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DECISION

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

FILE: B-188408 DATE: June 19, 1978

MATTER OF: American Air Filter Co.--DLA
Request for Reconsideration

DIGEST:

1. Request for reconsideration filed by agency more than 10 working days after actual notice of GAO decision was received is untimely. However, prior decision is explained in view of apparent need for clarification.

2. GAO review of protests concerning contract modifications agreed to by procuring activity, or changes ordered by contracting officer, is intended to protect integrity of competitive procurement process.

3. Mutual agreement between contractor and Government modifying original contract was in effect, improper award of new agreement, which went substantially beyond the scope of competition initially conducted.

The Defense Logistics Agency requests reconsideration of our decision in American Air Filter Co., 57 Comp. Gen. ___ (1978), 78-1 CPD 136, regarding contract DSA700-77-C-8013 to supply ground portable heaters, type H-1, Class I, conforming to Military Specification MIL-H-4607B. The H-1 heater is the primary portable heating unit deployed throughout the Air Force and is used to preheat aircraft engines, cockpits, cargo compartments and work areas.

We sustained the protest filed by American Air Filter Co. (AAF), because the Government modified the contract awarded to Davey Compressor Co. (Davey), to require units which operate on diesel fuel, rather than gasoline. We concluded that the alterations made were outside the scope of the original contract and recommended that the Defense Logistics Agency (DLA) give consideration to the practicability of terminating

the contract for the convenience of the Government and of soliciting competitively its altered requirements. Our action took the form of a recommendation under § 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970).

DLA raises several bases upon which it urges reconsideration, arguing that:

1. GAO should defer to the contracting agency regarding whether a contract change is within the scope of the contract, and should "leave the contracting parties' agreement undisturbed unless, without question, the change is outside the scope of the contract."

2. The great weight of the evidence showed that there was a substantial basis to find that the changes made were within the scope of the contract.

3. A determination that an engineering change is outside the scope of the original contract should be based on an engineering analysis, which the decision lacked. The agency contends that our decision does not reflect that an engineering analysis was performed; that it erroneously assessed the importance of the technical changes which were made; and that it reflects a misunderstanding of statements made at a post-award conference with the contractor and Government personnel.

In this regard, DLA assumes that the impact of a contract modification is to be examined by applying the cardinal change doctrine. It argues that we should look principally to the contractor's capability to perform the change or modification, viewed in light of its individual circumstances. DLA maintains that the cardinal change doctrine was designed to protect the contractor's rights, and asserts that "Where there is a disagreement between the contracting parties over the scope of a proposed modification, the contractor's contentions as to the original meeting of the minds and the effect

of the change should be given due weight." DLA believes that the contentions of a third party challenger, such as AAF, are entitled to substantially less weight, "particularly where the parties [the Government and contractor] agree as to the scope of the change."

Further, DLA disagrees with our decision because, in its opinion, the manufacture of a diesel fueled unit poses no extraordinary difficulty for Davey.

DLA reported that the the Defense Construction Supply Center (DCSC) reached its original decision based upon "a lengthy analysis by DCSC and Air Force personnel of the technical changes required to accommodate the requested substitution * * *." The review was conducted "to ensure that a diesel heater was indeed feasible." The nature of the inquiry is described by DLA as being concerned with whether the alterations required "were technically feasible and within the scope of the Davey Contract." DCSC found, inter alia, that "use of a diesel power package would not require a research and development effort," and various changes which AAF suggested would be necessary "were either not required or [were] within the current state of the art."

AAF argues that DLA's request for reconsideration is untimely and should not be considered in view of our decision in Department of Commerce -- Request for Reconsideration, B-186939, July 14, 1977, 77-2 CPD 23. There we refused to consider an agency request for reconsideration filed 4 months after our decision had been released. Moreover, we held that § 20.9 of our Bid Protest Procedures makes no provision for waiving the time requirements applicable to requests for reconsideration, even though it is contended that the matters involved raise issues significant to procurement practices or procedure. 4 C.F.R. § 20.9 (1978).

Although a copy of our prior decision was sent to the Director, Defense Logistics Agency, on February 16,

1978, DLA states that it only obtained a copy of our decision on February 24. Its request for reconsideration was hand delivered to our Offices on March 13 --11 working days later. Although the rule in § 20.9(b) requires that a request for reconsideration be filed in our Office within 10 working days after the basis for reconsideration is known or should have been known, DLA argues that our decision was never operative upon it, because the copy sent to the Director was not received and accordingly, he was never formally notified of the decision.

In fact, DLA personnel contacted our Office prior to the expiration of the 10-day period and were advised that they should be certain that any request they cared to make was properly filed within the time limit. Inasmuch as we have consistently considered actual notice of a party's basis for protest or reconsideration to be sufficient to start the appropriate time limits established in the Bid Protest Procedures running, we find DLA's arguments unpersuasive. See, e.g., Brandon Applied Systems, Inc., B-188738, December 21, 1977, 77-2 CPD 486; Dupont Pacific, Ltd., B-190350, October 26, 1977, 77-2 CPD 327; Southwest Aircraft Services, Inc., B-188483, April 1, 1977, 77-1 CPD 227.

Even though we dismiss DLA's request as untimely filed, we have in similar situations in past decisions occasionally commented upon matters apparent on the face of the record, or because we felt that our views were required to clarify apparent uncertainty or misunderstanding regarding the issues in dispute. DLA's arguments in its request for reconsideration reflect a fundamental misunderstanding of the reasons underlying our earlier decision. In the circumstances and because our prior decision included a request that DLA consider whether remedial corrective action should be taken, we have concluded that we should clarify the basis upon which our decision was founded. In reaching our original decision, we stated that:

"* * * the modification to the contract to require a diesel powered and fired heater necessitated, inter alia, 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."

We concluded that

> "* * * the magnitude of the technical changes, and their overall impact on the price and delivery provisions compels the conclusion that the contract, as modified, is so different from the contract for which competition was held, that the Government should have solicited new proposals for its modified requirement." (Emphasis added.)

Even assuming that our prior decision was less than clear, nowhere did we indicate as suggested by the agency that we were applying the cardinal change test per se. The underscored portion of the quoted

language was meant to reflect what we view as a significant difference between a determination that a proposed change would result in a Government breach of contract, and a determination that a proposed contract modification evades the requirement for obtaining competition and therefore undermines the integrity of the competitive procurement process.

Moreover, it is our practice to evaluate technical facts in resolving protest cases. See, e.g., Earth Sciences Research, Inc., B-193964, January 27, 1978 (letter to the Secretary of the Interior). Our review however, is directed at determining whether the procuring activity has acted reasonably in the discharge of its legal responsibilities. Regardless of our own views in a particular case, we defer to the agency's judgment in any matter involving the exercise of its discretion. Cases involving the exercise of technical judgment are treated no differently, and we defer to the procuring activity's opinion, provided it has not abused its discretion. METIS Corporation, 54 Comp. Gen. 612 (1975), 75-1 CPD 44; Plessey Environmental Systems, B-186787, December 27, 1976, 76-1 CPD 533; Jarrell-Ash Division of Fisher Scientific Co., B-185582, January 12, 1977, 77-1 CPD 19.

Nevertheless, an agency's technical review cannot be conducted in a vacuum without regard to applicable legal standards. While we believe that an agency's opinion regarding technical facts is entitled to consideration, a conclusion by technical personnel regarding the legal implications of their findings carries no more weight than any other conclusion of law. DCSC's conclusion that in its technical opinion there was no cardinal change, and that the modifications made were within the scope of the contract, without more, contributes little to our understanding of the essential facts. Indeed, the DCSC engineering review appears to have been concerned primarily with the feasibility of accomplishing the proposed alterations, and particularly with whether the Air Force and Davey were agreeing to work which was within the state-of-the-art.

Contrary to the agency's position, we believe that the degree of difficulty, or ease, with which Davey could perform the modification is not controlling. The difficulty in producing the item per se is not an ultimate--as distinguished from evidentiary --fact even if the cardinal change doctrine were applicable.

As we indicated earlier, our decision in this matter reflects considerations related to our role in bid protest cases, and to our concern that lack of competition adversely impacts upon the integrity of the competitive procurement process. In 41 Comp. Gen. 484 (1962), we held that a contract modification ostensibly negotiated on a sole source basis with the existing contractor was improper. There the Navy sought to justify the change by arguing that the existing contractor was already on the site, knew of existing conditions, and offered the greatest assurance that the work would satisfy the Navy's requirements. Citing the rule that the contracting officer's opinion as to the nonavailability of qualified bidders may not be accepted as controlling prior to solicitation of bids, we noted that "We see no basis, other than the fact that an award to * * * [the incumbent] might not have been assured * * *, for contending that it would have been impracticable to obtain competitive proposals and to negotiate such a contract based upon such proposals."

That case is consistent with the rule set out in connection with our decision in 5 Comp. Gen. 508 (1926), that an existing contract may not be expanded so as to include additional work of any considerable magnitude, unless it clearly appears that the additional work was not in contemplation at the time the original contract was entered and is such an inseparable part of the original work that it is reasonably impossible of performance by any other contractor. Followed, 30 Comp. Gen. 34 (1950). Along similar lines, we have recently held that GSA acted improperly in extending a contract for plug-to-plug compatible replacement memory beyond the option periods provided in a mandatory ADP requirements contract, because there could be no justification for its

failure to timely solicit a follow-on contract. Intermem Corporation, B-187607, April 15, 1977, 77-1 CPD 263.

Further, while recognizing that contract changes or modifications are required subsequent to award, we have cautioned that this "is not to say that the contracting parties may employ a change in the terms of the contract so as to interfere with or defeat the purpose of competitive procurement." E. R. Hitchcock & Assoc., B-182650, March 5, 1975, 75-1 CPD 133. We have held that awarding a contract with the intention of significantly modifying the contract after award is improper. A & J Manufacturing Co., 53 Comp. Gen. 838 (1974); 74-1 CPD 240. See, also, Midland Maintenance, Inc., B-184247, August 5, 1976, 76-1 CPD 127.

The cardinal change doctrine was developed by the Courts as a means to deal with contractors' claims that the Government had breached its contracts by ordering changes which were outside the scope of the changes clause. As the court stated in Allied Materials & Eq. Co. v. United States, 569 F. 2d 562, 563-564 (Ct. Cl. 1978),

> "* * * a cardinal change is a breach. It occurs when the government effects an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for. By definition, then a cardinal change is so profound that it is not redressable under the contract, and thus renders the government in breach."

Even though we believe there is a significant area of overlap between the limits within which the Government may alter a contract without fear of breaching it, and the limits which act to restrain its right to do so without impacting upon the statutory requirement for competition, the evaluation of the legal problems presented in each instance have different starting points. Application of the cardinal change doctrine assumes a set of relationships between the litigants--the Government on one side, the claimant on the other. The

cases applying the doctrine reflect that relationship, molded by constraints inherent in the rules of evidence, drawing into focus what the contracting parties are deemed to have had in mind when they executed the contract.

In contrast to circumstances reflecting disagreement between the Government and its contractor, contract modification flows from the parties' willingness to agree. For an increase in price, the contractor may be expected to be amenable to performing the additional work. Such a contractor, obviously will not seriously question whether the award is outside the scope of the original contract and we do not expect the contractor to concern itself with the technical niceties of the statutory requirement that the Government award contracts competitively. Such a contractor will be prone to view the additional work as a logical extension of the original agreement.

Further, we do not agree with DLA's view that our original decision in this case unduly impacts upon the discharge of its responsibility for contract administration. There is an essential relationship between the limits of a contracting officer's power under the Changes and Disputes clauses and the statutory requirement for competition. The contract cannot be read so as to conflict with the statutory mandate for competition. Starting, therefore, with the proposition that the contracting officer's administrative authority is subordinate to the competition statute, it follows that due regard for protection of the integrity of the competitive procurement system does not interfere with the legitimate exercise of the contracting officer's administrative functions.

The impact of any modification is in our view to be determined by examining whether the alteration is within the scope of the competition which was initially conducted. Ordinarily, a modification falls within the scope of the procurement provided that it is of a nature

which potential offerors would have reasonably anticipated under the changes clause.

To determine what potential offerors would have reasonably expected, consideration should be given, in our view, to the procurement format used, the history of the present and related past procurements, and the nature of the supplies or services sought. A variety of factors may be pertinent, including: whether the requirement was appropriate initially for an advertised or negotiated procurement; whether a standard off-the-shelf or similar item is sought; or to whether, e.g., the contract is one for research and development, suggesting that broad changes might be expected because the Government's requirements are at best only indefinite.

Specifically, in reaching our decision in this matter, we gave consideration to the fact that this procurement was advertised. Bids were solicited to meet a requirement primarily defined by a Military Specification. Although the heaters perhaps cannot be fairly characterized as off-the-shelf items, similar readily available units have been purchased by the Government for years.

In concluding that offerors would not have reasonably anticipated that the changes clause would be used as it was, we were particularly impressed by the following:

1. The amended contract requires equipment using diesel fuel exclusively. The Military Specification expressly required gasoline fueled heaters capable of being driven interchangeably by gasoline engines or electric motors. The solicitation indicated that units with gasoline engines were to be furnished.

We did not accept DLA's characterization of the Military Specifications as a mere performance specification for heaters, because we believe the solicitation documents clearly imposed a salient constraint upon the description of the items being bought permitting bidders to conclude that gasoline or electric

powered equipment fell within the scope of the procurement, but that other equipment did not.

In referring to the decision by the Court of Claims in Keco Industries, Inc. v. United States, 176 Ct. Cl. 983 (1966), we explained that Keco differed in that award was made for both electric and gasoline driven units. The proportions were later changed to require all gasoline driven units. Although DLA suggests that this is a distinction without a difference, in our opinion the designation of fuels to be used went to the heart of the Government's description of the items sought. If choice of fuel was not material in the circumstances of this case, it is difficult to conceive of any alteration which DLA could have authorized which would have been.

2. The amendments eliminated the requirement that the units furnished be capable of using an interchangeable electric motor to provide power. Interchangeability of power units was in our view fundamental to the nature of the original procurement and reflected a second salient constraint imposed upon the scope of competition obtained. In effect, offerors were required to be capable of furnishing two distinct units, one using electric and the other gasoline power. Elimination of this requirement in our view significantly altered the framework upon which competition was predicated. (We note in passing that the interchangeability requirement distinguishes these circumstances, also, from the facts in Keco, inasmuch as interchangeability as such was not a requirement in that case.)

3. Along related lines, the solicitation anticipated, in our view, that the gasoline fueled unit would be a self-contained item capable of start-up in a -65°F environment. In this regard, the Military Specification required that the gasoline powered unit be capable of manual starting, and that it be demonstrated during first article testing that it could be started when

"cold-soaked" to -65°F. Preheating was to be accomplished by use of a gasoline fired preheater built into the unit.

We recognize that diesel engines typically utilize high compression ratios and electrical starting. It is a matter of common engineering knowledge that storage batteries generally--including lead acid batteries--experience a significant loss in available power when cooled to the temperatures at which these tests are to be conducted. The post award conference minutes referred to in our prior decision indicated that, "The specified cold test of -67°F [sic] will remain in effect and the impact of the switch to Diesel will be evaluated during this test." The effect of the discussion of cold starting requirements was evidently to require that Davey attempt to meet the cold starting requirement, but that the Government might not hold Davey to its agreement. Moreover, and of direct concern, DLA interprets the amended contract as not requiring that first article testing be performed with a cold-soaked battery.

At best, DLA's interpretation of the amended contract is strained. The diesel fueled units are to have a battery compartment. The battery evidently would be removed from it when operating at low temperatures. By allowing Davey to use an external power source (i.e., the battery) to meet the cold start requirement, DLA has abandoned the concept of a self-contained unit. While it is entirely proper for the Government to permit use of whatever method of starting that is consistent with assuring that its minimum needs are met, there is no question that the performance requirements relating to cold starting capability were significantly altered. If, as DLA contends, these changes are part and parcel of a change to a diesel fueled system, they properly underscore the significance of the change from gasoline to diesel fuel. To the extent they do not, it is fair to ask whether DLA would have acted outside the scope of the original procurement by authorizing an alteration permitting the vendor to dispense with the requirement that it provide manual starting, self-contained gasoline fueled units. In our opinion, the

Military Specification reflects the importance of such cold starting capabilities. Accordingly, we believe that DLA could not dispense with such requirements without at the same time abandoning one of the salient criteria which defined the scope of competition in the original procurement.

In our view, the contract in this instance was modified contrary to the statutory requirement for competition, amounting to an award to Davey for new requirements which were outside the competitive scope of the original procurement.

R.F. Keller

Acting Comptroller General
of the United States