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DECISION

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

FILE: B-214597 DATE: December 24, 1985

MATTER OF:

EPA Level of Effort Contracts - Appropriation Availability

DIGEST:

1. The Environmental Protection Agency may not issue a nonseverable work assignment under a cost-reimbursement, level of effort, term contract where the effort furnished will extend beyond the contract's initial period of performance into an option period. The Federal Acquisition Regulation requires that term contracts be "for a specified level of effort for a stated period of time." Further, issuance of a work assignment which could not be performed until the next fiscal year would violate the bona fide need rule.

2. The Environmental Protection Agency may not modify a level of effort contract to accommodate a non-severable task extending beyond the original contract period of performance. Since the period of performance is an essential part of a level of effort contract, any change in that term would substantially change the contract such that the contract for which competition was held and the contract to be performed are essentially different. Accordingly, such a contract could not be extended by contract modification.

This is in response to a request from C. Morgan Kinghorn, Comptroller of the Environmental Protection Agency (EPA), for a decision regarding the propriety of issuing a hypothetical nonseverable work assignment under a cost-reimbursement, level of effort, term contract, in which the effort furnished will extend beyond the contract's initial period of performance. EPA has also asked informally whether it may modify an existing level of effort contract to accommodate a work assignment extending beyond the term of the original contract to be funded with appropriations available during the

initial contract period. Although the contract described in EPA's hypothetical also contains options to extend the contract for additional periods of performance, EPA recognizes that performance under any options would be funded with appropriations available during the fiscal year covered by the option period. EPA's second question, however, is whether a modification, prior to option exercise, extending performance beyond the end of the fiscal year during which the original period of performance takes place, may encumber the funds of the expiring fiscal year.

For the reasons set forth below, we conclude that EPA may not issue a work assignment extending beyond the term of a level of effort contract, nor may it modify the term of an existing level of effort contract to accommodate such a work assignment.

Background: EPA uses level of effort, term contracts to perform service-intensive type work, including, for example, economic cost and benefit analyses and technical analyses of hazardous waste regulations. Typically, EPA, through its level of effort term contracts, purchases, on a cost-reimbursement basis, a specified quantity of person-hours (the level of effort) for the contract's base period and each option period. The contract's estimated cost is established, based upon a maximum number of hours set forth in the contract. EPA is obligated to order and the contractor is obligated to furnish the specified level of effort within the time period set forth in the contract. The contract provides for a downward adjustment in the contractor's fees if the contractor provides less than 90 percent of the specified level of effort. The contract's scope of work merely sets forth the broad outlines of the type of work to be performed. During the term of the contract, EPA issues work assignments which draw on the contract's specified quantity of person-hours and require the contractor to work on a specific task.

EPA raises the following hypothetical situation:

"Assume a level of effort, work assignment contract is awarded October 1, 1982, with a period of performance through September 30, 1983. The contract has an option for one additional year running from October 1, 1983, through September 30, 1984. Both the basic period of performance and the option year are for 10,000 professional hours for each period. Assume that the contractor has provided 9,000 hours as of September 25, 1983 and EPA issues a

> work assignment on September 26, 1983, for 1,000 hours. The contractor will provide the bulk of hours in FY 1984. The work assignment, when viewed alone, is for nonseverable services."

For purposes of our analysis of this hypothetical situation, we have assumed what EPA has implied but not stated, that the contract is being funded under an appropriation that is available for obligation only through the end of the contract term.1/

EPA asks two questions regarding this hypothetical situation. The first question is whether it properly may issue the 1,000 hour work assignment on September 26, 1983, recognizing that the contractor will provide the bulk of hours in fiscal year 1984. The second question is whether it could modify the terms of a level of effort contract to accommodate a work assignment extending beyond the term of the contract.

Analysis: We conclude that in the hypothetical situation posed by EPA, the issuance of a work assignment which could not be completed within the contract's initial term of performance, i.e., by September 30, 1983, would have violated both the Federal Procurement Regulations (FPR)2/ and the "bona fide need" rule, 31 U.S.C. § 1502(a). As EPA concedes, EPA's level of effort contracts fall squarely within the FPR definition of "term contracts." Section 1-3.405(e)(2) of the FPR provide:

> "The Term form is one which describes the scope of work to be done in general terms and which obligates the contractor to devote a specified level of effort for a stated period of time for the conduct of research and development."

1/ Our assumption is based on statements in EPA's inquiry letter such as "so long as a nonseverable work assignment was issued during the period of availability of a particular appropriation * * *." P.4. We are aware that EPA generally receives appropriations which are available for 2 fiscal years, but the principles remain the same.

2/ The FPR, rather than the Federal Acquisition Regulation (FAR), governed procurements by civilian agencies during the time period specified in EPA's hypothetical questions. However, the FAR has nearly identical provisions. See FAR 16.306(d)(2) and (4).

The FPR further provides in section 1-3.405(e)(5):

> "In no event should the term form of contract be used unless the contractor is obligated by the contract to provide a specific level-of-effort within a definite period of time." (Emphasis added.)

Accordingly, to permit a contractor to provide a portion of the required 10,000 professional hours beyond the basic period of performance, i.e., after September 30, 1983, would be contrary to the FPR requirement that such term contracts "provide a specific level of effort within a definite period of time."

Further, the issuance of a work assignment which could not be completed within the contract's initial term of performance would also violate the bona fide need rule. The bona fide need rule requires that appropriations made available for obligation during a given fiscal year or years may be obligated only to meet a legitimate need arising in that fiscal year (or years). 31 U.S.C. § 1502(a) (1982). See, e.g., 38 Comp. Gen. 628 (1959).

As a general rule, service contracts can extend beyond the duration of an appropriation period only when the portion of the contract to be performed after the expiration of the appropriation period is not severable from the portion performed during the prior period. See 60 Comp. Gen. 219 (1981). In the EPA case, the level of effort contract is, by definition, a severable services contract. It requires the performance of a certain number of hours of work within a specified time period rather than requiring the completion of a series of work objectives. Because the original contract in EPA's hypothetical is for 10,000 hours of work to be performed in fiscal year 1983, funds obligated under the contract may not be expended for work performed within fiscal year 1984. See B-183184, May 30, 1975. The fact that a work assignment issued under the contract late in the fiscal year might, by its nature, be considered nonseverable if this were what the FPR (as well as the FAR) call a "completion" form of term contract, does not change the result in this case. A completion contract would require the contractor to complete and deliver a specified end product--e.g., a final report. As long as the end product is a bona fide need of the year in which it was ordered, the funds could remain obligated until the end product was delivered. See FPR 1-3.405(e)(1) and FAR 16.302(d)(1). In contrast, the EPA hypothetical contract calls for 10,000 work hours before the end of the fiscal year. Performance of those hours in the next fiscal year would not be consistent with the requirements of the contract.

The second question raised informally by EPA is whether it may modify the original contract to accommodate the completion of a work assignment, performance of which will extend beyond the end of the contract period of performance. In raising this question, EPA says it recognizes that a modification cannot be issued which extends the term of the contract beyond the period of availability of the fiscal year appropriation to be charged. Essentially, EPA is asking whether it may amend a level of effort contract near the end of the fiscal year to provide for the performance of a nonseverable task, performance of which will extend beyond the end of the fiscal year. As noted, EPA's modification would be for the purpose of funding the modification with expiring appropriations. Any options exercised, of course, would be funded with currently available appropriations.

The determination of whether a particular modification should be treated as a new procurement is generally decided on a case-by-case basis. For example, we have held that if the contract as changed is materially different from the contract for which the original competition was held, the new requirement should be procured competitively, unless a non-competitive procurement is justifiable. 57 Comp. Gen. 285, 286 (1976).

The essential characteristics of a level of effort contract are the stated level of work and the term in which that work is to be performed. Therefore, any change in that structure -- particularly a change from a specified level of effort for a fixed term to the performance of specified, non-severable tasks -- would "substantially" change the contract such that "the contract for which competition was held and the contract to be performed are essentially different." Accordingly, we conclude that a modification of the sort suggested by EPA to a level of effort contract could not be done by contract modification, but rather would require the execution of a new contract. This is because EPA's suggested modification would turn a level of effort contract into a contract for one or more nonseverable tasks.

In a memorandum prepared by the EPA Office of General Counsel on this issue before it was submitted to us, the suggestion was made that use of indefinite quantity or requirements contracts would eliminate the end of year problems encountered with level of effort term contracts. We would agree that the kind of services explained in EPA's hypothetical question could be acquired under such an arrangement, provided that the nature of the services themselves is non-severable. It appears that the most satisfactory form of contract, for EPA's purposes, may be the completion contract, described earlier as requiring a specific end product as a

condition for payment of the full fee and costs. As a non-severable contract, performance could extend into a subsequent year but be payable from funds obligated at the time the contract was executed. See FAR 16.306(d)(1),(2), and (3).

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for Comptroller General
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