

*M. W. W.*



Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** Ion Track Instruments, Inc.

**File:** B-238893

**Date:** July 13, 1990

Barry L. Shillito, Esq., Eckert Seamans Cherin & Mellott, for the protester.  
Thomas W.A. Barham, Esq., Arent, Fox, Kintner, Plotkin & Kahn, for Thermedics, Inc., an interested party.  
David S. Glater, Esq., Transportation Systems Center, Department of Transportation, for the agency.  
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

1. Protest alleging that the extension of a research and development (R&D) contract beyond 5 years is improper is denied since the Federal Acquisition Regulation (FAR) does not limit the duration of R&D contracts to 5 years; the extension of the performance period, standing alone, does not constitute a change in the scope of the procurement; and the contract is not a "multiyear contract" limited to a maximum duration of 5 years under FAR § 17.102-2(a).
2. New and independent grounds of protest based on information in the agency's report responding to the initial protest allegations are untimely where the protester first raises such issues more than 10 days after receiving the agency report.

## DECISION

Ion Track Instruments, Inc. (ITI) protests the Department of Transportation's extension of contract No. DTRS-57-84-C-00063, a cost-reimbursement research and development (R&D) contract awarded to Thermedics, Inc., for the design and development of an Explosives Vapor Detector, and the fabrication of a Walk-Through Passenger Screening System using the Explosives Vapor Detector, for screening airport passengers. ITI argues that the contract has been improperly extended on a sole-source basis beyond the maximum period permitted, and that by extending Thermedics'

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contract for longer than the permissible period, the contract has been modified beyond the scope of the original procurement. ITI further argues that the increases in the cost of the Thermedics contract and the changes to the Statement of Work are also beyond the scope of the original procurement.

We deny the protest in part and dismiss it in part.

On March 25, 1984, after a competition in which ITI participated, the Department of Transportation awarded identical R&D contracts to three offerors: Thermedics, Inc. (the successor-in-interest to the original awardee Thermo-Electron, Inc.); Bendix Corporation; and SCIEEX, Ltd. The work included in the three contracts was divided into three phases. The first phase required submission of a Design Study Report detailing how each contractor would develop an Explosives Vapor Detector. The second phase required the contractor to develop the Explosives Vapor Detector and demonstrate its compliance with the specification. In the third phase the contractor was required to develop an integrated walk-through screening system using the Explosives Vapor Detector. In all three contracts, the government reserved the right to select, via contract modification, one or more of the firms to proceed with Phases II and III of the procurement.

After completion of the first phase, only Thermedics was selected, in June 1985, to proceed with Phase II of the contract in accord with the design it had submitted earlier. In September 1986, Thermedics began work under Phase III of the contract. Phase III of the procurement is still proceeding, and immediately prior to filing this protest, ITI learned the agency may extend the contract past its current expiration date of November 1990.

ITI argues, in its initial protest, that the agency's extension of the contract awarded to Thermedics is beyond the scope of the work required in the original procurement, because the original procurement anticipated a significantly shorter performance period. ITI also argues that any further extension of Thermedics' contract, awarded in 1984, is improper because Thermedics' contract is a multiyear contract limited to a maximum duration of 5 years by Federal Acquisition Regulation (FAR) § 17.102-2(a). In support of its position, ITI relies on paragraph B of the Statement of Work which states that "[a] three (3) phased, multiyear effort is planned for the development of the anticipated system." (Emphasis added.)

As a preliminary matter, the agency argues that ITI's protest should be dismissed because extensions to Thermedics' contract involve matters of contract administration that are the responsibility of the contracting agency. As a general rule, our Bid Protest Regulations provide for dismissal of protests involving contract administration matters. 4 C.F.R. § 21.3(m)(1) (1990). However, we consider protests such as ITI's alleging that modifications to a contract are beyond the scope of the original contract, thus changing the nature of the contract originally awarded, since the work covered by the modification would then be subject to requirements for competition absent a valid sole-source determination. Neal R. Gross & Co., Inc., 69 Comp. Gen. 247 (1990), 90-1 CPD ¶ 212.

When it is alleged that a contract modification is outside the scope of the original contract, the question is whether the original nature or purpose of the contract is so substantially changed by the modification that the original and modified contracts would be essentially different and the field of competition materially changed. See Defense Technology Corp.; Department of the Navy--Requests for Recon., B-229972.2; B-229972.3, Sept. 21, 1988, 88-2 CPD ¶ 273. In its initial protest, ITI alleged only that the extension of the contract term materially changed Thermedics' contract.<sup>1/</sup> In essence, ITI contends that the extension of the performance period for Thermedics' contract is so significant that the length of the contract, standing alone, has changed the scope of the original procurement.

Phase III of the contract was originally scheduled to be completed by January 1, 1988. After numerous modifications, the contract currently extends until November 16, 1990. Despite the extension of its term, however, the contract requires the same services as were initially required--the development of an Explosives Vapor Detector, and a walk-through device to screen airport passengers who might be concealing explosives. Thus, we do not view the extension of the performance period, standing alone, as a change beyond the scope of the contract, especially given that the contract here was one for research and development. See American Air Filter Co.--DLA Request for Recon., 57 Comp. Gen. 567 (1978), 78-1 CPD ¶ 443 (broad changes in R&D contracts are to be expected because the government's requirements are at best indefinite).

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<sup>1/</sup> As discussed further below, ITI subsequently raised other factors which allegedly show that the original scope of the work has materially changed.

We also do not agree with ITI's argument that Thermedics' contract is a multiyear contract limited by the FAR to a duration of no more than 5 years. A "multiyear contract" is a term of art in federal procurement law: it refers to a special type of definite quantity contract used to acquire known requirements on a unit basis for a multiyear period. FAR § 17.102-2(a). Such contracts must be firm, fixed-price; fixed-price with economic price adjustments; or fixed-price incentive-type contracts. FAR § 17.102-3(b). Thermedics' cost-reimbursement contract for research and development simply falls outside the definition of a multiyear contract. The language in the Statement of Work describing this procurement as a "three (3) phased multiyear effort" merely indicates that the research effort involved here will last more than 1 year; this language does not establish that the contract here is a "multiyear contract."

Rather than a "multiyear contract," Thermedics' contract is an R&D contract governed by Part 35 of the FAR. There is no bar in Part 35 of the FAR against R&D contracts extending beyond 5 years. Nor are we aware of any FAR provision limiting an R&D contract such as this to a duration of 5 years. As a result, on this basis to conclude that the agency has impermissibly extended Thermedics' R&D contract.<sup>2/</sup>

In its comments in response to the agency report and the conference on this protest, ITI, for the first time, argues that increases in the cost of Thermedics' contract, together with certain changes to the Statement of Work, also show that the contract exceeds the scope of the original procurement. In its initial protest letter ITI did not raise either of these challenges to the agency's actions. Since these contentions are new and independent grounds of protest, they must independently satisfy the timeliness requirements of our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2).

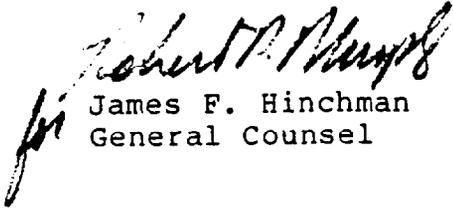
At the latest, ITI learned of these bases for protest on April 23, upon receipt of the agency's report in response to the protest. Inclusion of such new grounds for protest in

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<sup>2/</sup> The FAR rules governing the use of options in federal contracting bar basic performance periods and option quantities extending beyond 5 years in contracts for supplies or services. FAR § 17.204(e). However, R&D contracts are specifically exempted from these restrictions. FAR § 17.200.

the protester's post-conference comments, filed more than 10 working days after receipt of the agency report, does not constitute compliance with our timeliness requirements. See Motorola, Inc.--Request for Recon., B-234773.2, Dec. 7, 1989, 89-2 CPD ¶ 523. Accordingly, these allegations are untimely and will not be considered. 4 C.F.R. § 21.2(a)(2).

The protest is denied in part and dismissed in part.

James F. Hinchman  
General Counsel