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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Caltech Service Corporation

File: B-240726.6

Date: January 22, 1992

Allen Samelson, Esq., Rogers, Joseph, O'Donnell & Quinn, for the protester.
John J. Duffy, Esq., and Deborah S. Missal, Esq., Piper & Marbury, for Tate Facilities Service, Inc., an interested party.
Jewel Miller, Esq., Defense Logistics Agency, for the agency.
Paul E. Jordan, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contract modification which involves increase in estimated cargo tonnage under one line item of consolidation and containerization requirements contract, which does not affect unit price or contractor's responsibilities under the contract, does not constitute a cardinal change since the nature and purpose of the original contract remains unchanged.

DECISION

Caltech Service Corporation protests the modification of requirements contract No. DLA005-91-D-0003, awarded to Tate Facilities Service, Inc., by the Defense Distribution Region West (DDRW), Defense Logistics Agency (DLA), for operation of a consolidation and containerization point (CCP) in Lathrop, California. Caltech contends that the modification which increases the estimated requirements for SEAVAN cargo is improper because it is beyond the scope of the original contract.

We deny the protest.

Request for proposals (RFP) No. DLA005-90-R-0003, issued July 31, 1990, was the subject of a prior protest by Caltech in which it challenged the estimated workload quantities provided under the RFP as too high in view of an apparent past downward trend. Caltech Serv. Corp., B-240726, Dec. 18, 1990, 90-2 CPD ¶ 497. In that protest, Caltech

also complained that a planned consolidation of supply depots in the San Francisco area would affect the estimates, and Caltech objected to the absence of guaranteed minimum quantities of work. In response to the protest, the agency amended the RFP to provide updated workload estimates and to reduce the two 1-year options to two 3-month options "to reduce the long term risks to offerors." Id. In determining that the estimates were reasonable, we considered the contracting officer's explanation in the agency report that:

> "It is recognized that due to the DLA consolidation, there are many uncertainties; however, as of this date [August 1990], there is no information indicating any changes in projected workload quantities that can be attributed to the consolidation. The same organizations are utilizing CCP functions that utilized it prior to the consolidation with no organizations added or deleted. A Contracting Activity (CA) study is in progress; however, there are no anticipated changes to FY 91 requirements."

We denied the protest. Id.

The RFP, as amended, solicited offers for receiving, documenting, consolidating, packing, and loading cargo for rerouting on-site, air shipment, and by SEAVAN containers at the DDRW Sharpe Site, formerly Sharpe Army Depot. Items to be consolidated were supplied by the General Services Administration (GSA), Sharpe, and Defense Depot Tracy. The government was responsible for delivery of cargo to the ultimate destinations. At the time that the RFP was issued, these destinations were Army installations, but the RFP scope of work provided only that the destinations were "designated activities" in the Pacific Ocean area including Alaska and Hawaii.

Offerors were to provide technical and cost proposals. Cost proposals were to contain unit prices for each type of cargo, based upon total estimated quantities for each performance period. The RFP advised that failure of the government to place delivery orders in the estimated quantities would not provide a basis for an equitable price adjustment. The RFP also provided that the contractor was not obligated to honor any order for a single item in excess of $1.5 million; any order for a combination of items in excess of $3 million; or a series of orders within 30 days that together call for quantities exceeding the other limitations.

Caltech, Tate, and five other offerors submitted proposals, and award was ultimately made to Tate as the low, technically acceptable offeror on January 23, 1991.[1] The initial contract performance period, including a 1-month phase-in, began March 1, 1991, and will end February 29, 1992.

At the time of that award, Caltech was performing a cost-plus-award-fee contract to operate the Sacramento Air Logistics Command CCP at McClellan Air Force Base. The contract responsibilities were comparable to those at Sharpe, with items for consolidation being furnished by GSA, Sharpe, and Tracy (90 percent) and the Air Force (10 percent), for shipment to Air Force destinations in the Pacific Ocean area.

In April 1991, DLA assumed distribution functions of the McClellan CCP into DDRW. According to a Master Memorandum of Agreement between the Air Force and DLA, existing CCP functions would remain with the Air Force until contracts such as Caltech's expired, and future requirements would be processed and funded by DLA. Since there was no need for a CCP at McClellan, and the average cost per short ton under Caltech's contract was $74, while the price under Tate's contract was $53.31, DLA directed the Air Force not to exercise Caltech's next contract option.

Because Sharpe would assume responsibility for an additional 1,190 short tons of SEAVAN cargo per month when Caltech's contract expired on September 30, 1991, DLA entered into a bi-lateral contract modification with Tate to change the estimated quantities for SEAVAN cargo line items in the basic and option periods. The modification did not provide for any increase in unit prices or otherwise change Tate's contract responsibilities.

Caltech protested to our Office alleging that the modification represented a cardinal change and, thus, an improper sole-source award to Tate. In particular, Caltech argues that the original contract scope was limited to cargo destined for Army recipients; that addition of Air Force cargo substantially increased the scope of the contract with respect to both quantity and character; and that the modification significantly increased the cost of contract performance.

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[1]Award originally was made to another offeror, but the award was rescinded because the offeror had made a mistake in its small disadvantaged business certification.

DLA contends that the contract modification is within the scope of the original contract since it did not change the type of work, performance period, or the unit price. Accordingly, the agency asserts that the modification is a matter of contract administration which our Office should not review.[2]

As a general rule, our Bid Protest Regulations provide for dismissal of protests involving contract administration matters. See 4 C.F.R. § 21.3(m)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991). However, we will consider a protest such as this which alleges that a modification represents a cardinal change, that is, beyond the scope of the original contract, and that the work covered by the modification should be subject to requirements for competition absent a valid sole-source determination. Neil R. Gross & Co., Inc., 69 Comp. Gen. 292 (1990), 90-1 CPD ¶ 212, aff'd on recon., B-237434.2, May 22, 1990, 90-1 CPD ¶ 491.

When a contract modification is alleged to be outside the scope of the original contract, the question is whether the original nature or purpose of the contract is so substantially changed by the modification that the original and modified contract are essentially different. See Ion Track Instruments, Inc., B-238893, July 13, 1990, 90-2 CPD ¶ 31. In determining the materiality of a modification, we consider factors such as the extent of any changes in the type of work, performance period, and costs between the modification and the prime contract, as well as whether the modification is of a nature that potential offerors would reasonably have anticipated under the changes clause. See American Air Filter Co., Inc., 57 Comp. Gen. 285 (1978), 78-1 CPD ¶ 136, aff'd on recon., 57 Comp. Gen. 567 (1978), 78-1 CPD ¶ 443; CAD Language Sys., Inc., B-233709, Apr. 3, 1989, 89-1 CPD ¶ 342.

We do not find that DLA's modification materially changed the nature or purpose of the original contract. The contract performance period is unchanged; Tate has the same responsibilities and is to be paid the same unit price per short ton of cargo. The only change is in the estimated number of short tons of SEAVAN cargo to be consolidated during the life of the basic contract and options. Caltech

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[2]In this regard, DLA has not stayed performance of the modification because it maintains that the modification did not constitute a contract award within the meaning of the Competition in Contracting Act of 1984, 31 U.S.C. § 3553 (1988). In view of our conclusion that the modification at issue does not constitute a material change, we see no reason to take exception to DLA's rationale.

argues that this increase in SEAVAN cargo constitutes a material change in the scope of the contract since it amounts to a more than 60 percent increase over the actual tonnage processed prior to the modification. Caltech also states that Tate has acquired six additional forklifts, ostensibly for use on its CCP contract.

While the procurement history is relevant, where, as here, the modification concerns a requirements contract, the appropriate benchmark for reviewing whether that modification is beyond the scope of the contract as competed is the estimated quantities rather than the actual quantities handled to date. Here, the increase in tonnage under the modification represents a 20 percent increase over the estimated quantities for the base year and a 49 percent increase in each of the option periods. Assuming both options are exercised, the total increase at issue would be 30 percent. We do not find this increase to be significant since functions under the original contract and those represented by the modification are the same. See Marine Logistics Corp., B-218150, May 30, 1985, 85-1 CPD ¶ 614. The additional tonnage applies only to a single, albeit large line item, is well within the limits of the contractual maximum, and will continue for a relatively short period of time. That Tate might acquire additional equipment to handle the increase is not germane. The firm could have required the same additional equipment apart from the modification. The acquisition of additional equipment by the contractor does not establish that the modification is beyond the scope of the contract. Similarly, while the increase in quantities will result in Tate's receipt of some additional revenue, we do not find that this establishes that the modification is beyond the scope of the original contract.

Further, this is the type of change which reasonably should have been anticipated by Caltech in the original competition. At the time of the issuance of that RFP, the protester was aware of the planned consolidation of CCPs in the San Francisco area and, in fact, based its earlier protest on the alleged failure of the RFP to take consolidation into account. As amended, the RFP did take

into account the eventuality of consolidation through its requirements-type format,[3] the absence of guaranteed minimum quantities, and the shortening of option periods.

Caltech alleges that DLA's representations during its first protest, concerning the impact of consolidation, were misleading. We disagree. The fact that DLA was unaware in August 1990 of precisely what affect consolidation, which ultimately occurred in April 1991, would have on the contract does not constitute a misleading statement. As quoted above, the contracting officer acknowledged that there were many uncertainties involved with consolidation. His representation that there would be no change in organizations using the CCP is substantially correct. Both the Sharpe and McClellan CCPs received cargo items for consolidation from Sharpe, Tracy, and GSA. We do not find that the 10 percent of McClellan's cargo that was generated by the Air Force was significant. Moreover, not all of the McClellan cargo will be processed at Sharpe. Some cargo can be shipped directly to the port of embarkation by GSA or loaded at other DLA sites. Thus, DLA's earlier representations do not change our conclusion that some modification of this type was foreseeable.

Finally, we disagree that the change in cargo destinations encompassed by the modification had any affect on the scope of the contract. In this regard, Caltech's reliance on our decision in Neil R. Gross & Co., Inc., supra is misplaced. That protest involved court reporting services and the Department of Labor's modification of an existing requirements contract to include services beyond the scope of the original contract. In sustaining the protest we found that the new services were different in character since they involved hearings which were more technical and difficult to transcribe and required a significantly faster delivery schedule. We also considered that, in the past, the agency had acquired the services covered by the modification by separate procurement.

Here, in contrast, the character of Tate's responsibilities is unchanged by the addition of Air Force destinations. Tate is required only to consolidate and containerize cargo; the government remains responsible for shipment to the

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[3]Competitors for a requirements contract, such as the one here, are on constructive notice of the Economy Act, 31 U.S.C. § 1535(a)(3) (1988), which specifically allows one agency to use its contracts to satisfy another agency's needs. See Liebert Corp., 70 Comp. Gen. 448 (1991), 91-1 CPD ¶ 413. Thus, even apart from the consolidation effort, Caltech should have been aware of the potential for a change in the requirements.

destinations. The fact that separate agencies, the Army and Air Force, once used separate procurements to operate the CCPs at McClellan and Sharpe does not establish that the services were different in character. Accordingly, DLA's use of a modification to consolidate identical services under a single contract is within the scope of the original contract.

The protest is denied.

Robert P. Murphy
for James F. Hinchman
General Counsel