



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Defense Systems Group; Warren Pumps, Inc.;
Dresser Industries, Inc.

File: B-240295; B-240295.2; B-240295.3

Date: November 6, 1990

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Inc.; Kenneth S. Kramer, Esq., Fried, Frank, Harris, Shriver,
& Jacobson, for Dresser Industries, Inc., for the protesters.
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party.

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participated in the preparation of the decision.

DIGEST

1. Protests that contract modifications at substantial price increase were beyond the scope of the original contract and constituted an unjustified sole-source procurement are timely where filed within 10 working days of when the protesters first learned the amount of the price increase.

2. Modifications which involve substantial cost and affect first article test requirements, delivery schedule, and performance specifications do not constitute a cardinal change where the nature and purpose of the original contract as well as the field of competition remain unchanged.

DECISION

Defense Systems Group (DSG), Warren Pumps, Inc., and Dresser Industries, Inc. protest the modification of contract No. N00104-86-C-0605, awarded to Scot Division of Ardox Corporation, by the Navy Ships Parts Control Center, for the supply of 675 centrifugal pump units and corresponding parts. The protesters contend that contract modifications which waive most of the first article test requirements, extend the delivery schedule, change a noise level specification, and

"definitize" the price at more than double the original contract award, are improper because they are beyond the scope of the original contract.

We deny the protests.

This solicitation, No. N00104-86-B-0447, was a part of the Navy Standard Titanium Fire Pump Program, initiated to standardize and achieve configuration control over the fire pump. The pump, constructed of cast titanium, was to be operated by an electric motor meeting certain performance specifications as set forth in a military specification and drawing as well as a drawing from Hansome Energy Systems, Inc. These references contained the required salient characteristics of the motor. Performance parameters under the Hansome drawing were considered the Navy's "critical" minimum technical requirements and included restrictions on structureborne noise levels for the motor and the pump/motor unit was considered particularly important by the Navy.1/

Accordingly, bidders were required to provide the rationale, design, and calculations that would assure that structureborne noise levels "shall not exceed 10 [decibels] db above" the levels shown on the referenced drawings, except at 125 hertz which "shall not exceed a maximum of 85 db." The specifications also advised that the "noise levels attained shall permit the pump unit to meet the structureborne noise requirements of MIL-STD-740B Type 2."

Eighteen concerns, including Scot and the protesters, submitted bids and Scot was the low responsive, responsible bidder at a fixed price of \$15,941,810. Scot proposed to use a Louis-Allis motor and on September 23, 1986, was awarded the contract.2/ Under the terms of the contract, Scot was required to conduct first article tests on one unit for each of eight different pumps, with a test report to be submitted

1/ The Navy explains that structureborne noise is that noise produced by the movement of mechanical structures through the result of some driving force. Since the pumps are to be used on ships that are part of the Anti-Submarine Warfare program, minimizing structureborne noise created by the fire pumps was considered critical to avoid detection by enemy submarines.

2/ The solicitation did not require the use of a Hansome motor. Rather, if the low bidder offered other than the Hansome motor, it was required to provide a preaward survey team with the methods by which the proposed motor would attain the performance levels shown on the drawing. Here, the preaward survey team approved the manufacturers proposed by Scot, including Louis-Allis, as possible suppliers.

within 260 calendar days of the date of award. Deliveries were to commence in April 1987 and be completed in March 1989.

From the time of contract commencement through May of 1989, Scot identified several drawing errors and submitted engineering change proposals (ECPs) to seek their correction. Among other matters, these change proposals concerned the pump shaft and impeller bore diameters, thread depths on various parts, and changes to certain tube assemblies. Other modifications included deletion of first article testing for the pump component and a change in mounting position of 125 pumps from vertical to horizontal. The most significant drawing error concerned the structureborne noise specifications for the pump motor.

At some point prior to May 1989, it became apparent to Scot and the Navy that the overall noise requirement for the pump/motor unit "possibly could not be met" if the motor had only to achieve a noise level not greater than that specified including the 10 db noise allowance. At or about the time Scot and the Navy were discussing this problem, the Navy indicated that it needed delivery of 30 of the 675 pumps on an expedited basis. Also, during this time period, in August 1988, the Department of Defense issued an interim rule requiring that all anti-friction bearings and bearing components, whether procured directly or installed in defense end items and subassemblies, must be of domestic manufacture. The Department subsequently finalized the rule and published it at Department of Defense Federal Acquisition Regulation Supplement (DFARS) §§ 208.79 and 252.208-7006 (DAC 88-7). In view of the delays which had already occurred and uncertainties as to whether Scot's original motor subcontractor could meet the overall noise specification, Scot decided to contract with Hansome to supply the motors.^{3/} Also, in order to expedite delivery of the 30 units, Scot suggested that the Navy eliminate the first article test requirement based upon the Navy's experience with the Hansome motor under a prior contract.^{4/}

As a result, in May 1989, the Navy issued modification P00007 which deleted the 10 db noise allowance, and provided for test

^{3/} The protesters have alleged that the Navy "directed" Scot to use the Hansome motor in order to avoid first article test requirements. The record demonstrates that the choice of Hansome was Scot's, and that the Navy only agreed to a waiver of the first article test requirement "contingent upon the use of the approved Hansome motor" (modification P00008).

^{4/} Dresser had supplied similar titanium pumps using the Hansome motor.

procedures to ensure repeatability. In July 1989, modification P00008 was issued which deleted first article testing and all references to such testing with the exception of performance testing.

In August 1989, Scot submitted a cost proposal covering the various changes to the contract. In December 1989, the Defense Contract Audit Agency (DCAA) conducted an audit of Scot and its subcontractors. In June 1990, the Navy issued modification A00005 to "definitize" the cost of several change orders. The total contract price increase totalled \$19,333,775.16, of which \$164,637.16 represents changes apart from P00007. Scot explains that the significant cost increase is attributable in part to the increased cost of materials, especially titanium, the substitution of a new motor subcontractor, and uncertainties surrounding the ability to meet the overall noise specification using domestic bearings. Scot also states that it has shipped a "good supply" of the spare parts, has 30 pump units ready to deliver and plans to ship 18 units per month beginning in November 1990.

On July 3, 1990, after learning of the price change for the various modifications, DSG filed its protest with our Office. Also upon learning of the price change, Warren and Dresser respectively filed their protests on July 17, and September 5, 1990.

As a preliminary matter, the Navy argues that the protests of DSG and Dresser are untimely because DSG knew in December 1989, and Dresser knew in early August 1990, the contents of modification P00007, but filed their protests more than 10 working days after those dates. See Bid Protest Regulations 4 C.F.R. § 21.2(a)(2) (1990). Both DSG and Dresser maintain that it was knowledge of modification A00005, which contained the price of the various changes, including P00007, that provided the basis for their protests. Both filed their protests within 10 days after learning of the cost magnitude of that modification. Where, as here, the primary basis of the protests is the magnitude of a contract price increase, coupled with the allegation that the increase and other modifications constitute an improper sole source award to Scot, the protests are timely. National Data Corp., B-207340, Sept. 13, 1982, 82-2 CPD ¶ 222.

The protesters contend that the waiver of first article test requirements, extension of the delivery schedule, and the deletion of the 10 db allowance for motor noise, without changing the originally specified overall noise requirement, represent cardinal changes to the original contract. In this regard, Warren and Dresser note that they proposed use of the Hansome motor, promising to meet the overall noise specification, at prices far below those now to be paid Scot. They

assert that the \$19 million increase in contract price is excessive and indicative of a sole-source contract award to Scot.

The Navy replies that the contract modifications did not change the nature, purpose or method of operation of the pump unit. Thus, it concludes that the changes made are not cardinal. The Navy maintains that the various changes are a matter of contract administration which our Office should not review.

As a general rule, our Bid Protest Regulations provide for dismissal of protests involving contract administration matters. 4 C.F.R. § 21.3(m)(1). However, we consider protests such as these that allege that modifications to a contract represent a cardinal change, that is, beyond the scope of the original contract which change the nature of the contract originally awarded, because the work covered by the modification would be subject to requirements for competition absent a valid sole-source determination. Neal R. Gross & Co., Inc., 69 Comp. Gen. 247 (1990), 90-1 CPD ¶ 212.

When it is alleged that a contract modification is outside the scope of the original contract, the question is whether the original nature or purpose of the contract is so substantially changed by the modification that the original and modified contract are essentially different and the field of competition materially changed. See Ion Track Instruments, Inc., B-238893, July 13, 1990, 90-2 CPD ¶ 31. In determining the nature of a modification, we consider factors such as the extent of any changes in the type of work, performance period, and costs between the modification and the prime contract. See American Air Filter Co., Inc., 57 Comp. Gen. 285 (1978), 78-1 CPD ¶ 136, aff'd on recon., 57 Comp. Gen. 567 (1978), 78-1 CPD ¶ 443; CAD Language Sys., Inc., B-233709, Apr. 3, 1989, 89-1 CPD ¶ 342.

We do not find that the Navy's modifications materially changed the nature or purpose of the original contract. There is nothing in the record to indicate that the field of competition would materially change in view of the modifications involved. See Ion Track Instruments, Inc., supra. Scot remains obligated to produce the same 675 pumps it contracted to produce in 1986. The overall motor noise specification has not been relaxed and with the exception of the minor changes discussed above, the pump has not changed in configuration or purpose. While the record indicates that meeting the original specification is more difficult, due in part to the DFARS § 208.79 requirement for use of domestic bearings, increased difficulty in performance does not constitute a cardinal change.

This difficulty in performance also led to lengthening the delivery schedule. The original contract envisioned delivery of all 675 units by March of 1989, 2 years after first article approval. Due to uncertainties associated with meeting the specification using domestically produced bearings, under the terms of the modified contract, Scot will have an additional year to deliver all units. Where, as here, a contractor is provided additional time to perform a contractual obligation, that modification does not constitute a cardinal change, unlike the situation where time is used to define the extent of the obligation, such as under a requirements contract. See Ingersoll-Rand, B-225996, May 5, 1987, 87-1 CPD ¶ 474.

Under the circumstances of this procurement, we also do not find that deletion of first article testing represents a cardinal change. While the original contract called for first article testing of each of the eight different pump units, the modified contract requires performance testing of all units. Thus, the risk of unsuccessful performance remains on Scot. Further, since Scot will be using the Hansome motor, on which the specifications were based, it appears that any such risk will be limited. Waiver of most of the first article requirements will allow for expedited performance. Since performance has already been delayed, future performance is expected to take longer, and first article test requirements would consume close to an additional year, we find no basis to object to the agency's decision to relax the requirement.

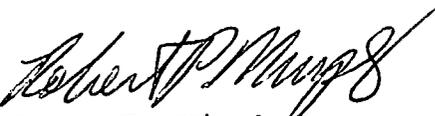
We recognize that the substantial cost of the modifications, here representing more than a 120 percent increase in price, can provide evidence of a cardinal change. However, where, as here, it is clear that the nature and purpose of the contract have not changed, a substantial price increase alone does not establish that the modifications are beyond the scope of the original contract. As Scot explained in correspondence to the contracting officer, most of the cost impact of the price proposal is for increases in material and labor costs as a result of modification P00007, including uncertainties associated with obtaining repeatable structureborne noise requirements in view of the domestic bearing requirement. By our calculation, nearly half of the price increase is attributable to increased costs associated with meeting the noise specification change.^{5/} Given the high cost of materials involved and the passage of four years since contract award, it is understandable that costs have increased substantially. We also believe it was reasonable for Scot to

^{5/} The remaining costs are attributable to increases in such areas as the price of titanium, overhead, general and accounting costs, incurred costs during contract performance, and fee.

have waited until the various ECPs were resolved prior to ordering production quantities of the components involved. Notwithstanding the protesters' arguments that they had proposed solutions far less expensive than the new contract price, it appears that any offeror would face the same high cost of materials and difficulty of performance that Scot faces. Thus, the protesters' 1986 prices are of limited evidentiary value. Our conclusion is supported by Warren's response to a request for pricing information from the contracting officer, which produced a "budget price" very close to the new contract price.

Since the nature and purpose of the contract, as well as the competitive field, remain unchanged, we find that the various modifications to the contract outlined above do not constitute cardinal changes individually or together. They represent the efforts of a government agency to work with a contractor that is having trouble meeting specifications, some of which would not produce the desired results as originally set forth in the solicitation and whose achievement was complicated by a requirement for domestic bearings, unforeseen at the time of contract award. In this regard, the protesters contend that Scot's contract should have been terminated for default since Scot had made virtually no deliveries since contract award in 1986. The reasonableness of the agency's actions in response to Scot's performance difficulties is a question of contract administration that is not reviewable by this forum. Casecraft, Inc., B-226796.2, June 30, 1987, 87-1 CPD ¶ 647.

The protests are denied.


for James F. Hinchman
General Counsel