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DECISION

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

FILE: B-218949 **DATE:** August 22, 1985

MATTER OF: Rolm Corporation

DIGEST:

An agency's acceptance of a contractor's post-award offer to substitute more up-to-date equipment for outdated telephone switching equipment, at no cost, is not outside the scope of the original contract where there is no significant change in the nature of the obligation of either party to the contract.

Rolm Corporation protests the U.S. Air Force's proposed modification of a contract with AT&T Information Services, Inc. for telephone facilities and services. We deny the protest.

The proposed contract modification involves a "maintenance changeout"[1/] for the telephone switching equipment currently utilized to provide telephone service at Bergstrom Air Force Base. This equipment is owned by AT&T and primarily consists of a Western Electric 701 switch, installed in 1951, with a capacity of 1800 lines. The 701 switch is supplemented by a Dimension 2000 switch that was added in 1983 to provide an additional 300 lines of service. The current equipment does not provide satisfactory service, however, in part because the 701 switch utilizes outdated technology and is difficult to maintain, and in part because the 701 and 2000 switches do not operate well together. AT&T proposes to remedy this situation by replacing the two currently installed switches with a single 2100 line capacity Dimension 2000, at no cost to the government.

[1/] A maintenance changeout, as defined by the Air Force, is an action initiated by a commercial telephone company with respect to equipment owned by the company "to replace non-logistically supportable equipment for which the commercial company has maintenance responsibility" under a "tariff-leased" arrangement.

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Rolm contends that the proposed modification is outside the scope of AT&T's contract because the proposed Dimension 2000 replacement switch is a far more advanced system, with capabilities and features well beyond those of the existing 701. The protester asserts that any replacement of the existing equipment must be accomplished through a competitive procurement.

We generally will not consider a protest against a contract modification since modifications involve contract administration, which is the responsibility of the contracting agency. Central Texas College System, B-215172, Feb. 7, 1985, 85-1 CPD ¶ 153. However, because a contract modification that goes beyond the scope of the contract is tantamount to a sole-source award that may not be justified, we will review an allegation that a modification would go beyond the contract's scope and should be the subject of a new procurement. Cray Research, Inc., 62 Comp. Gen. 22 (1982), 82-2 CPD ¶ 376.

It is not a simple matter to determine whether a changed contract would be materially different from the contract originally awarded so that the contract as modified should be the subject of competition. For guidance, we have looked to the "cardinal changes" doctrine developed by the Court of Claims to deal with contractors' claims that the government breached a contract by ordering changes that were outside the scope of the contract's Changes clause. See American Air Filter Co., 57 Comp. Gen. 285 (1978), 78-1 CPD ¶ 136. The basic standard defined by the court for determining when a cardinal change has occurred is whether the modified work is essentially the same as the work for which the parties contracted. See Air-A-Plane Corp. v. United States, 408 F.2d 1030 (Ct. Cl. 1969).

Thus, in a situation such as this, where it is alleged that a proposed contract modification will be outside the scope of the original contract, the question is whether the original purpose or nature of the contract would be so substantially changed by the modification that the original contract and the modified contract would be essentially different. See American Air Filter Co., 57 Comp. Gen. 285, supra. In making this determination, we consider any relevant factors, including the magnitude,

quality and effect of the change. Sierra Pacific Airlines, B-205439, July 19, 1982, 82-2 CPD ¶ 54.

In this case, the contract, which is scheduled to expire in 1991, consists of a basic agreement and a communication service authorization (CSA) issued under the basic agreement. The basic agreement establishes the basic terms and conditions applicable to the contract, and the CSA establishes the specific services and equipment to be provided.2/

The Air Force and Rolm disagree as to whether the contract is essentially one for services or one for equipment. Rolm emphasizes that the CSA consists primarily of a listing of equipment to be provided and asserts that since a substantial part of that equipment will be upgraded as a result of the modification, the modification is outside the scope of the original contract. The Air Force, on the other hand, characterizes the contract as one for service to access the local and long-distance telephone network and contends that the CSA lists the equipment to be provided only because, historically, the prices for telephone service were structured around the equipment used to supply the service. The Air Force argues that under the proposed modification, AT&T simply will be providing different equipment to meet its existing switching service obligation and therefore, that the fundamental purpose and nature of the contract remains the same.

We think it is apparent that the contract is for a telephone system (consisting of telephone equipment) and that the essential purpose of this system is, as the Air Force asserts, to provide access to the local and long-distance telephone network. We do not consider this purpose to be substantially changed by the proposed contract modification in this case. In reaching this conclusion, we consider it significant that the modification was

2/Prior to the break-up of the Bell System, the services and equipment covered by the current CSA were the responsibility of Southwestern Bell. After the system was broken up, those responsibilities were transferred to AT&T, and the Air Force entered into the current CSA with AT&T to reflect that transfer. The Air Force views the current contract as a continuation of the contract originally awarded to Southwestern Bell.

instigated by the contractor; the replacement equipment is being provided at no additional cost to the government; the performance period of the contract remains the same, and the government's basic requirements for telephone equipment and service have not changed.

As we stated in Cray Research, Inc., 62 Comp. Gen. at 27, 82-2 CPD ¶ 376 at 8, the government is not precluded from accepting a contractor's offer of a better or more advanced way to meet the contract's performance requirements than that contemplated when the contract was awarded, where the parties' basic contractual relationship is not otherwise altered. In this case, AT&T simply proposes a no-cost substitution of more modern equipment for existing equipment that, because of its age and inherent limitations, is difficult to maintain and awkward to use. AT&T's basic obligation, to provide the Air Force with a telephone system, however, is unchanged.

Rolm asserts that our decision in Cray Research, Inc., does not support the contract modification here because, unlike the situation in Cray, AT&T's contract with the Air Force contains no performance specifications that offerors must meet. We find no merit to Rolm's assertion. While there, in fact, are no performance specifications in AT&T's contract, we cannot overlook the unique historical origins of the contract as a utility contract for tariffed telephone services with a regulated telephone company. Under these circumstances, no performance requirements were necessary, and services were ordered simply by issuing a CSA against a basic agreement containing the basic terms and conditions applicable to all such orders. AT&T's contract takes this form and thus it contains no performance specifications. This does not mean, however, that AT&T's obligation under the contract is only to supply certain specified equipment to the Air Force. Rather, as previously stated, we think the contract is most accurately characterized as one for a telephone system, the purpose of which is to provide the agency with access to the local and long-distance telephone network.

The protester also contends that however the contract is characterized, the modification results in a significantly expanded level of service and thus must be viewed as outside the scope of the contract. There is no question that the modification will result in better telephone service to the agency since the substitute equipment

is more up-to-date than the old equipment. In addition, the substitute equipment does have certain desirable features, such as reserve power back-up, that are unavailable in the old equipment. These features, however, do not represent changes in the agency's basic requirements, but instead, simply reflect the fact that the substitute equipment offers a better way to meet those requirements. While the agency is obviously pleased that the modification will result in better service, this alone does not make the modification improper. Therefore, we find no merit to Rolm's contentions in this regard.

Rolm also relies on several prior decisions of our Office to support it contention that the proposed modification is outside the contract's scope. We find those decisions distinguishable from the present situation.

For example, in Memorex Corp., 61 Comp. Gen. 42 (1981), 81-2 CPD ¶ 334, aff'd, B-200722.2, Apr. 16, 1982, 82-1 CPD ¶ 349, the agency modified a contract for computer disk drives by allowing the substitution of new model disk drives for those already covered by a contract option, at an additional cost of more than $200,000. We found this modification to be outside the scope of the original contract because the modification converted the option from an outright purchase to a "lease-to-ownership" plan with continuing performance requirements that shifted the burden and risk of non-performance from the government to the contractor. In this case, however, the modification is being accomplished at no cost to the government and there are no significant changes to the terms and conditions of the contract. We therefore do not consider Memorex dispositive of this protest.

Rolm also relies on Webcraft Packaging Division of Beatrice Foods, B-194087, Aug. 14, 1979, 79-2 CPD ¶ 120. There, the contract modification involved the relaxation of specifications for paper to be used by the contractor in the printing and packaging of government forms. This change was made shortly after contract award and resulted in a cost increase of nearly $500,000. We held that the modification was outside the scope of the contract because it was clear that considerably more firms would have entered the original competition if the relaxed specifications had been used. Rolm contends that the field of competition also is changed here because, today, there is a very competitive marketplace for telephone systems whereas there was no competition in 1951, when the

original switching equipment was installed, and the Bell system has a legally sanctioned monopoly for telephone service. While this is true, we do not find that it compels a conclusion that the proposed modification is outside the contract's scope.

Unlike the situation in Webcraft, the change in the potential field of competition here does not result from the contract modification, but instead from the break-up of the Bell System, which occurred many years after the original switching equipment at issue in this case was installed. The proposed modification simply would have no effect on the potential field of competition in this case. Moreover, we do not think that the fact that competition has become available precludes the proposed modification since the agency is not extending the term of its existing contract or otherwise foreclosing future competition for the equipment and services covered by the current contract.

In that connection, we recognize Rolm's assertions that AT&T will secure a future competitive advantage as a result of the contract modification. The Air Force assures us, however, that this will not be the case because it is currently planning for a future competitive acquisition in which all new equipment will be required. In addition, the Dimension 2000 switch to be acquired under the modification uses analog technology, while the Air Force program for the competitive acquisition of telephone systems requires digital technology. Accordingly, it does not appear that any competitive advantage will result from the proposed contract modification. In any event, the fact that a competitive advantage may result from a proper contract modification is not legally objectionable. See Clifton Precision, Division of Litton Systems, B-207582, June 15, 1982, 82-1 CPD ¶ 590.

Rolm also asserts that, at the very least, the acquisition of the existing 2000 switch, added in 1983 to provide a 300-line expansion in service, should have been the subject of a competitive procurement.[3/] Rolm first

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[3/] Rolm notes that as early as 1974, our Office had held that the procurement of equipment to expand telephone facilities had to be done on a competitive basis to the maximum practicable extent. See RCA Alaska Communications, Inc., B-178442, June 20, 1974, 74-1 CPD ¶ 336.

raised this issue in its comments on the agency report on its protest (since, according to Rolm, it first learned of the acquisition from the report). As a result, the record has never been fully developed on this issue, and the exact circumstances of the acquisition are unclear. In any event, since the equipment in question will be eliminated under the proposed contract modification, there is no practicable corrective action available even if we were to sustain this aspect of the protest. While Rolm apparently seeks a recommendation that an entire new telephone system be procured at this time, we do not think a sole-source acquisition which added 300 lines to an existing 1800 line system would warrant such a recommendation, even assuming that the award was improper. Accordingly, we think no useful purpose would be served by our consideration of the issue, and it will not be addressed.

The protest is denied.

for Harry R. Van Cleve
General Counsel