DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

8121

FILE: B-192274 DATE: October 26, 1978

MATTER OF: Aero-Dri Corporation

DIGEST:

1. Contrary to usual view that protests against contract modifications are not for review since they are within the realm of contract administration, protest which alleges that modification is beyond scope of contract is reviewable by General Accounting Office, if otherwise for consideration.

2. Value engineering change which substituted air purification component of one manufacturer for air purification component of another manufacturer did not so materially alter original contract as to require new competition.

3. Where only evidence with respect to disputed question of fact consists of contradictory assertions by protester and contracting agency, protester has failed to carry burden of affirmatively proving its allegation.

4. Protest after award alleging procurement of inappropriate component involves apparent solicitation impropriety and is therefore untimely under GAO Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1977).

Aero-Dri Corporation (Aero) protests the propriety of the decision of the Defense Logistics Agency (DLA) to accept a Value Engineering Change Proposal from Mako Compressors, Inc. (Mako), under Contract DSA700-77-C-8578. Aero's basic contention is that the modification of the contract was outside the scope of the original contract and, therefore, the agency was required to reopen competition on the basis of its revised requirements.

Request for proposals No. DSA700-77-R-1638 was issued on September 1, 1977, inviting offers for the procurement of 30 underwater diving equipment sets, in accordance with Components List 4220-97-CL-E13. Because of the inability to adequately describe the required components, the components list identified the diving set by various manufacturers' components. Four offers, including those of Mako and Aero, were received in response to the solicitaiton. Mako submitted the lowest offer and was awarded the contract on September 28, 1977.

On November 18, 1977, Mako submitted a Value Engineering Change Proposal (VECP) pursuant to the Value Engineering Incentive clause (ASPR § 7-104.44 (a)(1)), provision L08, of the contract. Mako's VECP deleted the Aero air purification system and substituted the Mako assembly, which consists of a combined compressor and purification component. DLA determined that the Mako component performed the required functions with less weight and at a reduced cost and, therefore, accepted the proposal. Production of the diving sets has been totally completed.

Aero argues that the modification so materially altered the original contract that a "cardinal change" resulted and that a new competition was required.

A protest concerning contract modification ordinarily is not for resolution under our Bid Protest Procedures, 4 C.F.R. part 20 (1977 ed.), since it involves contract administration, a matter primarily within the authority of the contracting agency. Symbolic Displays, Incorporated, B-182847, May 6, 1975, 75-1 CPD 278. Where, however, as here, the protester alleges that the modification constitutes a "cardinal change" beyond the scope of the contract and that the modification should have been the subject of a new procurement, we will review the protest. Brandon Applied Systems, Inc., 57 Comp. Gen. 140 (1977) 77-2 CPD 486; Die Mech Corporation, B-190421, July 14, 1978, 78-2 CPD 36.

It is not always easy to determine whether a changed contract is materially different from the competed contract. However, we have recognized that the decisions of the Court of Claims relating to cardinal

changes offer some guidance. American Air Filter Co., Inc., 57 Comp. Gen. 285, 286 (1978), 78-1 CPD 136. Even though a cardinal change results from the unilateral action of the Government and the change in this case resulted from the mutual agreement of the parties through the Value Engineering Incentive clause, the Court of Claims decisions are useful here, since they provide the standards for determining whether the changed contract is essentially the same as the original. Id. For example, in Air-A-Plane Corporation v. United States, 408 F.2d 1030 (Ct. Cl. 1969), the court stated:

> "The basic standard, as the court has put it, is whether the modified job 'was essentially the same work as the parties bargained for when the contract was awarded. Plaintiff has no right to complain if the project it ultimately constructed was essentially the same as the one it contracted to construct.' Conversely, there is a cardinal change if the ordered deviations 'altered the nature of the thing to be constructed.' [Citations omitted.] Our opinions have cautioned that the problem 'is a matter of degree varying from one contract to another' and can be resolved only 'by considering the totality of the change and this requires recourse to its magnitude as well as its quality.' [Citations omitted.] 'There is no exact formula * * *. Each case must be analyzed on its own facts and in light of its own circumstances, giving just consideration to the magnitude and quality of the changes ordered and their cumulative effect upon the project as a whole.'"

Therefore, the question before us is whether the original purpose or nature of the contract has been so substantially changed by the modification that the contract for which competition was held and the contract to be performed are essentially different. American Air Filter Co., Inc., supra.

The value engineering proposal accepted by the Government substituted a single Hako component, which has an air purification system mounted on top of an air compressor, for the Aero air purification component and the Hako air compressor that was required by the original contract. Aero argues that this change was of "such a magnitude affecting price, weight, utility and item configuration and ultimate purpose * * *" of the diving equipment set to constitute a "cardinal change." In support of its allegation, the protester asserts that our decision in American Air Filter Co., Inc., supra, is controlling in the instant protest.

In that case, the Government awarded a contract for the supply of gasoline-powered heaters. Later, a supplemental agreement was entered into between the agency and the contractor substituting diesel engine and fired heaters for the gasoline heaters originally specified in the contract. This modification necessitated the following changes:

"1. The substitution of a diesel engine for a gasoline engine.

"2. A substantial increase in the weight of the heater.

"3. The addition of an electrical starting system.

"4. The design of a new fuel control.

"5. The redesigning of the combustor nozzle.

"6. The alteration of various performance characteristics.

"7. An increase in the unit price by approximately 29 percent.

"8. The approximate doubling of the delivery time." American Air Filter Co., Inc., supra.

In light of the magnitude of these technical changes and their overall impact on the price and delivery provisions, we found that the modified contract was so different from the contract for which competition was

held, that the Government should have solicited new proposals for its modified requirement.

We believe that the modification made pursuant to the VECP in the instant case was not of the same magnitude as the changes made in American Air Filter, Co., Inc., supra. The value engineering change here basically involved the substitution of one company's air purification component for another company's component. The Mako air purification system has identical functional performance capabilities as the Aero component it replaces. Mako's component has the same dehydration and oil removal capabilities as the Aero component, while decreasing costs by $3,000 per diving set and reducing the weight substantially. This type of modification is of the nature which potential offerors would have reasonably anticipated under the "changes" clause of the contract and therefore it falls within the scope of the original procurement. See American Air Filter Co.--DLA Request for Reconsideration, supra.

Moreover, the value engineering change involved here is similar to the situation in 50 Comp. Gen. 540, supra. In that case, the Government accepted a VECP which substituted solid-state tuners for electro-mechanical tuners in electronic countermeasures sets because of cost savings as well as technical advantages. We held that the change of this one component was not of the magnitude and quality to necessitate a new procurement.

Therefore, we cannot conclude that the original purpose of the contract has been so substantially changed by the modification that the contract for which competition was held and the contract to be performed are essentially different. Consequently, we fail to see any circumvention of the competitive procurement process.

Aero also contends that prior to its proposal submission, Aero advised the Government that a more efficient and less expensive unit could be fabricated if the Government would allow offerors to deviate from the required compressor and air purification system. The Government's response, according to Aero, was that no alternative offers would be allowed and that no deviation would be allowed after the contract award.

Aero argues that the Government's subsequent acceptance of changes to the air purification system was patently unfair in light of the Government's comments prior to award.

DLA states that Aero never suggested an alternative offer to the contracting officer either by telephone or in writing. In addition, it must be noted that the protester has not supplied our Office with any documentary evidence demonstrating that Aero had suggested an alternative air purification system. Where the only evidence with respect to a disputed question of fact consists of contradictory assertions by the protester and the contracting agency, the protester has failed to carry the burden of affirmatively proving its allegation. Kessel Kitchen Equipment Co., Inc., B-190089, March 2, 1978, 78-1 CPD 162.

Aero's final contention is that the agency was aware, at the time of issuance of the solicitation, that the capability of the air purification component required was three times greater than needed in view of the capability of the required compressor. This contention is untimely. Section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. part 20 (1977), requires that protests based upon alleged improprieties in the solicitation which are apparent prior to the closing date for receipt of initial proposals must be filed prior to the closing date for receipt of initial proposals. Since the agency's requirements were apparent from the solicitation as issued, and, as noted above, since Aero professes knowledge that the specifications overstated the Government's needs, a protest after award is untimely. In any event, DLA states that it was unaware of any commercially available alternative to the Aero air purification component until the VECP was initiated and documented by Mako, and the protester has failed to present any evidence to the contrary.

Accordingly, the protest is denied.

P. F. Kelly

Deputy Comptroller General
of the United States