



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Exide Corporation

File: B-276988; B-276988.2

Date: August 18, 1997

James J. McCullough, Esq., Deneen J. Melander, Esq., and Catherine E. Pollack, Esq., Fried, Frank, Harris, Shriver & Jacobson, for the protester. John S. Pachter, Esq., Jonathan D. Shaffer, Esq., and Eun K. Chung, Esq., and Christina M. Pirrello, Esq., Smith, Pachter, McWhorter & D'Ambrosio, for East Penn Manufacturing Co., Inc., the intervenor. Vera Meza, Esq., and Wendy S. Saigh, Esq., Department of the Army, for the agency. Henry Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Delivery order issued under an existing requirements contract for a quantity of batteries in excess of the maximum order limitation (MOL), and to be delivered after the expiration of the contract, is not beyond the scope of the contract where the contract permits orders in excess of the MOL, the total quantity ordered under the contract does not significantly exceed the estimated quantity, and the contract provides for delivery after the contract's expiration date.

DECISION

Exide Corporation protests delivery order No. 0037, issued by the Department of the Army, Tank-automotive and Armaments Command (TACOM), to East Penn Manufacturing Co., Inc. under East Penn's existing requirements contract No. DAAE07-92-D-J011, for dry-charged batteries. Exide alleges that the delivery order is beyond the scope of East Penn's contract.

We deny the protest.

The contract at issue in this protest was competed under request for proposals (RFP) No. DAAE07-92-R-S067 using full and open competition. The RFP contemplated the award of a 5-year requirements contract for three types of dry-charged batteries (2HN, 4HN, and 6TL). Both Exide and East Penn submitted proposals in response to the RFP and participated in negotiations with the Army. The Army awarded the contract to East Penn on May 12, 1992. The contract stated an expiration date of May 11, 1997. On July 23, 1996, the contract was modified by

deleting the 6TL battery and replacing it with the 6TLFP battery at a unit price of \$68.04.¹

The solicitation/contract stated that the estimated total requirement for the 6TL/6TLFP batteries was 1,134,000 units. It also stated that the agency expected individual delivery orders to be for quantities of one quarter of the annual requirement,² and stated the minimum and maximum order quantities between which the agency was required to place, and East Penn was required to honor, an order. The solicitation/contract stated that no order would be issued for quantities greater than the maximum order limitation (MOL)--which was 100,000 units for 6TLFP batteries--with the following exception:

Notwithstanding [the MOL restriction] the Contractor shall honor any order exceeding the [MOL] unless that order (or orders) is returned to the ordering office within -5- days after issuance, with written notice stating the Contractor's intent not to ship the item (or items) called for and the reasons. Upon receiving this notice, the Government may acquire the supplies or services from another source. The Government is not obligated to issue orders under this contract for any quantity exceeding 310,000 for [6TLFP batteries] during any single contract year.

Section H-2 stated that delivery orders may be issued from the date of contract through 5 years after date of award. Section H-4 of the solicitation contract stated:

(f) Any order issued during the effective period of this contract and not completed within that period shall be completed by the Contractor within the time specified in the order. . . .

¹This modification resulted from testing of prematurely expired 6TL batteries. These tests concluded that battery life could be extended by changing the calcium and antimony plates to all calcium plates and including a "fill pack" container of special battery acid with each battery. The modification was not protested and is not at issue in the present protest. This modification was issued in conjunction with a provisional purchase description, effective only for the duration of the contract, which East Penn's 6TLFP battery satisfied through informal first article testing. The agency also prepared the purchase description to be applied to all future solicitations which required all contractors, including East Penn, to satisfy formal first article test requirements.

²The estimated annual quantity of 6TLFP batteries for the final year of the contract was 227,000 units, one quarter of which is 56,750 units.

The contract's delivery terms called for delivery to begin 150 days from the date of the delivery order and, in the case of 6TL/6TLFP batteries, delivery was to continue at the rate of 20,000 units per month until the order was completed.

During the course of East Penn's contract, the Army determined that it would shift from using the 6TLFP battery to the 6TLMF battery--a refined version of the 6TL/6TLFP battery. On February 27, 1997, the Army issued a solicitation for proposals to supply 6TLMF batteries.³ A Supply Control Study, dated March 26, 1997, determined that the agency will require 350,229 dry-charged 6TLFP batteries prior to the delivery of the new 6TLMF batteries. The study recommended filling this purchase requirement with an order under the East Penn contract for the total amount that current funding would permit--that being 209,140 batteries--and soliciting for a new contract for the remaining requirements;⁴ the Army is proceeding with such a solicitation under full and open competition procedures.

On April 10, 1997, Exide submitted an unsolicited proposal to supply 6TLFP batteries at a unit price lower than that in East Penn's contract.⁵ The Army rejected that proposal.

On April 30, 1997, the Army issued delivery order 0037 under East Penn's contract for 209,140 6TLFP batteries with deliveries beginning on September 30, 1997, and ending on July 31, 1998.⁶ This protest followed.

Exide contends that the delivery order is beyond the scope of East Penn's contract allegedly because the order was prohibited under the terms of the contract, the order was for a quantity far in excess of what offerors could have contemplated

³The Army anticipated a contract award under this solicitation by July 31, 1997, with first article testing projected to take 390 days and delivery expected to commence on October 31, 1998. The responsibility for procuring the 6TLMF batteries was subsequently shifted from TACOM to the Defense Supply Center Richmond (DSCR), which resulted in cancellation of TACOM's 6TLMF solicitation so that DSCR could issue a solicitation for that requirement. This shift in procurement responsibility resulted in a revised projected delivery date of March 31, 1999, for 6TLMF batteries.

⁴The study suggested an alternative recommendation of ordering the entire 350,229 batteries under East Penn's contract if current funding permitted.

⁵The proposal requested modified first article testing which the agency considered unacceptable.

⁶The delivery order also ordered 3,508 4HN batteries with delivery dates extending through November 30, 1997, and 18,308 2HN batteries with delivery dates extending through September 30, 1998. Exide does not protest this portion of the order.

from the terms of the contract as indicated by the MOL, the order resulted in a substantial increase of the contract's total estimated quantity of 6TLFP batteries, and the order extended the performance period beyond the May 11, 1997, expiration date of the contract. We disagree.

Although the issuance of a delivery order under an existing contract is generally a matter of contract administration and not for consideration by our Office, 4 C.F.R. § 21.5(a) (1997), we will consider a protest alleging that a delivery order is beyond the scope of the contract, and thus modifies the contract, to the extent that the work covered by the order would be subject to requirements for competition absent a valid sole source determination. Astronautics Corp. Of Am., 70 Comp. Gen. 554, 556 (1991), 91-1 CPD ¶ 531 at 4. In determining whether a delivery order issued under an existing contract is beyond the contract's scope of work, we look to whether there is a material difference between the contract, as modified by the delivery order, and the original contract. Lockheed Martin Fairchild Sys., B-275034, Jan. 17, 1997, 97-1 CPD ¶ 28 at 4. As to the materiality of a modification, we consider factors such as the extent of any changes in the type of work, performance period and costs between the contract as awarded and as modified by the delivery order, as well as whether the original contract solicitation adequately advised offerors of the potential for the type of delivery order issued. Id. at 4-5.

Here, the delivery order was issued prior to the expiration of the contract, and by its terms neither extended the expiration date of the contract, nor modified the type or price of batteries ordered under the contract.

While it is true that this order was for quantities in excess of the MOL stated in the contract, the order was not beyond the scope of the contract. In this regard, the terms of the solicitation/contract stated an exception to the MOL which permitted the agency to issue such an order with the provision that the contractor could refuse it. This exception gives the agency great discretion in determining whether to place such orders under the contract. Mills Mfg. Corp.--Recon., B-250214.2, Mar. 16, 1993, 93-1 CPD ¶ 235 at 3. Under the circumstances, the Army's decision to fill its purchase requirements under the East Penn contract was thus proper, and East Penn accepted and was bound by the delivery order by not returning it within 5 days of issuance.

Moreover, the total quantity (including the protested quantity) of 6TL/6TLFP batteries ordered over the life of the contract was 1,272,966 units--within 13 percent of the stated estimated quantity. This increase from the estimate is not significant in terms of the scope of the contract, particularly given that the character of the goods ordered did not change. See Caltech Serv. Corp., B-240726.6, Jan. 22, 1992, 92-1 CPD ¶ 94 at 5 (30 percent increase over estimate is not so significant as to constitute a change beyond the scope of the contract); Marine Logistics Corp., B-218150, May 30, 1985, 85-1 CPD ¶ 614 at 5 (25 percent increase is not significant). Although the contract did indicate that the agency expected to place delivery orders

for smaller quantities than was done here, we think that offerors under the solicitation for this contract were reasonably apprised that an order for the quantity at issue here was possible. This is so because the contract permitted orders in excess of the MOL and the total quantity ordered under this contract did not significantly exceed the total estimated quantity.

Nor was the performance period modified by this delivery order. The contract contemplated delivery of batteries beyond the expiration date of the contract because it explicitly provided for delivery orders allowing the completion of an order after the expiration date of the contract where such order could not be completed prior to that date. It also stated that delivery would begin 150 days after the date of the delivery order and continue at the rate of 20,000 6TL/6TLFP batteries per month thereafter until the total quantity ordered is delivered. The delivery order issued here stated terms for delivery after the contract expiration date which are consistent with that provision. Thus, this delivery order does not modify the performance period contemplated by the solicitation contract.⁷

We thus conclude that the delivery order neither changed the nature or purpose of East Penn's contract, nor went beyond the potential type which offerors reasonably could have anticipated from the terms of the contract solicitation. Therefore, the issuance of the delivery order was proper. See Lockheed Martin Fairchild Sys., supra, at 5.

The protest is denied.

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⁷Because the order was properly placed under the contract, the fact that these batteries will be delivered and used after the contract's expiration date is essentially irrelevant to whether the order is within the scope of the contract.