



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Shamrock Industries Inc.; Southern Plastics
Engineering Corp.--Reconsideration

File: B-225216.2; B-225216.3

Date: March 18, 1987

DIGEST

1. While an agency may not properly award a contract with the intent to modify it, when a protester neither alleges nor makes out a prima facie case that this occurred, a modification executed 5 months after award is a matter of contract administration, not within the bid protest jurisdiction of the General Accounting Office.
2. When contract modification is within the scope of an original contract and is supported by consideration, the contracting officer acts within his authority in agreeing to it, and in fact is the only person authorized to execute a change order.
3. A bidder's attempt after opening to modify its bid to provide an accelerated delivery schedule at the same price cannot be accepted because it constitutes a late modification.

DECISION

This decision involves two protests against an allegedly improper modification of a contract for certain camouflage equipment known as batten spreaders. The United States Army Troop Support Command, St. Louis, Missouri, awarded the contract on July 10, 1986, to Bahr, Inc., under invitation for bids No. DAAK01-86-B-C057.

We dismiss a protest by Shamrock Industries Inc., and we affirm a prior dismissal of a similar protest by Southern Plastics Engineering Corporation.

Southern initially protested the terms and conditions of the solicitation, which it alleged improperly permitted bidders who had to undergo first article testing a longer time for delivery than those for whom such testing was waived. The protester also alleged that the procuring activity and the

awardee intended to negotiate or had negotiated a contract modification under which significant price increases would be exchanged for an accelerated delivery schedule.

We dismissed Southern's protest on the first ground because it involved an alleged deficiency that had been apparent on the face of the solicitation, but had not been filed, as required by our regulations, before bid opening. See Southern Plastics Engineering Corp., B-225216, Dec. 2, 1986, 86-2 CPD ¶ 630. We declined to consider the propriety of the purported modification, stating that although an agency may not award a contract with the intent to modify it, Southern had neither alleged nor made out a prima facie case that this had occurred. Therefore, we stated, the modification was a matter of contract administration, and not within our bid protest jurisdiction. Id.

Southern now requests reconsideration because, on the basis of information obtained under the Freedom of Information Act, it has learned that the modification, issued November 6, 1986, indeed changed delivery terms and increased the contract price. In post-award discussions with the procuring activity, Southern states, it similarly offered to accelerate delivery at a price that would have been less than the awardee's. It seeks termination of the awarded contract and resolicitation.

Shamrock Industries Incorporated, which has not previously protested concerning this procurement, also alleges that the modification was improper; argues that the contracting officer is not authorized to make a unilateral determination that a price increase is offset by accelerated delivery; and states that it would be willing to perform on the accelerated schedule without increasing the unit price that it originally bid. The firm seeks the award as the low bidder.

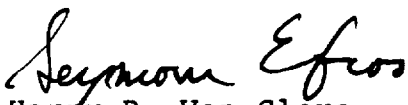
As we stated in our prior decision, an agency may not properly award a contract with the intent to modify it. American Television Systems, B-220087.3, June 19, 1986, 86-1 CPD ¶ 562; U.S. Materials Co., B-216712, Apr. 26, 1985, 85-1 CPD ¶ 471. Here, however, the Army states that the need for accelerated delivery became known only after award and was ordered by the materiel manager to meet Army commitments. The contract, awarded in July, was not modified until November. In the absence of evidence other than the protesters' speculative statements that a contract was awarded with an intent to modify it, we remain of the opinion that the protested modification is a matter of contract administration. See Datastrip Corp., B-217581, Jan. 25, 1985, 85-1 CPD ¶ 105. The protesters have neither alleged nor shown that

the modification was beyond the scope of the original contract in that the goods or services to be delivered are different from those covered by the original solicitation, so as to require a separate, new procurement. See King-Fisher Co., B-224341, Aug. 28, 1986, 86-2 CPD ¶ 240; Educational Computer Corp., B-221276, Mar. 7, 1986, 86-1 CPD ¶ 230.

As for Shamrock's allegation that the contracting officer lacked authority to determine that the accelerated delivery schedule justified a price increase, since the modification was within the scope of the original contract, the contracting officer was acting within his authority in agreeing to it, and in fact was the only person authorized to execute a change order. No higher-level approval is required. See Federal Acquisition Regulation, 48 C.F.R. §§ 43.102, 43.202 (1986). Such a modification must, as a matter of law, be supported by consideration, i.e., some benefit flowing to the government. See generally 58 Comp. Gen. 7 (1978) and court cases cited therein. Here, the contractor's agreement to deliver earlier than required by the contract served as consideration for the price increase to which the contracting officer agreed, and vice versa. Shamrock's protest on this basis is therefore without legal merit.

Finally, the protesters' offers after bid opening to accelerate their delivery schedules amount to attempted late modifications of their bids and, as such, cannot be considered, regardless of whether the government would achieve a savings that Southern believes would amount to \$300,000. See Tabco Products, Inc., B-222632, Aug. 27, 1986, 86-2 CPD ¶ 231.

We affirm our prior dismissal of Southern's protest and dismiss Shamrock's protest.

for 
Harry R. Van Cleve
General Counsel