

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-207586

DATE: October 28, 1982

MATTER OF: Cray Research, Inc.

DIGEST:

1. While contract modifications generally are the responsibility of the procuring agency in administering the contract, GAO will consider a protest that a modification went beyond the contract's scope and should have been the subject of a new procurement, since such a modification has the effect of circumventing the competitive procurement statutes. A modification does not exceed the contract's scope, however, as long as the modified contract is substantially the same as the contract that was competed.
2. An agency's acceptance of a firm's post-award offer to change the way it will perform to meet its obligation--furnish a system that would meet various performance specifications--is not outside the contract's scope, even if that change reflects a more advanced or sophisticated approach, where there is no change in the nature of the obligation of either party to the contract.

Cray Research, Inc. protests the Department of the Navy's modification of contract N66032-79-C-0004, which had been awarded to Control Data Corporation (CDC) on July 5, 1979 for a large-scale scientific computer system. Cray contends that the modification, which permits CDC to substitute a new central processing unit (CPU) for the one already installed, exceeds the scope of the contract for which the competition was conducted. We deny the protest.¹

¹Cray also filed suit in the United States District Court for the District of Columbia (Civil Action No. 82-2515) to enjoin the Navy from accepting delivery of the new CPU until we could resolve the protest. By order of October 5, 1982, the court denied Cray's request for an injunction.

Facts

The Navy solicited offers for the system, intended to provide the Navy Fleet with environmental predictions, through request for proposals (RFP) N66032-78-R-0060, issued on March 17, 1978. The RFP, which required offerors to meet numerous performance specifications, provided for four benchmark tests, labeled A through D. Benchmark tests B, C and D had to be demonstrated before award. Benchmark test A, however, which involved the system's multi-programming feature, did not have to be demonstrated until just before acceptance of the feature, which was to be 12 months after installation. The reason, according to the Navy, was that at the time the contract was to be awarded the competitors did not possess the technology necessary to meet the Navy's ultimate multi-programming requirements, which the benchmark reflected. (Both CDC and Cray, however, could meet the Navy's multi-programming need for the first few years of the system's life.)

CDC offered to meet the RFP's performance specifications with a system that included a Cyber 203 CPU. Cray was involved in the competition as a proposed subcontractor to another firm, which offered a Cray computer. Both offerors passed benchmark tests B, C and D, and the Navy then awarded the contract to CDC based on its lease with purchase option plan, which offered the lowest evaluated cost over the 10-year life of the system.

The Navy accepted the CDC system in December 1980. In February of 1981, CDC offered to substitute for the Cyber 203, which by then no longer was in production, a central processing unit from the firm's new product line, the Cyber 205, at a significant increase in cost to the Navy. The Navy rejected CDC's offer as outside the scope of the contract. The Navy relied on paragraph L.13.10 of the contract, entitled "Equipment Substitutions and Additions," which provides:

"The Government may replace any equipment components (other than the Central Processing Unit and Central Memory), covered by this contract with substitute equipment whether or not such substitute equipment is obtained from or manufactured by the contractor. * * *

In rejecting CDC's proposal based on that provision, the Navy explained that the provision's intent "was to enable the Government to replace peripheral components only and not the central processing unit. * * *"

Benchmark test A was delayed, for various reasons, until August 1981. CDC could not pass the benchmark test principally because the Cyber 203 lacked adequate central memory, but also because it did not meet the processing time requirement. CDC then offered alternate remedies to avoid termination of the contract. The first alternative was to replace the Cyber 203 with a Cyber 205-422, a significantly more powerful unit, at the same monthly lease cost but with a substantially higher purchase price if the Navy were to exercise the purchase option. The second alternative was to add memory to the Cyber 203 at no additional cost to the Government.

The Navy refused the offer to replace the Cyber 203 with a Cyber 205 at additional cost. CDC responded with an offer to replace the Cyber 203 with a Cyber 205-411 at no additional cost to the Government. The Cyber 205-411 essentially is a scaled-down version of the Cyber 205-422. The Cyber 205-411 has certain features not available in the outdated Cyber 203, and includes fifty percent more central memory (1.5 million words as opposed to 1 million words). Neither CDC nor the Navy pursued the offer to increase the Cyber 203 memory.²

The Navy accepted CDC's offer of a Cyber 205-411 by the contract modification in issue. None of the contract's terms, conditions, or performance specifications otherwise were changed. The Navy relied on paragraph L.18.4 of the contract, which provides:

²In comments on the protest, CDC states that upon its own reevaluation this option was deemed disadvantageous since the memory hardware for the Cyber 203 was out of production, and since the Cyber 203 memory was manufactured in one million word increments whereas CDC had determined that an additional central memory of less than one-half million words was necessary to pass the benchmark test. Also, the processing time failure was considered relatively easy to correct.

"Processing Time Not Obtained"

"In the event the required processing time is not obtained, through no fault on the part of the Government, the contractor shall provide, at no additional charge to the Government for the life of the system, whatever hardware or software is necessary to meet the required processing time."

Protest

Cray protests that the modification to the contract to permit substitution of the Cyber 205-411 for the Cyber 203 exceeds the contract's scope. The reason essentially is that the Navy, through the substitution, has acquired a significantly upgraded system without a competition--Cray contends that the Navy either must accept CDC's offer of an increase in the Cyber 203 memory or afford other firms the opportunity to compete against the Cyber 205 model. Cray complains that CDC in effect is being rewarded for the failure to pass benchmark test A by the Navy's purchase of the firm's newer line of CPUs.³ In this respect, Cray asserts that in view of the economies that generally accompany new computer technology, the Navy is getting no bargain in paying the Cyber 203 price for a Cyber 205 model.

Cray points out that the Cyber 205-411 represents a technology that was not even available when the contract was awarded to CDC, and which can be expanded to accomplish functions more advanced than the Cyber 203 could. In fact, Cray complains, the Navy always desired these additional functions, but since they could not be accomplished by the technology current during the initial procurement, they could not be included as performance requirements in the solicitation; Cray implies that once CDC offered the Cyber 205-411 replacement, the Navy thus was pleased to accept the upgraded systems notwithstanding the

³As stated above, the parameters of benchmark test A reflect multi-programming needs anticipated to arise further into the system's 10-year life. To date, CDC has been meeting the Navy's actual multi-programming requirement with the Cyber 203.

legalities of the matter. The effective result of the Navy's action, Cray argues, is an unjustified sole-source purchase from CDC.

Cray also argues that the Navy's contract with CDC itself precluded the substitution in issue. Cray relies on paragraph L.13.10, quoted above, which Cray suggests specifically precludes replacement of the CPU or the central memory. Cray argues that paragraph L.18.4, which the Navy relied on in issuing the modification,

"quite obviously has nothing whatever to do with the performance of equipment that has never been accepted in the first place, and it certainly does not contemplate substitution of an entirely different mainframe CPU and CM [central memory] for the one required by the contract's specifications. Otherwise there would be no meaning to Paragraph L.13.10.1, which would in effect be written out of the contract."

Analysis

We generally will not consider a protest against a contract modification, since modifications involve contract administration, which is the responsibility of the procuring agency, not this Office. Symbolic Displays, Incorporated, B-182847, May 6, 1975, 75-1 CPD 278. We will, however, review an allegation that a modification went beyond the contract's scope and should have been the subject of a new procurement. The reason is that such a modification could be viewed as an attempt to circumvent the competitive procurement statutes. Aero-Dri Corporation, B-192274, October 26, 1978, 78-2 CPD 304.

We often have pointed out that it is not a simple matter to determine whether a changed contract is materially different from the competed contract so that the contract as modified should have been the subject of a new competition (unless a sole-source acquisition was justified). For guidance, we have looked to Court of Claims decisions involving the "cardinal changes" doctrine, which was developed by

the courts to deal with contractors' claims that the Government had breached its contracts by ordering changes that were outside the scope of the changes clause. See American Air Filter Company--DLA request for reconsideration, 57 Comp. Gen. 567, 572 (1978), 78-1 CPD 443.

The Court has defined the basic standard for determining whether there has been a cardinal change as whether the modified job is essentially the same work for which the parties contracted. See Air-A-Plane Corporation v. United States, 408 F.2d 1030 (Ct. Cl. 1969). In applying this standard to situations where a firm that is not a party to the contract complains that a modification is not within the scope of the competition that initially was conducted, we have stated:

"* * * the question * * * is whether the original purpose or nature of the contract has been so substantially changed by the modification that the contract for which competition was held and the contract to be performed are essentially different." American Air Filter Company, Inc., 57 Comp. Gen. 285, 286 (1978), 78-1 CPD 136.

Seldom have we found that an agency's modification of a contract was an improper exercise of administration under that standard. In American Air Filter Company, Inc., supra, we did sustain a protest against a modification to a contract for gas powered and fired heaters that permitted diesel powered and fired heaters. We noted that the modification necessitated numerous other changes in the contract, including the substitution of a diesel engine for a gasoline engine; a substantial increase in the weight of the heater; addition of an electrical starting system, new fuel control and combustor nozzle design; alteration of various performance characteristics; a 29 percent increase in the unit price; and the doubling of delivery time. The magnitude of the technical changes and their overall impact on the price and delivery provisions compelled the conclusion that the modified contract was so different from the competed contract that the Government should have solicited new proposals for its modified requirement.

Another example where we objected to a contract modification is our decision Webcraft Packaging, Division of Beatrice Foods Co., B-194087, August 14, 1979, 79-2 CPD 120. There, a contract had been awarded to supply what was, in effect, a "specialty" product, produced only by a few sources. When the awardee could not secure the item, the agency modified the contract to relax the specifications. Because the record was clear that considerably more firms would have entered a competition based on the relaxed specification than competed for the initial contract, so that the fields of competition differed significantly, we concluded that the agency should have resolicited for its needs.

Finally, in Memorex Corporation, 61 Comp. Gen. 42 (1981), 81-2 CPD 334, an agency awarded a contract for disk drives with an option to purchase an additional quantity. The agency exercised the option but refused delivery because of difficulties with the drives that had been installed. When the contractor complained that this refusal was a breach of contract, the parties resolved their differences by modifying the contract to substitute a new model disk drive for the option quantity; convert the option from an outright purchase to a five-year "lease to ownership"; and establish stringent performance requirements for the disk drives over the lease term. We found the modification improper essentially because the change from the outright purchase of bare machines to the acquisition of guaranteed service was a significant change in the nature of the thing procured so that the contract was substantially different from that originally competed. See Memorex Corporation - Reconsideration, B-200722.2, April 16, 1982, 82-1 CPD 349.

The reasoning in these decisions compels us to deny Cray's protest. In American Air Filter, the contract obligation as modified simply was substantially different than that contracted. In Webcraft, the relaxation of the specification on which the award had been based clearly compromised the competition that led to that award. In Memorex Corporation, the agency's modification resulted in a substantially different obligation than reflected in the awarded contract. In each case, then, there was more than

merely the contractor's offer of a superior way to meet its obligation under the contract than the one contemplated when the contract was awarded. Rather, there was a substantial change in the nature of the contractor's fundamental obligation.

Here, however, the contract basically required CDC to furnish a system that would meet various performance specifications. In the original competition, CDC offered to meet these specifications with the Cyber 203 and that offer was deemed most advantageous to the Government of those received based on the solicitation's award criterion. The Navy then judged CDC capable of meeting the agency's needs at the offered price, and the award to the firm legally bound CDC to do so. We do not believe that an agency's acceptance of a firm's post-award offer to change the way it will perform to meet its obligation, even if that change reflects a more advanced or sophisticated approach, can be considered to be outside the contract's scope where there is no change in the nature of the obligation of either party to the contract. See 50 Comp. Gen. 540 (1971); ConDiesel Mobile Equipment Division, B-201568, September 29, 1982, 82-2 CPD

Moreover, we fail to see how paragraph L.13.10 of CDC's contract, quoted above, precludes CDC's substitution of a Cyber 205-411 for the Cyber 203, as Cray argues. As the Navy explains, paragraph L.13.10 is a standard clause in contracts of this type to enable the Government unilaterally to replace or add equipment with the same or another manufacturer's in the event the original equipment wears out or for other reasons. The standard clause was amended for purposes of this procurement to preclude the Government's replacement of the CPU or the central memory. It does not on its face preclude an effort by the contractor to cure a performance problem. Regarding contract paragraph L.18.4, which the Navy relied on for the modification, that provision requires the contractor to provide "whatever hardware or software is necessary to meet the required processing time" if the contractor does not pass a benchmark test because of a processing time problem.

While the primary cause of CDC's failure to pass benchmark test A was the Cyber 203's lack of memory capacity, rather than the processing time requirement, the provision nonetheless does not preclude CDC from curing the deficiency with which the provision is concerned with an item that also enhances the overall system in other respects.

Finally, the suggestion that the users within the Navy were pleased to have the more advanced Cyber 205-411 instead of the Cyber 203 or, once it became clear that the Cyber 203 could not pass benchmark test A, indeed encouraged the substitution rather than an increase in the memory of the out-of-production Cyber 203, does not make the action improper. The fact is that, as discussed, the change was within the contract's scope. The Government is not precluded from accepting a contractor's offer of a better or more advanced way to meet the contract's performance requirements than that contemplated when the contract was awarded, where the parties' basic contractual relationship is not otherwise altered. See 50 Comp. Gen., supra, where a change from electro-mechanical tuners and amplifiers to solid-state tuners, which interested the contracting agency because it would involve both cost savings and technical advantages, including improved performance and reliability, was within the contract's scope.

We note here that Cray is concerned that the change to the Cyber 205 model at this Navy location may afford CDC an advantage in future similar competitions at other locations. Even if that is so, however, a competitive advantage of that sort certainly is not unusual, and is not legally objectionable unless it is the result of unfair Government action. See Honolulu Disposal Service, Inc.--Reconsideration, 60 Comp. Gen. 642, 647 (1981), 81-2 CPD 126. A proper modification to a contract does not constitute unfair Government action. Clifton Precision, Division of Litton Systems, Inc., B-207582, June 15, 1982, 82-1 CPD 590.

We conclude that the Navy's modification of CDC's contract to accept the Cyber 205-411 substitution was within the scope of the contract. The protest is denied.

A handwritten signature in cursive script that reads "Milton J. Fowler".

Acting Comptroller General
of the United States