



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Stoechner Security Services, Inc.

**File:** B-248077.3

**Date:** October 27, 1992

Jeffrey L. Michelman, Esq., Blumenfeld, Kaplan, Sandweiss, Marx, Ponfil & Kaskowitz, P.C., for the protester, Joseph James, Esq., Department of Housing and Urban Development, for the agency, Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Modification to contract for Guard I security services, which added a significant amount of Guard II security services at a site not under the contract for a new price negotiated after the award of the contract, exceeded the scope of the contract, which did not envision or price Guard II services; modification did not satisfy the requirements for a sole-source award and should be terminated.

### DECISION

Stoechner Security Services, Inc. protests the modification of contract No. 1-92-085, awarded to St. Louis Security Services, Inc., by the Department of Housing and Urban Development (HUD), for security guard services. Stoechner contends that the modification, which called for St. Louis Security to provide Guard II security guard services at LaClede Towne Apartments was an improper sole-source procurement not within the scope of the contract.

We sustain the protest.

On January 17, 1992, HUD issued invitation for bids (IFB) No. 1-92-085, as a total small business set-aside, to obtain armed and unarmed, uniformed security guard services for the protection of government-owned or possessed properties in the St. Louis, Missouri, metropolitan area. The IFB was said to be for an indefinite quantity, firm, fixed-price contract for 1 year with 2 option years. The IFB required the contractor to provide guard services as requested by HUD

for any properties within the designated locale, which HUD might assign to the contract during its term. To this effect, the IFB advised that properties and service covered by the contract would be added or deleted by written modification.

The IFB required bidders to bid a unit price per manhour for unarmed guard service and armed guard service, and a unit price per vehicle hour for vehicle drive-through patrol, although no estimates of manhours or vehicles were provided. The Statement of Work (SOW), as amended, specified a number of "Guard I" armed and unarmed guards to be provided for properties identified as Portland Towers, Water Tower I and II, University Club Apartments, Rivertrails, Baden Plaza, and Northview Village.<sup>1</sup> The SOW specified each site's guard stations and the duties for the Guard I guards. Although Guard II services were not specified for any identified property or otherwise referenced in the SOW, the IFB incorporated a Department of Labor wage determination for protective services that listed the Guard I classification (at a minimum hourly wage of \$5.71) as well as the Guard II classification (at \$9.05).<sup>2</sup>

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<sup>1</sup>The Department of Labor's Service Contract Act Directory of Occupations (July 1986) defines the Guard I labor classification as follows:

"Carries out instructions primarily oriented toward insuring that emergencies and security violations are readily discovered and reported to appropriate authority. Intervenes directly only in situations which require minimal action to safeguard property or persons. Duties require minimal training. Commonly, the guard is not required to demonstrate physical fitness. May be armed, but generally is not required to demonstrate proficiency in the use of firearms or special weapons."

<sup>2</sup>The Service Contract Act of 1965, 41 U.S.C. §§ 351-358 (1988), requires federal contractors performing service contracts to pay service employees minimum wages and fringe benefits determined by the Secretary of Labor. The Department of Labor's Service Contract Directory of Occupations defines the Guard II labor classification as follows:

"Enforces regulations designed to prevent breaches of security. Exercises judgment and uses discretion in dealing with emergencies and security violations encountered. Determines

(continued...)

At bid opening on March 9, HUD received 13 bids. Under the evaluation scheme used by HUD, St. Louis Security was the low responsive bidder and was awarded the contract; Stoehner was the third low bidder. Various modifications adding and deleting locations for which Guard I services are to be provided have since been made to the contract.

On June 15, HUD issued modification No. 9 to the contract, which added the LaClede Towne Apartments, which consists of four Federal Housing Authority properties assertedly encompassing approximately 60 acres with more than 1,200 units. The modification required the use of Guard II armed guards at that location. The modification provided that St. Louis Security would be paid at the fixed unit price of \$13.82 per hour for these services. (The contract price for Guard I services was \$8.97 per manhour for unarmed guards, \$9.05 per manhour for armed guards, and \$1.94 per vehicle hour.) Stoehner, which was the incumbent security guard contractor for the LaClede Towne Apartments, filed this protest on June 19, challenging the propriety of the modification to St. Louis Security's contract.

Stoehner contends that the modification was beyond the scope of the original contract because it resulted in a more than 107 percent increase to the original contract's scope of work and price, and in a change to the subject matter of the contract. In this respect, Stoehner asserts that the adding of Guard II services to the contract altered the qualification, education, and experience level required of the guards and involved the addition to the contract of a service neither contemplated nor priced by the original contract.

HUD contends that the modification did not exceed the original contract's scope, inasmuch as the IFB specifically stated that "properties and services" would be added or deleted by written modification to the contract. HUD essentially asserts that adding properties, without regard to dollar value, was proper because the contract called for the indefinite delivery of guard services. HUD contends that

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<sup>2</sup>(...continued)

whether first response should be to intervene directly (asking for assistance when deemed necessary and time allows), to keep situation under surveillance, or to report situations under surveillance, or to report situation so that it can be handled by appropriate authority. Duties require specialized training in methods and techniques of protecting security areas. Commonly, the guard is required to demonstrate continuing physical fitness and proficiency with firearms or other special weapons."

the change to Guard II services was permissible, since the contract did not specifically limit the type of guard services permitted under the contract and incorporated wage rates for both classifications of guards.

As a general rule, our Office will not consider protests against contract modifications, since they involve matters of contract administration. 4 C.F.R. § 21.3(m)(1) (1992); see American Air Filter Co., Inc., 57 Comp. Gen. 285 (1978), 78-1 CPD ¶ 136. However, we recognize an exception where, as here, it is alleged that a contract modification is beyond the scope of the original contract, since the work covered by the modification would be subject to the requirements for competition absent a valid sole-source determination. Everpure, Inc., B-226395.4, Oct. 10, 1990, 90-2 CPD ¶ 275; Neil R. Gross & Co., Inc., 69 Comp. Gen. 292 (1990), 90-1 CPD ¶ 212.

In determining whether a modification improperly exceeds the scope of the contract, we consider whether the contract as modified is materially different from the original contract for which the competition was held. Northeast Air Group, Inc., B-228210, Jan. 14, 1988, 88-1 CPD ¶ 33. The question of whether there is a material difference is resolved by considering factors such as the extent of any changes in the type of work, performance period, and costs between the contract as awarded and as modified, as well as whether potential bidders reasonably would have anticipated the modification. Neil R. Gross & Co., Inc., supra.

We find that the modification requiring Guard II services at the LaClede Towne Apartments exceeded the scope of the original contract. Although the contract is for guard services for HUD properties in the St. Louis area and is specifically tailored to allow the addition and deletion of properties as HUD's needs dictate, the modification went beyond the contract that HUD originally awarded. That contract contained only one set of guard prices (one price for armed guards and one price for unarmed guards); there were no separate prices for Guard I and Guard II services. As stated above, the requirements in the SOW all were to be satisfied with Guard I services. In fact, the loaded rates charged by St. Louis Security in the basic contract, including profit and overhead, reflect the rates required to

be paid Guard I personnel. We think the awardee's bid prices and resulting contract were predicated on the furnishing of Guard I services in the locations identified in the SOW and others that could be added after contract award.<sup>3</sup>

Guard II personnel were required by HUD because of serious crime and related problems at the Laclede Towne Apartments. There are substantial differences between these Guard II personnel and the Guard I personnel required and provided for in the basic contract. The Guard II personnel provide more sophisticated services, and are required to be significantly better qualified and trained and to exercise more responsibility than Guard I guards. These differences in qualifications and responsibilities are reflected in the Guard II classification's significantly higher minimum compensation rate (\$9.05 per hour as compared to the Guard I \$5.71 rate), and in the fact that St. Louis Security is charging HUD significantly higher rates for the Guard II services than the original contract rates. Not only does the challenged modification require substantially different and more expensive personnel, but the addition of the Guard II services at Laclede Towne Apartments more than doubles the contract work that formed the initial basis for award. Indeed, the guard services for this project previously had been provided under an entirely separate contract.

Under the circumstances, we consider the addition of these services to be outside the scope of the Guard I services contract awarded. See Tymshare, Inc., 60 Comp. Gen. 268 (1981), 81-1 CPD ¶ 118 (agency may not add to a contract for the support of one agency component similar support services for another agency component, where the solicitation does not adequately communicate that this could be done); Neil R. Gross & Co., supra (agency may not add to a court reporter contract a large amount of significantly different court reporter services that had previously been performed under another contract); Northeast Air Group, Inc., supra (agency may not add logistical services, which had previously been performed under another contract, to a maintenance contract that contemplated significantly less comprehensive services).

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<sup>3</sup>We are not persuaded that the mere incorporation of the wage rate in the IFB was sufficient to incorporate these services in the contract. As is frequently the case with such determinations, this one included numerous labor classifications not related to the contract, such as firefighters and court security officers.

In effect, the addition of Guard II services under the contract provision authorizing the addition or deletion of guard services by contract modification constituted the addition of an "unpriced option" to the original contract for Guard I services. Absent a justification for a sole-source award, the government generally is precluded from exercising unpriced options. See Federal Acquisition Regulation (FAR) § 17.207(f).<sup>4</sup> For an option to be exercised, the essential terms of the option and the corresponding commitment on the part of the contractor, have to be established at the time the underlying contract is awarded; the option is required to be clear and definite, and should require no further negotiation to work out important and essential terms. Id.; see Varian Assocs., Inc., B-208281, Feb. 16, 1983, 83-1 CPD ¶ 160. As discussed above, neither the IFB SOW nor the bid schedule suggested that Guard II services would be acquired through the exercise of an option under the contract, and indeed no price was provided in the contract for these services.

In view of the foregoing, the award of these services to St. Louis Security would be proper only if it can be justified as a sole-source award. Under the Competition in Contracting Act, 41 U.S.C. § 253(c)(1), a sole-source award may be made only when there is a single responsible source that can satisfy the government's needs. Those circumstances do not exist here. HUD obtained significant competition for the contract and HUD does not argue that only St. Louis Security could provide these services. Thus, there is no justification for a noncompetitive award of the LaClede Towne Apartment guard services to St. Louis Security.

The protest is sustained.

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<sup>4</sup>FAR § 17.207(f) provides that in order to satisfy the requirements for full and open competition, an option must have been evaluated as part of the initial competition and be exercisable at an amount specified or expressly determinable from the terms of the basic contract.

We recommend that the agency terminate this modification to St. Louis Security's contract and solicit for the requirement under competitive procedures.<sup>5</sup> In addition, we find that Stoenner is entitled to the costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1).

*for Milton J. Auster*  
Comptroller General  
of the United States

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<sup>5</sup>If HUD requires continued performance of the Guard II services, termination may follow HUD's prompt solicitation and award for these services. We note that St. Louis Security may not be eligible to compete if the procurement is set aside for small business concerns as the company, subsequent to the award here, has been found to be other than a small business.