

Cooper



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Avtron Manufacturing, Inc.

File: B-229972

Date: May 16, 1988

DIGEST

Where a contract for an aircraft generator test stand as modified would be materially different from the contract for which a competition was held, the modifications go beyond the scope of the contract so that the contract should be terminated and the requirement resolicited.

DECISION

Avtron Manufacturing, Inc., protests the proposed modification by the Naval Air Systems Command, Department of the Navy, of contract No. N00140-87-C-9064 with Defense Technology Corporation. The fixed-price, multiyear contract is for the design, construction, installation and testing of aircraft generator system test stands. Avtron contends that the proposed modifications to the contract are beyond the scope of the contract for which the competition was conducted, such that a new solicitation should be issued.

We sustain the protest.

Under the request for proposals (RFP), issued on March 15, 1985, the Navy solicited offers for first article units, data, and production and option quantities of hardware to be used to test Navy aircraft generators at land bases and on shipboard. The RFP anticipated that offerors would propose individual technical approaches to meet the Navy's needs, which were described in performance specifications set forth in the purchase description.

The test stand consists of four assemblies: the variable speed drive assembly that provides the power to drive and cool the generator; the load bank assembly that simulates the electrical load of the aircraft systems; the oil supply assembly that provides oil to the unit; and the control and instrument assembly that provides the operator a means of controlling, selecting and monitoring the test. The purchase description for the test stands imposed no

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requirements for input power to the test stands or for the amount of heat allowed to emanate from the units. However, it did state that the variable speed drive assembly output shaft should be capable of being set to any speed between 0 and 30,000 RPM, and the minutes of the preproposal conference, contained in an amendment to the solicitation, emphasized that the use of two shafts in the variable speed drive assembly, each with a different speed range, was unacceptable.

The Navy received four proposals in response to the solicitation. Defense Technology offered the low evaluated price of \$31,891,676.91. Avtron was the third low offeror at \$46,391,962. Defense Technology proposed to use a hydroviscous drive in the variable speed drive assembly. Avtron proposed the more conventional electric drive. The Navy found Defense Technology's proposal to utilize the hydroviscous drive for transmitting power and cooling the test stand technically acceptable and, after a favorable preaward survey, made award to that firm on December 24, 1986.

First articles under the contract are due in August of 1988. During a routine design review of the contract in February of 1987, the Navy learned that the input power required to run the test stands and the heat created by the units would exceed the capabilities of the existing facilities to house them. In addition, the Navy determined that the output requirement of the test stands could be reduced from 160 to 100 horsepower because of the phase-out of the only aircraft requiring the higher horsepower output. As a result of that modification, the Navy determined that the input power required to run the test stands and heat ejection would be significantly reduced. Accordingly, the Navy changed the purchase description, and modified the contract on April 10, 1987, to revise the output horsepower requirement from 160 to 100.

However, continued review by the Navy resulted in the conclusion that the reduction in horsepower specified in the April 10, 1987, modification was not adequate to allow the units to be used aboard ship since the heat ejection resulting from running the test stands still exceeded the acceptable level of heat for shipboard use. As a result, the Navy proposes to modify the purchase description further, and issue a change order to the contract with Defense Technology, to specify a limitation on the input power required to run the test stands. The modification

would allow for two output shafts running to the aircraft generator rather than one in order to reduce the level of heat generated through the use of two lower-capacity units with different speed ranges.

In response to the Navy's proposed revisions to the contract, Defense Technology assessed the cost impact of the changes as resulting in an increase of \$3,329,674, or 10.5 percent, including costs attributable to a possible conversion of the government-furnished generators to contractor-furnished generators. In addition, Defense Technology proposed a 180-day extension in the delivery schedule for all deliverables; this extension, however, if accompanied by the firm's proposed production rate increase for delivery of the units, still would result in all units being delivered within the timeframe of the current schedule. Defense Technology also noted that if the proposed modification was not issued by January 15, 1988, a day-for-day extension beyond the proposed 180 days would be necessary.

Avtron asserts that the Navy's proposed modification to the purchase description materially alters the terms of the original contract in that it significantly affects the design, construction, and performance of the aircraft generator test stand, thereby changing the scope of the contract so as to amount to a renegotiation of a new contract with Defense Technology on a noncompetitive basis. Avtron argues that the contract with Defense Technology should be terminated and the requirement resolicited, and that Avtron's proposal in response to the new solicitation would be significantly lower in price than its previous proposal because the modifications contemplated by the Navy create a significantly different test stand and delivery schedule.

The Navy argues that the proposed modification to the number of output shafts is a result of the change in the input power requirement and that the proposed modification is not substantial, does not change the nature, purpose or method of operation of the test stand, and is therefore within the scope of the Changes clause set forth in Federal Acquisition Regulation § 52.243-1 (FAC 84-29) and incorporated into the contract with Defense Technology.

As a general rule, our Office will not consider protests against contract modifications, as they involve matters of contract administration that are the responsibility of the

contracting agency. 4 C.F.R. § 21.3(m)(1) (1988). We will, however, consider a protest that a modification is beyond the scope of the original contract. If a contract as modified is materially different from the contract for which a competition was held, the subject of the modification should be competitively procured unless a sole-source award is appropriate. Ingersoll-Rand, B-225996, May 5, 1987, 87-1 CPD ¶ 474.

In determining whether a changed contract would be materially different from the contract originally awarded so that the modified contract should be the subject of competition, for guidance we have looked to the "cardinal changes" doctrine developed by the Court of Claims to deal with a contractor's claim that the government breached a contract by ordering changes that were outside the scope of the contract's Changes clause. See American Air Filter Co., Inc., 57 Comp. Gen. 285 (1978), 78-1 CPD ¶ 136, aff'd on reconsideration, 57 Comp. Gen. 567 (1978), 78-1 CPD ¶ 443. The basic standard defined by the court for determining when a cardinal change has occurred is whether the modified work is essentially the same as the work for which the parties contracted. See Air-A-Plane Corp. v. United States, 408 F.2d 1030 (Ct. Cl. 1969).

Thus, where it is alleged that a proposed contract modification will be outside the scope of the original contract, the question is whether the original purpose or nature of the contract would be so substantially changed by the modification that the original contract and the modified contract would be essentially different and the field of competition materially changed. American Air Filter Co., Inc., 57 Comp. Gen. 285, supra; Webcraft Packaging, Division of Beatrice Foods Co., B-194087, Aug. 14, 1979, 79-2 CPD ¶ 120.

We find that the Navy's proposed modifications to the performance specifications in the purchase description for aircraft generator test stands will materially alter the terms of the original contract and change the field of competition. The Navy's addition of an input power requirement and the increase in the permissible number of output shafts modify the performance specifications of the major assembly of the test stand--the variable speed drive assembly--by allowing two drive shafts operating at different speed ranges. This conventional method of operation was specifically and expressly disallowed by the RFP that led to Defense Technology's contract. As a result of that restriction, firms like Avtron were compelled to offer high-priced units that could span the entire speed

range, and Defense Technology won the competition in large part because its approach to meeting the Navy's needs--the hydroviscous drive--could be offered at a lower price. That somewhat unique approach, however, ultimately was found unworkable, and the currently proposed modification would specify the offeror-desired approach that expressly had been disallowed at the outset of the procurement. We think it entirely unfair to firms that lose a contract competition because an agency proscribes a conventional, suggested performance approach for the agency to decide, after award, that the same approach is precisely the one needed and then modify the contract accordingly.

The record strongly suggests that proposals submitted on the basis of the modified performance specifications, which relax the requirement for one output shaft operating over the entire speed range, would be significantly lower in price, and different in design and delivery schedule, from those submitted under the original purchase description. See Webcraft Packaging, Division of Beatrice Foods Co., B-194087, supra. In sum, the Navy's proposed modification cannot be said to fall within the scope of the procurement since it is not of a nature which potential offerors would have reasonably anticipated under the Changes clause incorporated into the contract with Defense Technology. Accordingly, we conclude that the competition for the contract as modified would be materially different from the competition originally obtained, and by separate letter to the Secretary of the Navy we are recommending that the contract with Defense Technology be terminated and the requirement resolicited under the modified specifications.

The protest is sustained.



Acting Comptroller General
of the United States