



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: New Beginnings Treatment Center, Inc.--
Reconsideration

File: B-252517.5

Date: April 11, 1994

David J. Cantelme, Esq., Lewis and Roca, for the protester.
Octavia R. Johnson, Esq., Department of Justice, for the
agency.
Charles W. Morrow, Esq., Guy R. Pietrovito, Esq., and
James A. Spangenberg, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Prior dismissal of protest challenging post-award modifications of a contract for corrections services is affirmed where the record shows that the modifications, which deleted the requirement for performance within 45 days of the award, deleted the base period performance, and deleted the requirement to accept direct court commitments, did not exceed the scope of the original contract and therefore were properly determined to be beyond our review authority as matters relating to the administration of the contract.

DECISION

New Beginnings Treatment Center, Inc. requests reconsideration of our November 5, 1993, dismissal of its protest challenging the modification of Behavioral Systems Southwest, Inc.'s contract with the Federal Bureau of Prisons, United States Department of Justice, for community correction services.

We affirm our prior dismissal.

This contract was solicited by the Bureau under request for proposals (RFP) No. 200-081-W on November 20, 1991, for the operation of a residential community corrections center (halfway house) to provide correction services for federal prisoners in the Tucson, Arizona, metropolitan area. The RFP contemplated the award of a fixed price, indefinite quantity contract for a base period from date of award to September 30, 1993, with four 1-year option periods. The RFP provided for multiple awards.

Offerors were informed that referrals to contractors' halfway houses could come from a variety of sources, including transfers from federal institutions, direct court commitments,¹ and parole/probation offices. The contractor could refuse any referral (a) with recent and extensive history of violence, (b) with recent and extensive history of sexual deviance, (c) who would present a threat to the security of the facility, and (d) who was a minor on the date of admission. Contract performance was to begin within 45 days after the date of award.

The Bureau made awards to Behavioral Systems on November 27, 1992, and to New Beginnings on February 9, 1993. In a letter dated February 9, 1993, that we received on March 2, 1993, New Beginnings protested the Bureau's award to Behavioral Systems, asserting that Behavioral Systems' center failed to meet the RFP's requirements for zoning, licensing, and community support, and that the Bureau waived the RFP's requirement that Behavioral Systems begin performance within 45 days of award.

We dismissed the protest as untimely because the protest was not received in our Office within 10 working days of the date New Beginnings learned of the information on which it based its protest. See 4 C.F.R. § 21.2(a)(2) (1993). New Beginnings requested reconsideration, which we denied because it was filed more than 10 working days after New Beginnings was aware of the basis for reconsideration. See 4 C.F.R. § 21.12(b). We also dismissed a separate protest filed by New Beginnings with its request for reconsideration that was based upon additional evidence obtained by the protester that allegedly substantiated the initial protest, because an untimely protest can not be made timely by virtue of the protester's later acquisition of additional information in support of the protest. See New Beginnings Treatment Ctr., Inc.--Recon., B-252517.2; B-252517.3, Apr. 29, 1993, 93-1 CPD § 349.

¹Direct district court commitments are described as:

"These offenders committed to Bureau of Prisons' custody are recommended by the courts to serve their entire terms of confinement in a community corrections center."

²By the performance date, the contractor was required to provide the contracting officer with satisfactory proof that all zoning and local ordinance requirements necessary for the operation of a community corrections center had been met.

Several months later, on November 2, New Beginnings protested that the Bureau had improperly modified Behavioral Systems' contract, as a result of a court-entered settlement agreement between Behavioral Systems, the city of Tucson, and the Bureau in a lawsuit before the Superior Court of Arizona. New Beginnings asserted that under this agreement Behavioral Systems was precluded from accepting certain referrals under the contract. We dismissed the protest because the asserted modification involved a question of contract administration that we do not review.

In requesting reconsideration, New Beginnings argues that the modifications made by the Bureau to the contract's scope of work and the time for performance were cardinal changes requiring a new procurement, and that our dismissal was therefore unwarranted.

As a general rule, our Office will not consider protests challenging contract modifications because modifying a contract involves the administration of the contract, which is the responsibility of the contracting agency. 4 C.F.R. § 21.3(m)(1). One exception to this rule is where it is alleged that a contract modification improperly exceeds the scope of the contract and therefore should have been the subject of a new procurement. CAD Language Sys., Inc., 68 Comp. Gen. 376 (1989), 89-1 CPD ¶ 364. A major consideration in determining whether a modification was improper is whether the modified contract is materially different from the originally competed contract. See Saratoga Indus., Inc., B-247141, Apr. 27, 1992, 92-1 CPD ¶ 397; Everpure, Inc., B-226395.4, Oct. 10, 1990, 90-2 CPD ¶ 275. The materiality of a modification is determined by examining factors such as the magnitude of the change in relation to the overall effort, whether the purpose of the contract has been altered, and whether the field of competition would be materially changed by the contract modification. Saratoga Indus., Inc., supra.

The Bureau states that several modifications were made to Behavioral System's contract because that firm lost the initial site for its facility, encountered weather-related construction delays and preoccupancy deficiencies, and had its zoning permit rescinded on April 15, 1993.¹ The Bureau also modified Behavioral Systems' contract in response to

¹The Bureau reports that at the time of the awards both New Beginnings and Behavioral Systems held zoning permits to operate halfway houses in the Tucson area. The Bureau also states that it found that unforeseeable circumstances affected Behavioral Systems' performance and that waiting for a resolution of Behavioral Systems' zoning dispute was in the agency's best interest.

the settlement agreement of September 29, 1993, that precluded Behavioral Systems from accepting direct district court commitments and other delineated referrals⁴ as a condition of obtaining a zoning permit. To accommodate this agreement, the Bureau modified Behavioral's contract by eliminating direct court commitments. In addition, the Bureau eliminated the base period and exercised the first option period. No other modifications were made to Behavioral Systems' contract.⁵

The record shows that the modifications, individually, or collectively, do not constitute a cardinal change. The fundamental purpose of Behavioral Systems' contract is to provide a halfway house in which correction services are offered to a variety of federal prisoners. The contract provides that referrals of federal offenders are made to the contractor from a variety of sources, including transfers from federal institutions, direct court commitments, and parole/probation offices, and that the contractor could refuse certain referrals. The deletion of direct court commitments does not change the basic work being provided under the contract--the provision of correction services in a halfway house. Indeed, the Bureau states that court commitments are only a minor part of the contract's overall scope of work, and New Beginnings admits that direct court commitments accounted for only 7.5 percent of its total 1993 referrals. Thus, the deletion of direct court commitments from Behavioral Systems' contract had only a minimal impact on the scope of work. The change in the period of performance similarly has no effect on the fundamental purpose of the contract. Moreover, since the Bureau did not extend the original contract period or

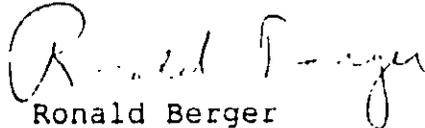
⁴The settlement agreement, which reflected the Bureau's representation of the likely referrals to be made under the contract, stated that Behavioral Systems could not accept referrals with: (a) extensive history of violent crime; (b) history of violent behavior in 2 years prior to incarceration; (c) significant participation in large-scale drug or property offenses; (d) history of sex crimes; (e) known membership or affiliation with major organized criminal enterprises in the community; (f) active membership or participation in local gang activity; (g) medical or mental disorders that would require on-going treatment; and (h) convictions of murder, assault, sex offenses, or any crime involving use of a deadly weapon.

⁵The record shows that Behavioral Systems' contract was not required to be modified in regard to the other restrictions contained in the settlement agreement because Behavioral Systems had already agreed under the terms of its contract not to accept such referrals.

otherwise incorporate additional work into the contract, we fail to see how the scope of work was materially changed.

Finally, New Beginnings in its request for reconsideration again questions whether Behavioral Systems' facility satisfied the RFP's requirements regarding the commencement of performance and zoning. As noted above, these contentions were raised in its first protest that we dismissed as untimely on March 3, 1993, and we denied New Beginnings' request for reconsideration of the dismissal on April 29, 1993. See New Beginnings Treatment Ctr., Inc.-- Recon., supra. Any request for reconsideration of our dismissal of these contentions or of our April 29, 1993, reconsideration decision is untimely and will not be considered.

The prior dismissal is affirmed.



Ronald Berger
Associate General Counsel