at 6. To the extent the AFH-alleged material changes were changes at all, we find that they do not fundamentally alter the type of work required by the original SOW requirements.

AFH also fails to establish how it was prejudiced by the alleged relaxation of requirements regarding the PAL implementation effort. Competitive prejudice is an

essential element of a viable protest, and where the protester fails to demonstrate prejudice, our Office will not sustain a protest. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996). Here, the alleged relaxation in requirements had no impact on AFH's ability to compete originally (AFH was part of the original field of competition), and the protester has not demonstrated that the alleged relaxed requirements would have altered its submission to its competitive advantage (i.e., that it would have become the successful offeror). See Blackwater Lodge & Training Ctr., Inc., B-311000.2 et al., Nov. 10, 2008, 2009 CPD ¶ 66 at 3-4. Accordingly, there is no basis for finding that any relaxation of the work requirements relating to the PAL project implementation effort resulted in prejudice to AFH.

AFH also protests that the Army's selection of Actus for phase 2 project implementation was improper insofar as the LDMP which the Army and Actus negotiated as the "blueprint" for the privatization effort was one that only Actus could use. The protester essentially argues that by not negotiating a generic or neutral LDMP, the Army unfairly favored Actus over AFH and other offerors and the Army's conduct amounts to an unjustified and improper sole source award. Protest, July 22, 2009, at 19-21. We find no merit in AFH's arguments here. The RFQ made clear that there would be one competitive selection process for the PAL (Group A) project, conducted prior to the phase 1 LDMP development effort. There was simply no requirement that the Army conduct a second competitive selection process prior to phase 2 project implementation. To the extent that AFH believes that the Army should have been required to conduct a separate competition for phase 2 project implementation, such protest is untimely. See 4 C.F.R. § 21.2(a)(1).

The protest is denied.

Michael R. Golden  
Managing Associate General Counsel