The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Theater Aviation Maintenance Services

File: B-233539

Date: March 22, 1989

DIGEST

1. General Accounting Office will not consider protests against contract modifications as they involve matters of contract administration unless the contract was awarded with the intent to modify it or the modifications are beyond the scope of the original contract.

2. Protest that agency improperly exercised an option to extend the term of a contract is denied where the protester has not shown that the agency failed to follow applicable regulations or that the agency's determination to exercise the option was unreasonable.

DECISION

Theater Aviation Maintenance Services (TAMS) protests the Army's issuance of several contract modifications and the decision to exercise the first year option under contract No. DAAJ09-87-D-A028, a firm-fixed-price requirements contract for maintenance of Army helicopters in Europe. The contract is held by the Agusta-TEAMCO Joint Venture, a joint venture of Agusta International S.A. and Trans European Airways Maintenance Company. We do not agree that the modification and option exercise were improper. Accordingly, we dismiss the protest in part and deny it in part.

The contract was awarded to Agusta on November 9, 1987, for a 1-year base period with four 1-year options. The contract requires the performance of various maintenance services on helicopters at the contractor's own facility and other maintenance services to be performed at a number of field sites. The contract as awarded included eight field sites, seven in the Federal Republic of Germany and one in Luxembourg.

The solicitation under which the contract was awarded included paragraph H.31 which stated that the Status of Forces Agreement (SOFA) was not applicable to this procurement. SOFA is an agreement among a number of the parties to the North Atlantic Treaty regarding the rights and obligations of the forces of the United States, Great Britain, Canada, France, Belgium and the Netherlands in the territory of the Federal Republic of Germany. Article 73 of the SOFA provides that certain personnel of contractors, referred to as "technical experts" whose services, either in an advisory capacity or in setting up, operating or maintaining equipment, are required by a particular country's force in Germany are to be considered and treated as members of that country's civilian component. An employee granted status as a technical expert under Article 73 may be entitled to certain benefits or logistical support, such as quarters, recreation facilities, communications, banking, laundry, vehicle registration, petroleum and oil products, base exchange, medical and dental services on a reimbursable basis and access to Department of Defense schools on a tuition paying basis.

TAMS, Agusta and two other firms competed for the contract under request for proposals (RFP) No. DAAJ09-86-A252. Award was made to Agusta based on its low-priced, technically acceptable best and final offer at $65,835,354 for the base and 4 option years. TAMS' best and final offer was $101,047,958, and the other two best and final offers were $77,725,678 and $71,357,836. Over the first year of performance, Agusta's contract was modified six times.

On November 9, 1988, TAMS protested that a number of contract modifications executed over the base year materially changed the contract terms on which the competition had been based. According to the protester, as a result of these modifications, the basis of competition was changed and, for that reason, the Army should be directed to reopen competition for the option years to give offerors an opportunity to compete for the changed requirements.

TAMS' protest principally challenges modification No. A00002, which was issued on February 8, 3 months after the contract was awarded. That modification changed the terms of the contract to provide that the SOFA benefits would apply to the contract. Under the modification, subject to availability at individual bases and the approval of theater/base commanders, the government was to make available the following logistic support: quarters, messing (including commissary), communications, banking, an Army postal mailing address, laundry, dry cleaning, on-base recreation, vehicle registration, petroleum and oil

products, base exchange, medical and dental facilities and club privileges at the discretion of base commanders. The modification also stated that these items of logistic support would be subject to normal charges for contractor personnel and that supervisory and contract personnel would be considered as having a grade comparable to the government GS-11 civilian grade and other personnel would be considered as having a grade comparable to the GS-9 civilian grade.

As consideration for the addition of the SOFA benefits for eligible contractor employees in Germany, the modification stated that Agusta was to provide an additional off-site field team, more specific definition of the skills and tools required at the field sites, pilots to ferry aircraft as required, additional administrative support and increased distribution of contract exhibits.

TAMS argues that the provision of SOFA benefits allowed Agusta to hire large numbers of United States citizens, an opportunity that was not available to offerors under the solicitation because of the additional cost to hire United States citizens without SOFA benefits. TAMS also argues that the addition of the SOFA benefits "effectively relieved the contractor of the requirement to comply with local European labor laws, a critical requirement imposed on all prospective offerors." Further, TAMS argues that the language in modification No. A00002 stating that contractor employees would be considered to have grades comparable to the civilian government GS-9 and GS-11 blurred the distinction spelled out in the solicitation between independent contractor personnel and government employees so that contractor personnel became little more than temporary government personnel.

TAMS also argues that the timing of the modification, 3 months after award, suggests that at the time of award the Army was considering removing the prohibition on SOFA benefits. Further, according to TAMS, Agusta knew, or had reason to know that the contract would be changed to permit the hiring of large numbers of United States citizens.

The protester also argues that by contract modification Nos. A00003 and A00004 the Army further changed the scope of the contract awarded to Agusta, with the effect of circumventing the competitive procurement statutes. According to TAMS, modification No. A00003 significantly expanded the contract's scope of work by adding new contract line items for maintenance requirements, helicopter armament maintenance and depot level maintenance. TAMS further argues that modification No. A00004 improperly increased the composite hourly labor rates and manday rates under the

contract. Although recognizing that clause H.26 of the contract, "Price Changes," allowed such wage increases based upon "decrees" issued by Belgium, Germany and Luxembourg, TAMS argues that no such decree had been issued here.

Finally, TAMS argues that, in modification No. A00006, the Army improperly exercised the first option to extend the contract. According to TAMS, as a result of the previous modifications, the contract in existence at the end of the base year was so different from the contract that was awarded to Agusta that the agency's only proper recourse was not to exercise the option but to issue a new solicitation for the option years.

As a general rule, our Office will not consider protests of contract modifications, as they involve matters of contract administration that are the responsibility of the contracting agency. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(1) (1988). Even if changes in a contract are significant, in the absence of evidence that a contract was awarded with the intent to modify it, we will not question a contract modification unless it is shown to be beyond the scope of the original contract, so as to require a separate procurement. Horizon Trading Co., Inc.--Request for Reconsideration, B-231177.3, Nov. 21, 1988, 88-2 CPD ¶ 493.

Here, the record does not support the protester's allegation that the Army awarded the contract with the intent to modify it. The contract was awarded by the Army Aviation Systems Command (AVSCOM) in St. Louis. Although that Office twice was requested to consider including the SOFA benefits in the solicitation, both requests were refused and AVSCOM stated that SOFA benefits would not be made available to the successful offeror. Contrary to TAMS' allegations, there is no evidence in the record that the Army office that awarded the contract did so with the intent to modify it after award to provide the SOFA benefits.

Authority to administer the contract was assigned to the United States Army in Europe (USAREUR) Contracting Center. Although that Office had requested AVSCOM to include the SOFA benefits in the solicitation, the record does not indicate that the USAREUR contracting office intended on its own to add the SOFA benefits to the contract after it was awarded. Rather, it shows that officials administering the contract only began to consider the issue when Agusta requested the SOFA benefits after the contract was awarded.

Further, we do not believe that, based on the addition of the SOFA benefits, Agusta's contract is materially different from the contract for which the competition was held.

First, the type of work to be performed remained unchanged by modification No. A00002 in that Agusta will still provide aircraft maintenance services. Also, the SOFA benefits did not substantially change the scope or the amount of work required under the contract as demonstrated by the fact that the contract prices remained the same after addition of the SOFA benefits. It is true, as the protester argues, that because of the SOFA benefits Agusta was able to hire a significant number of United States citizens and achieve some cost savings since those employees could be hired at less cost than non-United States citizens. Nonetheless, since the SOFA benefits go to the individual employees and not directly to the contractror, we do not believe that the full value of the SOFA benefits contributed to a price advantage for Agusta.1/

Moreover, TAMS was not prejudiced by the noninclusion of SOFA benefits under the solicitation since even if we were to attribute the full value of the benefits to Agusta there is no indication that those benefits would have changed the competitive standing of the offerors. See ManTech Field Engineering Corp., B-218542, Aug. 8, 1985, 85-2 CPD ¶ 147. The Army valued the full range of the SOFA benefits at approximately $3,000 per year for each employee eligible for the benefits. The number of Agusta employees eligible for the SOFA benefits has varied from less than 100, when the firm began performance, to less than 200 on January 1, 1989. According to Agusta, the number has fluctuated based on the Army's requirements for work at the field sites. We have no basis to disagree with the agency's determination that those benefits are worth no more than $3,000 per employee per year. A number of the benefits such as banking, laundry, dry cleaning and an Army mailing address are not worth any substantial amount and a number of other benefits, such as quarters, are not, in fact, available to Agusta employees under the contract. Based on the average number of Agusta employees eligible for the benefits, which are worth approximately $3,000 per employee per year, the SOFA benefits are worth less than $2,000,000 over the 5-year contract. Further, Agusta was required to offer the agency additional services as consideration for the SOFA. While the exact value of these services is not clear it is evident that their value was significant. Since, as explained, TAMS' offer on the solicitation was $35 million

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1/ We also reject TAMS' contention that, as a result of the SOFA benefits, Agusta's employees became little more than temporary government personnel; technical experts with SOFA benefits continue to be employees of the contractor.

higher than that of Agusta, we do not see how SOFA benefits in the solicitation would have significantly improved TAMS' competitive standing.

Further, TAMS concedes that, had the SOFA benefits been available under the solicitation it would not have submitted a proposal. TAMS says that its two joint venture partners, both German firms, employed almost all of the available German national labor force qualified to perform the contract and, for that reason, it would not have been possible for the joint venture to hire non-nationals for the contract. Thus, TAMS says, in all probability, it would not have submitted a proposal.

TAMS also argues, apparently in the alternative, that had it been able to use employees eligible for the SOFA benefits, it could have reduced its price by 33 percent for the work which could be assigned to such employees. TAMS argues that under these circumstances, which TAMS does not explain in detail, its proposal could have been price competitive. Due to the lack of an explanation as to how TAMS could have reduced its costs to such an extent and the inconsistency between this argument and the statement that TAMS would not have submitted a proposal at all, we conclude that TAMS' competitive position would not have improved had the SOFA benefits been allowed under the solicitation.

We also have no basis on which to conclude that modification Nos. A00003 and A00004 were beyond the scope of the contract awarded to Agusta. Among other things, modification No. A00003 established a separate contract line item (CLIN) for aircraft maintenance at the contractor's facility on the OH-58 Kiowa helicopter. It also established CLINS for armament maintenance on the AH-1 Cobra helicopter and for depot level maintenance on the UH-1, AH-1 and H-58 helicopters. According to the agency, the additional CLIN for OH-58 Kiowa work merely centralized work at Agusta's main facility that was already being performed at field locations. Since this CLIN did not add aircraft or staffhours to the contract and did not result in an increase in price, we conclude that it was not beyond the scope of the contract.

The additional CLIN for armament maintenance, according to the agency, merely included in the contract work that was excluded because of a misunderstanding regarding security clearances. Paragraph C.1(a)(20) of the contract stated that the "[c]ontractor will not perform repairs on or have access to any classified equipment/components or functional parts of weapon systems." The agency says that the phrase "of weapon systems" was deleted by the modification when AVSCOM determined that there were no classified components

involved in the AH-1 Cobra maintenance required under the contract which, but for the exclusion, would have included armament work. The agency states that this work is to be performed at the same hourly rate as the already required maintenance work and, in the first year, amounted to only 252 staffhours at a cost of $6,821. The agency estimates that armament maintenance work will be performed on only three or four AH-1 Cobras per year at an additional annual cost of approximately $28,000. Under these circumstances, and since the additional work and cost is not significant in relation to the total contract price, we are not prepared to find that the agency improperly modified the contract by including this work.

The agency explains that the purpose of the CLIN added by modification No. A00003 relating to depot level maintenance was simply to facilitate management of funds concerning the depot level work that was already authorized by the contract. In this respect, the Army says, and TAMS acknowledges, that limited depot level work was permitted by paragraph H.28 of the contract. According to the Army, different funds are used for depot level maintenance work from those used for other maintenance work under the contract and the separate CLIN was added for administrative purposes. Although TAMS says that the inclusion of a separate CLIN for this work indicates an increase in scope and workload on the contract, there is nothing in the record to support this contention.

Contract modification No. A00004 implemented a 2 percent increase in hourly labor rates and manday rates for Belgium employees of Agusta, a joint venture of two Belgium firms. This change was made pursuant to paragraph H.26 of the contract which allowed such a wage increase based on decrees issued by Belgium, Germany and Luxembourg. Contrary to TAMS' allegation, a decree was issued by the Belgian government. Although TAMS says that the Belgian decree did not mandate the wage increase, it is clear that such increases are allowed by paragraph H.26 of the contract. Since the wage increase is not beyond the scope of the contract, the implementation of the Belgian decree is a matter of contract administration which is not for consideration under the bid protest function. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(1) (1988).

TAMS also argues that contract modification No. A00006 improperly added 10 field sites to the contract. Although TAMS was given a copy of modification No. A00006 on October 27, the protester did not raise this issue until January 19, 1989, when it submitted its comments on the agency's report on the protest. Under the circumstances,

this issue is untimely and will not be considered. 4 C.F.R. § 21.2(a)(2).

Finally, we reject TAMS' contention that the option should not have been exercised. As a general rule, option provisions in a contract are exercisable at the sole discretion of the government. Federal Acquisition Regulation § 17.201. Our Office will not question an agency's exercise of an option in an existing contract unless the protester shows that the agency failed to follow applicable regulations or that the determination to exercise the option, rather than conduct a new procurement, was unreasonable. Syncor Industries Corp., B-224023.3, Oct. 15, 1987, 87-2 CPD ¶ 360. There has been no such showing here. Under the circumstances of this case, since the contract awarded to Agusta was not materially changed by the contract modifications, we have no reason to conclude that the option exercise was unreasonable.

The protest is dismissed in part and denied in part.

James F. Hinchman
General Counsel