



United States General Accounting Office  
Washington, DC 20548

## Decision

**Matter of:** Makro Janitorial Services, Inc.

**File:** B-282690

**Date:** August 18, 1999

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Miguel Valladares for the protester.

Thomas W. Burt, Esq., Department of the Army, for the agency.

Wm. David Hasfurther, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest that a task order for housekeeping services improperly exceeds the scope of the original contract for preventive maintenance and inventory, repairs and facility survey activities, that was subsequently modified to include the services covered by the task order, is sustained where the original contract as competed did not reasonably provide for the procurement of the housekeeping services added by the modification, and the modification was therefore outside the scope of the original contract. The use of the task order to obtain these services was improper and the services should be obtained through full and open competition.

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### DECISION

Makro Janitorial Services, Inc. protests the Department of the Army's failure to compete the procurement of housekeeping services for locations at the Kimbrough Ambulatory Care Center (Ft. Meade), Aberdeen Proving Grounds, and Edgewood Arsenal, Maryland. The agency issued task order No. 0084 for these housekeeping services to BMAR and Associates, Inc. under contract No. DACA01-96-D-0023, which was for preventive maintenance and equipment inventories at medical facilities in the continental United States, Caribbean, Alaska, and Hawaii. Contracting Officer's (CO) Statement at 1. The BMAR contract was modified in 1997 to include housekeeping and exterior grounds maintenance services. BMAR Contract at C-7-1 to C-7-5. Macro contends that the issuance of the task order in lieu of competing the procurement was improper and resulted in prices higher than those that would have been obtained through competition. Protester's Comments at 8-10.

We sustain the protest.<sup>1</sup>

An indefinite-delivery/indefinite-quantity (IDIQ) contract was competitively awarded by the U.S. Army Corps of Engineers, Mobile District Contracting Division, to BMAR on May 2, 1996, for a base year with four 1-year option periods at a total not-to-exceed value of \$27,500,000. The work would be accomplished through fixed-priced task orders. CO Statement at 1-2. Under the contract, BMAR would supply all plant, labor, materials, and equipment in performing “Real Property Inventory (RPI), Demand Maintenance Repairs, and surveys of Medical Facilities.” BMAR Contract § C-1.1.1. As noted, the contract was modified subsequently to include housekeeping and exterior grounds maintenance services. As relevant here, the contract modification defines “Housekeeping Services” as “all labor and materials to maintain the cleanliness of all medical facility spaces.” Id. § 2.1.3.1. The cleaning services include damp wiping and dusting, spot cleaning of surfaces, vacuuming, and cleaning plumbing fixtures, windows, beds and linens. The BMAR contract was awarded as part of the U.S. Army Medical Command’s program to ensure that its hospitals, clinics, and other facilities would meet the standards of the Joint Commission on Accreditation of Healthcare Organization standards by means of a collection (toolbox) of contracts that would be available to the facility manager at each medical facility. CO Statement at 1.

The agency notes that the procurement was described in the Commerce Business Daily under Code M, operation of government-owned facilities, and that in paragraph 1.03 of the solicitation/contract it was stated that the covered work previously was done in-house (that is, some of the larger installations performed their own housekeeping). Further, in solicitation/contract paragraph 2.1.1, “Maintenance” is defined as that which keeps real property in such a condition as to

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<sup>1</sup>The agency initially contends that the Makro protest is untimely since the task order was issued on April 15 and the protest was not filed until early May. CO Statement at 4-5. We do not agree. While the task order was issued on April 15, Makro had no knowledge of how the agency intended to obtain its housekeeping needs until it was informed on May 6 that the services were being obtained by a task order under BMAR’s previously awarded preventive maintenance contract. Protest at 3. Since its protest was filed on May 10, within 10 calendar days of learning on May 6 that BMAR was issued a task order under its prior contract, its protest is timely. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1999).

Additionally, there is no indication in the record, and the agency does not contend, that Makro was aware until May 6, 1999 of modification 8 which added housekeeping and exterior maintenance services to the BMAR contract in 1997. Accordingly, this situation is unlike that in Access Research Corp., B-281807, Apr. 5, 1999, 99-1 CPD ¶ \_\_\_, in which we found untimely a challenge to a modification issued 3 ½ years earlier where the protester acknowledged it was aware at the time of the agency’s actions.

be usable continuously for its intended purpose. The agency asserts that housekeeping is necessary to keep the facilities functional. The agency argues that since the intended purpose of the contract was for the successful operation of the facilities, the 1997 modification was merely a clarification of the original requirements under BMAR's contract, rather than a change that was outside the scope of the original contract. Agency's Supplemental Comments at 1-2.

The Competition in Contracting Act of 1984 (CICA) requires "full and open competition" in government procurements as obtained through the use of competitive procedures. 10 U.S.C. § 2304(a)(1)(A) (1994). Once a contract is awarded, however, our Office will generally not review modifications to that contract, because such matters are related to contract administration and are beyond the scope of our bid protest function. 4 C.F.R. § 21.5(a); Stoehner Sec. Servs., Inc., B-248077.3, Oct. 27, 1992, 92-2 CPD ¶ 285 at 4. The exception to this rule is where it is alleged that a contract modification is beyond the scope of the original contract, since the work covered by the modification would otherwise be subject to the statutory requirements for competition (absent a valid determination that the work is appropriate for procurement on a sole-source basis). MCI Telecomms. Corp., B-276659.2, Sept. 29, 1997, 97-2 CPD ¶ 90 at 7.

In determining whether a modification triggers the competition requirements in CICA, we look to whether there is a material difference between the modified contract and the contract that was originally awarded. Id.; see AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d 1201, 1205 (Fed. Cir. 1993). Evidence of a material difference between the modification and the original contract is found by examining any changes in the type of work, performance period, and costs between the contract as awarded and as modified. MCI Telecomms. Corp., supra, at 7-8. We also consider whether the solicitation for the original contract adequately advised offerors of the potential for the type of change found in the modification. CAD Language Sys., Inc., B-233709, Apr. 3, 1989, 89-1 CPD ¶ 342 at 4. The overall inquiry is "whether the modification is of a nature which potential offerors would reasonably have anticipated." Ervin and Assoc., Inc., B-278850, Mar. 23, 1998, 98-1 CPD ¶ 89 at 8, quoting Neil R. Gross & Co., Inc., B-237434, Feb. 23, 1990, 90-1 CPD ¶ 212 at 3.

Based on the record, we conclude that the modification to include housekeeping services and, therefore, the task order issued based on the modification, were beyond the scope of the contract as originally awarded. As noted above, under BMAR's original IDIQ contract, the scope of work requires the contractor to furnish all work for "Real Property Inventory (RPI), Demand Maintenance Repairs, and surveys of Medical Facilities." BMAR Contract § C-1.1.1. The detailed breakdown of work to be performed all relates to the above identified categories of work. For example, the contractor is required to "Prepare and execute a program for performing Real Property Inventories, Preventive Maintenance & Inventory, Demand Maintenance Repairs . . . for the facilities listed above and all equipment, controls, and building systems." Id. § C-1.1.1.1. Under another requirement, the contractor must keep records of each repair and maintenance task and preventive maintenance

and inventory data on equipment, including boiler reports. Id. §§ C-1.3.3.2, 1.3.3.3. There is nothing in the original scope of work that even remotely suggests that the contract contemplated the acquisition of housekeeping services as defined by the modification.

Further, the personnel required under the contract are those associated with facility maintenance repair, such as HVAC mechanic, boiler operator, plumber/pipefitter, general maintenance mechanic, electrician, painter, carpenter, electronic technician, welder and kitchen equipment mechanic. Id. at B-46 to B-47. In addition, the term “Maintenance” is defined as “[t]he recurring work required to keep real property in such a condition that it may be utilized continuously . . . for the intended purpose,” and the term “Preventive Maintenance” is defined as “[t]he systematic and periodic inspection and servicing which is required to prevent breakdown and to prolong the life of real property.” Id. §§ C-2.1.1, 2.1.1.1. Similarly, emergency and demand maintenance are defined to require the maintaining of the real property and equipment, i.e., the physical plant. Id. §§ 2.1.1.2, 2.1.1.3.

Moreover, in addition to the language of the original contract which, in our view, supports the conclusion that housekeeping services were not contemplated under the original contract, the various letters and memorandum from agency officials regarding the intent and purpose of the original contract also support our conclusion. For example, the memorandum of agreement (MOA) between the Army Corps of Engineers and the Army Medical Command that establishes the framework for the Corps’ support to the Army medical facilities identifies the goods and services to be provided as including “project management, contract award and administration, design, A-E support services, technical support and construction management.” Agency Report, Tab N, MOA, at 1. It further states that the agreement is limited to “facility operation, maintenance, repair and minor construction.” The agreement more specifically covers “scheduled or predictive maintenance” and “repairs to real property.” Id. The other correspondence and memorandum in the record concerning the purpose of this program and the BMAR contract are consistent with the MOA. For example, in one document, the Director of Sustainment states that the contract is intended to address “an ever-increasing backlog of maintenance and repair” and to meet “the basic requirements that medical facilities be repaired, if necessary, to meet . . . Life Safety Code Standards, and that maintenance be documented on critical life support systems.” Agency Report, Tab C, Statement of Director of Sustainment. Finally, a U.S. Army Medical Command memorandum concerning the “toolbox” of contracts states that:

The Mobile contracts have a specific role in this program. The contracts support the Sustainment portion of the program . . . [which] includes preventive maintenance services, minor repair, and major repair . . . . The Facility Support Program is absolutely essential to our future ability to attain accreditation and adequately maintain our . . . building infrastructure.

Agency Report, Tab D, Memorandum from the Assistant Chief of Staff for Installations, Environment, and Facility Management to Mr. Leo Hickman, U.S. Army Corps of Engineers (June 3, 1999).

The agency's argument that the modification did not materially expand the scope of the contract, since the original contract--which covered all work necessary for the maintenance of the real property--reasonably included housekeeping and exterior grounds maintenance, is not persuasive. The specific contract language and explanatory documents, as discussed above, show that the program and contract are intended to address the facilities' physical plant. There is simply no indication that the original contract contemplated housekeeping services or that any of the Army officials in charge of the program believed that housekeeping was a service contemplated under the program. We do not agree that the use of the term "maintenance" is a "catch-all" phrase that justifies a modification which could not reasonably have been anticipated under the original competition. The term must be read in context and, as noted above, the language of the contract and the explanatory documentation do not support the Corps' position that the scope of the IDIQ contract contemplated housekeeping services. See Ervin and Assoc., Inc., supra, at 8-9. We conclude that the modification and, therefore, the task order issued to BMAR for housekeeping services, were beyond the scope of the original contract.

Accordingly, we sustain the protest and recommend that the task order for the three locations be terminated and that the Army procure the housekeeping services in accordance with the competition requirements of CICA, 10 U.S.C. § 2304 (a)(1)(A). We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). Makro's certified claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

Comptroller General  
of the United States