



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Hughes Space and Communications Company

File: B-276040

Date: May 2, 1997

Michael A. Hordell, Esq., and Laura L. Hoffman, Esq., Gadsby & Hannah, for the protester.

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Douglas G. White, Esq., Defense Information Systems Agency, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contract modification to a satellite communications services contract which added "system preemptible" satellite transponder leases to the contract, which previously only specified "non-preemptible" transponder leases, did not exceed the scope of the contract, as originally awarded, because the fundamental nature and purpose of the contract was not changed.

DECISION

Hughes Space and Communications Company protests the Defense Information Systems Agency's (DISA) modification of contract No. DCA200-95-D-0079 (called the Commercial Satellite Communication Initiative (CSCI) contract) with COMSAT RSI, Inc. for satellite communications services. Hughes argues that the modification to provide satellite transponder services for the Armed Forces Radio and Television Service (AFRTS) exceeds the scope of the CSCI contract and is an improper sole-source award.

We deny the protest.

The CSCI contract, which DISA competitively awarded to COMSAT on July 18, 1995, provides, among other things, for the lease of a minimum of 2 and a maximum of 45 satellite transponders on an indefinite delivery, indefinite quantity (ID/IQ) basis.¹

¹A transponder is an electronic device based upon a satellite in geosynchronous orbit above the earth that receives electronic signals from a point on the ground and relays those signals back to earth. Typically, satellite transponders receive very "narrow" signals and relay back to earth "large footprint" signals covering a large geographic area.

The satellite transponder leases could be for domestic or international service. The contract statement of work provides:

"The DISA intends to use the satellite transponders provided under this contract whenever the [Department of Defense] DOD requires commercial satellite communications support to any location in the footprint of the available satellite transponders, subject to [Federal Communications Commission] FCC or host national approval and the minimum and maximum limitations specified under the ID/IQ contract."

Specific satellite transponder characteristics for domestic and international service regions were provided, describing, among other things, the required coverage, frequency bands, and bandwidth. The contract also provided that COMSAT could "not preempt satellite transponders leased to the DISA" and that in the event of operational, performance, or satellite failure, COMSAT would repair or replace the affected satellite transponder within 6 hours of the failure.

On December 26, 1996, DISA announced in the Commerce Business Daily (CBD) its intention to award the AFRTS services to COMSAT, but invited interested vendors to submit proposals. These satellite communication services are to provide AFRTS service and programming, which is now routinely provided for entertainment and morale purposes to other military personnel outside the continental United States, to U.S. Navy ships in the Atlantic, Pacific, and Indian Ocean Regions. On January 10, 1997, COMSAT and Hughes submitted proposals in response to the CBD request. On January 17, DISA issued Modification No. 12 to COMSAT's CSCI contract to provide for the AFRTS services over three transponders under that contract; the maximum number of transponders that could be ordered under the contract and period of performance were not changed. This protest followed, challenging the modification as being outside the scope of COMSAT's contract.²

As a general rule, our Office will not consider protests against contract modifications because they involve matters of contract administration. 4 C.F.R. § 21.5(a) (1997); American Air Filter Co., Inc., 57 Comp. Gen. 285, 286 (1978), 78-1 CPD ¶ 136 at 2. However, we recognize an exception to this rule where, as here, it is alleged that a contract modification is beyond the scope of the original contract, such that the work covered by the modification would be subject to the requirement for competition absent a valid sole source determination. Neil R. Gross & Co., Inc., 69 Comp. Gen. 292, 294 (1990), 90-1 CPD ¶ 212 at 2. In determining

²Hughes also protested DISA's cancellation of the procurement announced in the CBD, the evaluation of its proposal, and allegedly unequal treatment of Hughes and COMSAT. We dismissed these other protest allegations, given the fact that the agency had decided to fulfill its requirements through an existing contract.

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. Id., 69 Comp. Gen. 294, 90-1 CPD ¶ 212 at 2-3. The question of whether there is material difference is resolved by considering factors such as the extent of any changes in the type of work, performance period, the costs between the contract as awarded and as modified, and whether the agency itself had historically procured the services under a separate contract, as well as whether potential offerors reasonably would have anticipated the modification. Data Transformation Corp., B-274629, Dec. 19, 1996, 97-1 CPD ¶ 10 at 6; Stoehner Sec. Servs., Inc., B-248077.3, Oct. 27, 1992, 92-2 CPD ¶ 285 at 4.

Hughes complains that COMSAT's CSCI contract only provides for satellite transponder leases on a non-preemptible basis, but the AFRTS satellite communications services added to the contract are for services on a preemptible basis. Hughes argues that preemptible satellite communication services are materially different from non-preemptible services, such that adding these services to the CSCI contract could not have been anticipated by the original competitors for the contract, and are beyond the scope of that contract.³

DISA and COMSAT respond that there is no technical difference between non-preemptible and preemptible transponder services leases. Rather, the designation of transponder leases as non-preemptible or preemptible identifies the priority a specific lease has within a hierarchy that defines the "bumping" rights non-preemptible leases have vis-a-vis lower priority preemptible leases; in the event of operational or satellite transponder failure, non-preemptible leases receive the highest priority in being allocated to available equipment. DISA and COMSAT point out that the CSCI contract, as modified, provided for "system preemptible" transponder leases, which the contract provided could not be preempted by the contractor, but which would only be preempted in the event of an operational or

³On April 11, more than a month after the filing of its comments on the agency's report, Hughes also argued for the first time that Modification No. 12 did not amend the CSCI contract to provide for the power requirements identified in the CBD announcement and that this demonstrates that the addition of AFRTS services was outside the scope of the CSCI contract. Hughes should have known the basis of this protest allegation from its review of the CSCI contract, which the record shows Hughes reviewed prior to the filing of the January 24 protest. The timeliness requirements of our Bid Protest Regulations do not provide for the piecemeal presentation of protest allegations but require that protests of other than alleged apparent solicitation improprieties must be filed not later than 10 working days after the basis of protest is known. 4 C.F.R. § 21.2(a)(2); Pacific Architects & Eng'rs, Inc., B-262243; B-262243.2, Dec. 12, 1995, 95-2 CPD ¶ 253 at 12. This new factual assertion as to why the modification is outside the scope of the CSCI contract is untimely and is dismissed.

satellite equipment failure. In the event of satellite failure, the contractor was required to use its best efforts to allocate other equipment to provide the service.

We find that COMSAT's CSCI contract, as modified to provide for AFRTS services over preemptible satellite transponder leases, is not materially different from that awarded. The fundamental purpose of the CSCI contract is to provide domestic and international satellite communication services through satellite transponder leases. To this end, offerors for the CSCI contract were informed that DISA would use the satellite transponders provided under the contract whenever it required commercial satellite communications support to any location in the footprint of the available satellite transponders and that the CSCI program to be supported by the contract would:

"1) meet operational communications support requirements; 2) reduce DOD telecommunications costs; 3) enhance diversity, capability, and flexibility of DOD satellite communications services; 4) take advantage of the newest commercial satellite services and the relaxation of restrictions involving international commercial satellite communications; and 5) provide a preplanned surge capacity for crises, contingency and humanitarian relief operations."

As this indicates, and as offerors for the original contract therefore should have been aware, the CSCI contract provided a flexible means of ordering satellite communication services within the specified minimum and maximum ordering limitations on the lease of satellite transponders. Here, the modification of the contract to provide for AFRTS service did not affect the specified minimum or maximum order limitations or the stated period of performance. Moreover, although the parties disagree as to the dollar value of the additional premium preemptible services, the record shows that any increase in the value of the contract due to the addition of these AFRTS services is minimal in relation to the overall value of the contract as originally awarded.⁴

⁴While, as noted by the protester, non-preemptible services are generally more costly than preemptible services because non-preemptible leases have the highest priority in terms of bumping rights and restoration of service in the event of satellite failure, the monthly lease charge for the preemptible service under the CSCI contract is higher than the lease charge for non-preemptible service in the same region. COMSAT explains that the non-preemptible service is being provided, in accordance with the contract requirements, over standard transponders while the preemptible service is being provided over premium transponders, which are more costly than standard transponders. Premium transponders are necessary for these services because standard transponders are not powerful enough to transmit to small terminals on ships. Hughes argues that the cost to DISA of preemptible

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It is true that the CSCI contract, as awarded, limited the satellite transponder leases to non-preemptible leases. However, the record shows that there is no technical difference between the satellite communication services provided under non-preemptible or preemptible transponder leases; both services must satisfy the specific satellite transponder characteristics identified in the contract for the domestic and international service regions.

It is also true that the government assumed greater risk of loss of service by accepting preemptible service rather than non-preemptible service. That is, in the event of operational or satellite failure there is a greater risk of some loss of service due to the greater bumping rights and higher priority for restoration of service non-preemptible leases enjoy vis-a-vis preemptible leases. This risk is significantly mitigated by the terms of the CSCI contract, which only allow preemption in the event of operational or satellite failure and which require the contractor to repair or replace the affected satellite transponder within 6 hours of the failure. Additionally, the contractor is required to prepare a Satellite Transponder Backup Plan, which is "updated after the lease of each additional satellite transponder" to address satellite failure. Furthermore, COMSAT and DISA point out that the risk of satellite or transponder failure is extremely low in any case. While we find that the government assumed some greater risk of loss of service by accepting preemptible service, we do not find that this assumption of what the record shows to be extremely minimal risk to be so significant as to conclude that the contract, as modified, is materially different from that as awarded.

In conclusion, we find that the CSCI contract, as modified, is not materially different from that awarded. The type of service and quantity of transponders to be leased are within that contemplated by the original contract. In addition, the costs associated with the modification of the contract are minimal vis-a-vis the original estimated contract value. In sum, the modification to provide the AFRTS service is within the scope of the original contract.

The protest is denied.

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⁴(...continued)

services over premium transponders could have been lower as the result of competition; however, this argument that DISA received a "bad deal" does not demonstrate that the addition of the AFRTS services is outside the scope of the CSCI contract.