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DECISION

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

FILE: B-213559 **DATE:** July 23, 1984

MATTER OF: Nucletronix, Inc.

DIGEST:

Although a protested modification clearly exceeded the scope of the original contract, the award of the modification on a sole source basis was justified inasmuch as time was of the essence and only one firm could meet the government's needs within the available time.

Nucletronix, Inc. protests the modification of contract No. 263-80-C-0533 by the National Institutes of Health (NIH). NIH awarded the contract to the Cyclotron Corporation in 1980 for a cyclotron (a nuclear particle accelerator) capable of generating photon beams of up to 40 million electron volts (MEV). The modification permits Cyclotron to substitute a cyclotron capable of producing photon beams of up to 26 MEV for the 40 MEV machine contemplated by the original contract. Nucletronix contends that the modification is not within the scope of the original contract and consequently NIH should have secured the less powerful cyclotron competitively.

We deny the protest.

NIH awarded the original contract to Cyclotron after the firm prevailed in a competition with Nucletronix and one other offeror. Under the terms of the contract, Cyclotron was to deliver and install a 40 MEV cyclotron between April and September of 1982. Cyclotron did not deliver a cyclotron at that time, or any other time, but NIH failed to serve a notice of default on Cyclotron as required by the contract. In February 1983, Cyclotron filed a petition for reorganization under Chapter 11 of the Bankruptcy Act, 11 U.S.C. § 1101 et seq. (1982).

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In late August 1983, contracting officials at NIH secured legal advice to the effect that the agency, by failing to serve notice of default on Cyclotron, had waived its right to terminate the contract for default under the delivery schedule. The right to terminate for default could only be revived by establishing a new delivery schedule, reasonable under the circumstances, and giving Cyclotron an opportunity to meet it. The officials were also advised that any attempt to terminate would have to be approved by the bankruptcy court, a process which NIH believed would take from 3 months to 1 year. NIH decided that it could not terminate the contract and conduct a competition in time to receive a cyclotron by November 30, 1984, when NIH's cyclotron facility is to be completed and staffed. Consequently, on September 30, 1983, NIH modified Cyclotron's contract to accommodate the delivery of a less powerful cyclotron.

Nucletronix contends that the modification is outside the scope of the original contract. Nucletronix asserts that the modification is not a mere work reduction as NIH contends, but rather is a contract for an entirely new and different machine that will be capable of producing fewer radioisotopes than the 40 MEV cyclotron. Since the modification is outside the scope of the original contract, argues Nucletronix, the new requirement should have been procured competitively rather than on a sole source basis. For this reason, Nucletronix requests the termination of Cyclotron's contract.

We generally will not consider a protest against a contract modification, since modifications involve contract administration which is the responsibility of the procuring agency and beyond the scope of our bid protest function. Symbolic Displays, Incorporated, B-182847, May 6, 1975, 75-1 CPD ¶ 278. We will, however, review an allegation that a modification went beyond the contract's scope and should have been the subject of a new procurement. Aero-Dri Corporation, B-192274, Oct. 26, 1978, 78-2 CPD ¶ 304.

We find that the modification clearly exceeded the scope of the contract. Not only is the substituted cyclotron substantially less powerful and capable than the original cyclotron, but more importantly, the substituted cyclotron is admittedly a standard, proven product whereas the 40 MEV cyclotron presses the state of the art and is to a large extent a research and development effort. Thus, the cyclotron contemplated by the modification differs in very fundamental ways from the cyclotron described in the original contract. Moreover, beyond the changes in the main specification, the modification altered numerous other terms and conditions of the original contract. For example, the modification created a wholly new price structure, altered the terms of the guaranty clause, and set forth different procedures for obtaining progress payments. Last, unlike the original contract, the modification contained an extended warranty and provided for the installation of the cyclotron. In sum, the modification changed the fundamental nature of the item being procured and substantially restructured the contractual relationship between the two parties. Thus, we conclude the modification was not within the scope of the initial contract.

The question remains whether the new effort should have been procured competitively, as Nucletronix contends, or whether a justification existed for award to Cyclotron without benefit of competition. Negotiated procurements must be conducted on a competitive basis to the maximum practicable extent. 10 U.S.C. § 2304(g) (1976); Defense Acquisition Regulation § 3-101(d). Noncompetitive (sole-source) acquisitions may be authorized, however, when the work or supplies required can be furnished by only one source. There may be only one source for any of several reasons--because the items or services needed are unique; time is of the essence and only one source can meet the government's needs within the available time; data that would be needed to permit a competitive procurement is unavailable and cannot be obtained within the time available; or only a single source can provide an item that must be compatible or interchangeable with existing equipment. ROLM Corporation and Fisk Telephone Systems, Inc., B-202031, Aug. 26, 1981, 81-2 CPD ¶ 180. While we subject

sole-source acquisitions to close scrutiny, B&E Cablevision, B-199592, Feb. 19, 1981, 81-1 CPD ¶ 110, we will not object to such an acquisition if there is a reasonable basis for it. Winslow Associates, 53 Comp. Gen. 478 (1974), 74-1 CPD ¶ 14; Amray, Inc., B-209186, June 30, 1983, 83-2 CPD ¶ 45.

As mentioned, it was essential for NIH to secure a cyclotron by November 1984. In August 1983, when NIH was considering its alternatives, it became apparent to NIH that only Cyclotron could provide a cyclotron within that time frame. NIH believed it could take 3 months to 1 year for the bankruptcy court to issue a ruling on a petition to terminate Cyclotron's contract, if the court approved at all. Adding the time it would take thereafter to conduct a competition and award a contract and the approximately 13 months apparently required to perform the contract, it became evident to NIH that it could not meet the deadline by terminating the contract and recompeting. Consequently, NIH decided to award the altered requirement to Cyclotron on a sole source basis.

The protester does not challenge NIH's view that the bankruptcy court had to assent to a contract termination. The only aspect of NIH's determination that Nucletronix questions is NIH's belief that it would take more than 3 months to secure a ruling on a petition to terminate the contract. Nucletronix states that the particular bankruptcy court with which Cyclotron filed for reorganization scheduled a hearing on a petition by Cyclotron to reject several executory contracts within 1-1/2 months of the filing of the petition. Nucletronix believes that the court may have ruled on the petition at the time of the hearing. Thus, Nucletronix believes that NIH could have obtained a termination within 1-1/2 months, rather than in the estimated 3 months to a year, and consequently, had time to terminate and conduct a competition.

We find that Nucletronix has failed to sustain its burden of proving that NIH's actions were unreasonable. First, it offers no independent evidence in support of its belief. Second, even if the court has acted on one particular petition within 1-1/2 months, it would not prove that NIH's more lengthy estimate was not reasonable at the time, especially since the issues with which the court

would have been presented by an NIH petition for termination are ostensibly more complex than those represented by a petition to reject an executory contract. Moreover, Nucletronix does not unequivocally state that the court disposed of the petitions in 1-1/2 months,but merely speculates that the court may have done so. This speculation does not satisfy the protester's burden to affirmatively prove its case. Adam II, Limited, B-209194, July 21, 1983, 83-2 CPD ¶ 102. Therefore, we find no basis to object to the agency's action here.

The protest is denied.

for Milton J. Socolar
Comptroller General
of the United States