

PL-1

11,117



**DECISION**

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

FILE: B-194087

DATE: August 14, 1979

MATTER OF: Webcraft Packaging, Division of  
Beatrice Foods Co.

*DLG 02564*

DIGEST:

*[Protest Alleging Specification Changes Were Beyond Scope of Contract]*

1. Generally, in determining whether protester satisfies "interested party" requirement, consideration should be given to nature of issues raised by protest and direct or indirect benefit or relief sought by protester. Protester, who initially submits alternate paper samples and finally no-bid with explanation that it cannot meet IFB's specifications, is interested party, having direct and substantial economic interest in procurement, where agency after award relaxes specifications and issue raised is that changes to specifications were beyond scope of contract and should have been subject of new procurement.
2. Protest filed with GAO within 10 working days of agency's denial of initial protest is timely and for consideration on the merits. 4 C.F.R. § 20.2(a) (1978).
3. GPO's modification of contract by relaxing specifications in existing contract alleged to be beyond scope of contract will be considered by GAO since relaxation could be viewed as attempt to circumvent competitive procurement statutes.
4. Unavailability of paper as originally specified at time of award indicates specified paper was specialty product. Moreover, fact that there were at least nine potential sources of supply for revised paper indicates that field of competition was materially changed due to contract modification and, therefore, contract for which competition was held and contract to be performed are essentially different. Consequently, procurement should have been readvertised.

~~006170~~/110126

Background

*DLG 02524*

*AGC00178*

Webcraft Packaging, Division of Beatrice Foods Co. (Webcraft), has protested the award of contracts by the Government Printing Office (GPO) to Messenger Corporation (Messenger), Lienett Co., Inc. (Lienett), and Pace Press, Inc. (Pace), under Jacket No. 277-516, which was issued for the solicitation of the printing, folding and packing of the 1980 Decennial Census - FOSDIC Short Form. *DLG 02565*  
*DLG 02566*  
*DLG 02567*

The solicitation had a total requirement of 115,503,000 copies of the form, broken down into 18 lots, and reserved to GPO the right "to make award for one, all, or a combination of lots, whichever was deemed to be in the best interests of the Government." Each awardee was required to furnish, among other things, whatever paper was necessary to satisfy its contract. The paper specified had to possess, among other things, the following pertinent characteristics:

Brightness: Average . . . . percent. . . . 91  
A tolerance of plus or minus 3 percent shall be allowed.

Porosity: Average . . . . seconds . . . . 28  
A tolerance of plus or minus 7 seconds will be allowed.

*AGC00074*

The Department of Commerce (Commerce), during its planning phase concerning the 1980 Census, sent to GPO the proposed paper's specification sheet and requested GPO to comment on its availability, to identify any potential problem areas, and to make recommendations with respect to such problem areas. Consequently, GPO obtained and tested various printing papers and concluded that Commerce's proposed specifications were restrictive. Then GPO conducted a survey of the paper industry to determine if paper similar to that proposed by Commerce could be produced in the necessary quantity. After analysis of the responses to the survey and discussions with GPO, Commerce submitted a requisition containing, among others, the characteristics mentioned above for the 1980 Decennial Census Forms. On November 28, 1978, GPO issued the solicitation in question.

Webcraft contends that on December 20, 1978, after its own survey of 17 paper mills, it contacted GPO advising that the required paper was not available in quantities required by GPO. Concomitantly, Webcraft submitted alternate paper samples for GPO's inspection. These samples were found to be unacceptable and rejected by GPO since both of them failed to conform to the specifications.

Bid opening was on December 26, 1978. GPO received 41 responses, 36 of which were no bids, with a majority of these giving explanations for these no bids. Almost immediately one of the bidders was determined nonresponsive due to its shipping schedule. However, due to inclement weather, a preaward survey that eventually found the low bidder not responsible was delayed until January 8, 1979. Subsequently, GPO performed preaward surveys on the three remaining bidders. On January 22, 1979, the low bidder protested the nonresponsibility determination which was denied by GPO the following day. Purchase orders, dated January 24, awarding the various lots were sent to the remaining three bidders: Pace receiving 11 lots, Messenger receiving 5 lots and Lienett receiving 2 lots.

As a result of the purchase order, Pace, on January 25, unsuccessfully attempted to place an order with its supplier for the necessary paper. Pace advised GPO by mailgram, dated January 25, that: " \* \* \* If we are not successful in getting new paper sources meeting all your specifications we SHALL be put in a position of Refusing this order." It is apparent that Pace believes its "difficulties with the various paper mills [resulted from GPO's] failure to notify [Pace] of award on December 29, 1979 as [stated in the] specifications \* \* \*."

GPO, by letter dated January 31, informed Pace of the relaxation of certain specifications which was designed to provide Pace the opportunity to obtain paper as follows:

"Brightness has been changed from 91 plus or minus 3% to 88 plus or minus 3%. Porosity average seconds must be 21 or above. There is no upper limit for porosity."

In addition, GPO requested "documentation showing the final price paid per pound and a copy of [the] original estimate showing the price for paper per pound used to complete [the] bid." By letter dated February 8, GPO advised Pace "\* \* \* [that it would] be required to produce this order in accordance with the original specifications and subsequent changes \* \* \* as listed in [the] January 31, 1979 letter \* \* \*." GPO concluded by informing Pace that it would review the circumstances surrounding Pace's loss of the original paper commitment and the obtaining of the new commitments and "\* \* \* determine if a decrease or increase in price and schedule adjustment can be achieved."

The record is not clear concerning whether Messenger and/or Lienett also experienced difficulty in obtaining paper that satisfied the original specifications, or for that matter the amended specifications. Nevertheless, even though our decision only refers to Pace, we believe that our decision is equally applicable to the remaining two awardees.

Webcraft, by telegram dated January 31, protested the past and pending awards under Jacket No. 277-516, by GPO. This protest was denied by GPO in a letter dated February 5 and received by Webcraft on February 8. On the same date, Webcraft filed its protest with our Office. It is Webcraft's position that "the contracting officer knew, or should have known, that the specified paper it sought could not be supplied in the quantities requested and that Webcraft and other bidders should have been given the opportunity to rebid the contract under the revised paper specifications." Webcraft contends that the awards made in this procurement are invalid since the bids materially differ from the specifications as subsequently changed. Moreover, Webcraft argues that the changes in the specifications were not minor since they "change[d] the nature of the required paper from a specialty item virtually unobtainable to what is essentially a shelf product on which several paper mills could immediately bid."

GPO's position is fourfold. The first argument raised is that Webcraft is not an interested party since it did not submit a bid pursuant to this procurement. Secondly, GPO contends that Webcraft is protesting "that either the paper specification in the solicitation

did not permit full and free competition, or that the specifications somehow prevented them from competing," which are apparent improprieties in the solicitation and should have been protested before bid opening. Consequently, GPO argues that since the protest was not filed prior to bid opening, it is untimely pursuant to GAO Bid Protest Procedures (Procedures), 4 C.F.R. § 20.2(b)(1) (1979). GPO also argues that even if Webcraft is found to be an interested party and its protest is timely, any changes to the specifications were minor and, therefore, such contract modifications concern contract administration and are the responsibility of the procuring agency. However, GPO does concede that if the contract as changed was materially different from the contract for which competition was held, it would be appropriate for our Office to consider such as a basis for a bid protest.

#### Interested Party

Our Procedures, 4 C.F.R. § 20.2(a) (1979), provide that a party must be "interested" in order that its protest might be considered. The requirement that a party be "interested" serves to insure a party's diligent participation in the protest so as to sharpen the issues and provide a complete record on which the correctness of a challenged procurement may be decided. A protester may well be viewed as possessing a sufficient interest in the award selection in question even though the protester may not or does not choose to bid on the procurement. We have considered protests filed by nonofferors such as a subcontractor, a labor union, a contractor's association and a Chamber of Commerce, where there was a possibility that recognizable established interests will be inadequately protected if our bid protest forum is restricted solely to offerors or bidders in individual procurements. Abbott Power Corporation, B-186568, December 21, 1976, 76-2 CPD 509, District 2, Marine Engineers Beneficial Association--Associated Maritime Officers, AFL-CIO, B-181265, November 27, 1974, 74-2 CPD 298; B-177042, January 23, 1973; and 49 Comp. Gen. 9 (1969).

In determining whether a protester satisfies the interested party criterion, our Office will examine the degree to which the asserted interest is both established and direct. In making this evaluation, we consider the nature of the issues raised and the direct or indirect benefit or relief sought by the protester. ABC Management Services, Inc., 55 Comp. Gen. 397 (1975), 75-2 CPD 245; Kenneth R. Bland, Consultant, B-184852, October 17, 1975, 75-2 CPD 242.

Webcraft argues that it "was active throughout the bidding," adding that it submitted a "no bid" which provided an explanation for that submission. It is apparent that Webcraft's position is that the submission of a bid is not a prerequisite to have a protest considered by GAO on the merits. Webcraft adds that the relief it is seeking is the issuance of a new solicitation containing the amended specifications. Webcraft advises that if this relief was granted, it would submit a bid.

On the other hand, GPO contends that our decision in Die Mesh Corporation, B-192668, November 29, 1978, 78-2 CPD 374, is dispositive of this issue. In that case, Die Mesh admitted that it was perfectly capable of submitting a proposal but believed that doing so would have been futile in light of preferential treatment given to certain companies in previous procurements. However, Die Mesh did profess its concern for electric vehicle development. We held:

"It is evident that the direct and substantial economic interest at stake are not those of Die Mesh, but rather those of offerors which participated in the procurement and did not receive awards. \* \* \* Die Mesh's interests are too remote for it to be considered an interested party because there are other intervening parties with more direct and substantial interests."

We do not agree that Die Mesh Corporation is dispositive in this instance. Although GPO's view of the decision's holding is not incorrect, we believe that the case is distinguishable. In that case, Die Mesh

raised, among others, the issue that there was preferential treatment given to the successful offerors. Assuming that was in fact true, it was the unsuccessful offerors not Die Mesh that were harmed and they would have been the appropriate parties to file a protest with our Office.

In the present case, Webcraft is not a nonofferor protesting as to which of several competing offerors should properly receive an award under Jacket No. 277-516. Rather, Webcraft is protesting essentially on the basis that the changes to the specifications made after award were cardinal changes and the contract should be terminated for the convenience of the Government, and that a new procurement reflecting these changes should be initiated. Webcraft's protest, or a protest by any other party similarly situated, involves a direct economic interest, i.e., an opportunity for the party to submit a proposal under the new Jacket and compete for an award. Unlike Die Mesh, there is no other identifiable group of potential protesters whose members arguably have a more direct interest in asserting this basis for protest. See Cardion Electronics, 58 Comp. Gen. \_\_\_\_\_, B-193752, June 8, 1979, 79-1 CPD 406.

#### Timeliness

GPO contends that Webcraft's protest is untimely pursuant to our Procedures, 4 C.F.R. § 20, supra, since its protest, which is essentially based on the restrictiveness of the specifications, was not filed prior to bid opening. In response, Webcraft denies that its protest is based on the restrictiveness of the specifications. Webcraft argues that although "it is of course now clear that the specifications were restrictive," the basis of Webcraft's protest is essentially that there was a material change in the specifications after award rather than cancelling the award and issuing a new solicitation which would have allowed a competition among all bidders.

Webcraft advises that it protested initially to GPO on January 31, 1979, when it became aware of the fact that on the same day GPO, by letter, advised Pace that the specifications had been relaxed to afford Pace the additional opportunity to obtain the paper for the procurement. This protest was denied on February 5 and subsequently Webcraft filed its protest with our Office on February 8, 1979.

Under these circumstances, it is our view that Webcraft timely filed its initial protest with GPO. Consequently, we believe that Webcraft's subsequent protest to our Office limited to the material change in the specifications was timely since it was filed within the 10 working days after the agency's denial as prescribed in our Procedures. 4 C.F.R. § 20.2(a) (1978).

#### Contract Modifications

A protest concerning a contract modification ordinarily is not for resolution under our bid protest function since it involves contract administration, a matter within the authority of the contracting agency. Symbolic Displays, Incorporated, B-182847, May 6, 1975, 75-1 CPD 278. However, our Office will review such a matter when it is alleged, as here, that the modification went beyond the scope of the contract and should have been the subject of a new procurement, since the execution of the modification could be viewed as an attempt to circumvent the competitive procurement statutes. Accordingly, we view this protest as appropriate for our consideration. Brandon Applied Systems, Inc., 57 Comp. Gen. 140 (1977), 77-2 CPD 486; Die Mesh Corporation, B-190421, July 14, 1978, 78-2 CPD 36.

It is not always easy to determine whether a changed contract is materially different from the competed contract. However, we have recognized that the decisions of the Court of Claims relating to cardinal changes offer some guidance. American Air Filter Co., Inc., 57 Comp. Gen. 285, 286 (1978), 78-1 CPD 136. Even though a cardinal change usually results from the unilateral action of the Government and the change in this case resulted from the mutual agreement of the parties, the Court of Claims decisions are useful here, since they provide the standards for determining whether the changed contract is essentially the same as the original. Id. For example, in Air-A-Plane Corporation v. United States, 408 F.2d 1030 (Ct. Cl. 1969), the court stated:

"The basic standard, as the court has put it, is whether the modified job 'was essentially the same work as the parties bargained for when the contract was awarded. Plaintiff has no right to



complain if the project it ultimately constructed was essentially the same as the one it contracted to construct.' Conversely, there is a cardinal change if the ordered deviations 'altered the nature of the thing to be constructed.' [citations omitted] Our opinions have cautioned that the problem 'is a matter of degree varying from one contract to another' and can be resolved only 'by considering the totality of the change and this requires recourse to its magnitude as well as its quality.' [citations omitted.]' There is no exact formula \* \* \*. Each case must be analyzed on its own facts and in light of its own circumstances, giving just consideration to the magnitude and quality of the changes ordered and their cumulative effect upon the project as a whole."

Therefore, the question before us is whether the original purpose or nature of the contract has been so substantially changed by the modification that the contract for which competition was held and the contract to be performed are essentially different. In other words, was the field of competition materially changed due to the modification. See American Air Filter Co., Inc., supra.

Webcraft contends that after the change in the specifications was made the paper mills, previously unable to satisfy the IFB requirements, were able to supply paper meeting the revised specifications and in the quantity specified by the IFB. However, Webcraft points out that as a result of this change Pace, who originally bid, \$1,188,640, has requested this be increased to \$1,626,905. We note that Pace essentially based its request on delays by GPO in placing the order and the need to quickly acquire the paper to meet accelerated delivery dates. Webcraft believes that the increase in price of approximately \$500,000 demonstrates that the change was material. In further support of its position, Webcraft presents a second method, a comparison of the new and original product concentrating on their differences, for determining whether a change in specification is material. Webcraft believes "that the change

in the brightness specification materially altered the product which GPO sought." Also, Webcraft states: "The paper specified in the November 28, 1978, invitation for bid was a speciality product. Almost no one could supply it. \* \* \* A wide range of papers meet the revised specifications. The relaxing of the brightness standard from 91+3 to 88+3 opened the contract to standard papers from a variety of suppliers." In support of this contention, Webcraft lists the following six standard papers which were available and complied with the revised specifications, but would not meet the original specifications:

<u>"Manufacturer</u>	<u>Brand Name</u>	<u>Brightness</u>
"Weyerhaeuser Corp.	Cougar Opaque	87
"Finch Pruyn & Co.	Finch Opaque	86
"Northwest Paper	Mountie Opaque	85-88
"Georgia Pacific	Hunter Opaque	86
"Georgia Pacific	Hopper Opaque	87
"Champion Papers	Carnival Offset	85"

We note that in addition to these there are at least three other papers that were available, e.g., those offered by Pace after it unsuccessfully placed an order with its supplier for paper as originally specified in the Jacket.


GPO submitted an administrative report on March 9, 1979, and a supplemental report on July 2, 1979. Neither of these reports refuted Webcraft's contentions which essentially are that the original paper was a specialty product and the revision in the specifications changed the field of competition. As a matter of fact, GPO's position, set forth above, does not deal with the changes in the field of competition or concern itself with whether the original paper was a specialty item.

It is the objective of our bid protest function to insure attainment of full and free competition. This was demonstrated in American Air Filter Co., Inc., supra, where we fully examined how, if at all, the field of competition would be affected by the modification to the original contract. Therefore, based on the record, we can only conclude that the reason for the original paper's unavailability at time of award was that it is a specialty

product, produced only by a few sources. Moreover, the fact that there were at least nine potential sources of supply for the revised paper demonstrates that the field of competition was materially changed due to the modification. Consequently, the agency should have canceled the original Jacket and resolicited for the revised paper.

Accordingly, Webcraft's protest is sustained.

We cannot recommend corrective action in this instance due to the status of the procurement. However, by letter of today to the Public Printer we are recommending that appropriate procurement personnel be apprised of our decision with a view toward attempting to preclude a repetition of similar difficulties in future procurements.

  
Deputy Comptroller General  
of the United States