

Decision

Matter of: Department of the Army, Fort Carson—Application of *Bona Fide* Needs Rule to Contract Modification

File: B-332430

Date: September 28, 2021

DIGEST

A modification to a firm-fixed-price contract that is within the scope of the original contract may result in an increase to the contract price. Where such a price increase arises from and is enforceable under a provision in the original contract, the agency must obligate the price increase against appropriations available when the contract was originally executed, not against appropriations available when it made the modification. Therefore, a modification to a firm-fixed-price contract to reconnect four buildings to a new water main at Fort Carson, Colorado must be obligated against Operations and Maintenance, Army appropriations for fiscal year 2019, when the contract was executed, rather than against amounts appropriated for fiscal year 2020, when the modification was made.

DECISION

A certifying officer for the United States Army Garrison, Fort Carson (Fort Carson) has requested our decision under 31 U.S.C. § 3529 regarding the application of the *bona fide* needs rule to a contract modification.¹ Specifically, the certifying officer questions whether Fort Carson should obligate either fiscal year 2019 or fiscal year 2020 Operations and Maintenance, Army appropriations for the price increase resulting from a modification to a contract to replace a water main at Fort Carson.² As explained below, a modification to a firm-fixed-price contract that is within the scope of the original contract may result in an increase to the contract price. Where

¹ Letter from Garrison Resource Management Officer, Fort Carson, to Comptroller General, GAO (Aug. 11, 2020) (Request Letter).

² *Id.*

such a price increase arises from and is enforceable under a provision in the original contract, the agency must obligate the price increase against appropriations available when the contract was originally executed, not against appropriations available when it made the modification. Accordingly, Fort Carson must in this case obligate the price increase against the fiscal year 2019 Operations and Maintenance, Army appropriation.

In accordance with our regular practice, we contacted Fort Carson to seek factual information and its legal views on this matter.³ Fort Carson responded with its explanation of the pertinent facts and its legal analysis, along with additional information.⁴

BACKGROUND

On October 11, 2018, Fort Carson officials decided to repair or replace the water main that runs along a street on the installation.⁵ Accordingly, on November 9, the Army issued a firm-fixed-price task order contract (contract) under an existing indefinite-delivery, indefinite-quantity contract. The contract work specifications required the contractor to perform work related to replacing the water main, including re-establishing connections between the existing buildings and the new water main corresponding to the connections that had connected the buildings to the old water main.⁶

After the contract was formed, unanticipated site conditions, coupled with possible discrepancies in the design drawings, arose.⁷ Accordingly, in June 2020, the contracting officer determined that a contract modification was necessary to carry out the work necessitated by the unanticipated site conditions, as well as to carry out

³ GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 5, 2006), available at www.gao.gov/products/GAO-06-1064SP; Letter from Assistant General Counsel, GAO, to Contract and Fiscal Law Attorney, Fort Carson (Oct. 21, 2020).

⁴ Letter from Contract and Fiscal Law Attorney, Fort Carson, to Assistant General Counsel, GAO (Nov. 19, 2020) (Response Letter); E-mail from Contract and Fiscal Law Attorney, Fort Carson, to Senior Attorney, GAO, *Subject: RE: [Non-DoD Source] GAO Letter to Army B-332430 (UNCLASSIFIED)* (Nov. 19, 2020) (Response E-mail).

⁵ Facilities Engineering Work Request, DA Form 4283 (Oct. 11, 2018).

⁶ Response Letter, at 1.

⁷ For example, the drawings showed the presence of existing service lines that were not actually present at the site. In addition, though the contract documents stated that the contractor was to re-establish existing connections, in some cases the drawings did not depict the re-establishment of these connections. Response Letter.

necessary work despite the possible discrepancies.⁸ The contracting officer estimated that the modification would result in additional costs for the contractor.⁹ The contracting officer determined that the modification was within the scope of the contract and, to cover the increased price, requested a total of \$162,505 in funds that were available at the time of execution of the contract, which were fiscal year 2019 Operations and Maintenance, Army appropriations.¹⁰

However, the certifying officer believes that Fort Carson must obligate the increased price against amounts available at the time of the modification, which are fiscal year 2020 Operations and Maintenance, Army appropriations, rather than against funds available at the time of execution of the contract.¹¹ In 2019, Fort Carson conducted a study that recommended the demolition of certain buildings, including the four subject buildings.¹² However, Fort Carson chose not to follow the recommendation to abandon and demolish the four buildings, and instead decided to proceed with re-establishing the water lines to the buildings.¹³ Due to the difference in opinion between the certifying officer and other Fort Carson officials, the certifying officer has requested our decision.¹⁴

DISCUSSION

At issue here is whether the modification is a *bona fide* need of fiscal year 2019 or of fiscal year 2020.

By law, “an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability.” 31 U.S.C. § 1502(a). In other words, annual appropriations that are made for a specific fiscal year are only available to fulfill a genuine or “*bona fide* need” of the fiscal year the funds are appropriated. B-317139, June 1, 2009; 73 Comp. Gen. 77 (1994).

Whether a particular expenditure constitutes a *bona fide* need of a particular fiscal year depends on the specific facts and circumstances of the expenditure. See

⁸ Request Letter, Enclosure 3.

⁹ *Id.*

¹⁰ *Id.*; Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, div. A, title II, 132 Stat. 2981, 2984 (Sept. 28, 2018).

¹¹ Request Letter, at 1; Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, div. A, title II, 133 Stat. 2317, 2321 (Dec. 20, 2019).

¹² Response Letter, at 1.

¹³ *Id.*

¹⁴ Request Letter.

70 Comp. Gen. 469, 470 (1991). This is particularly true of contract modifications that increase the contract price. Which fiscal year appropriations to obligate for a price increase resulting from a contract modification depends on whether the modification is within the general scope of the contract. If the modification is within the general scope, the next question is whether the modification is attributable to, and enforceable under, a provision of the contract that renders the government liable to make an equitable adjustment. 65 Comp. Gen. 741 (1986).

Government contracts typically include a standard provision, known as the “changes clause,” that permits the government to make changes in the work within the general scope of the contract. 48 C.F.R. § 43.205. For example, the government may change contract specifications, the method or manner of performance of the work, or direct the contractor to accelerate performance. 48 C.F.R. § 52.243-4. The changes clause requires the contracting officer to make an equitable adjustment to compensate the contractor if such a change increases the contractor’s expenses or time required for the work. See, e.g., 48 C.F.R. § 52.243-4(d). By agreeing to the changes clause, the contractor agreed to perform any within-scope changes the government may order, and the government agreed to compensate the contractor for any such change orders. 23 Comp. Gen. 943, 945 (1944).

At contract execution, the agency does not obligate amounts to cover potential change orders that may result in future price increases since it does not know whether a change will result in a liability for the government, let alone the amount for which the government may be liable. 23 Comp. Gen. at 945. Should the government issue a change order, its liability to make an equitable adjustment arises from and is enforceable under a provision of the original contract—specifically, the changes clause. Because this liability arises under the original contract, it is also known as an “antecedent liability.” See, e.g., 59 Comp. Gen. 518, 522 (1980). A change order creates no new liability: “the fact remains that the obligations and liabilities of the parties respecting such changes are fixed by the terms of the original contract, and the various amendments merely render definite and liquidated the extent of the Government’s liability in connection with such changes.” 23 Comp. Gen. at 945.

Therefore, a modification made within the general scope of a contract which results in an upward price adjustment by operation of a clause of the original contract is a *bona fide* need of the year in which the contract was originally executed. To fund the price adjustment, the agency must obligate appropriations available at the time of contract formation, rather than appropriations available at the time it modifies the contract. *Id.*; see also 71 Comp. Gen. 502 (1992); 59 Comp. Gen. at 521.

Here, the agency issued a modification pursuant to a clause of the original contract—in this case, the changes clause—and created an increased cost because

of the operation of that clause.¹⁵ The modification made changes to account for site conditions that differed from the original drawings and other discrepancies between the drawings and specifications.¹⁶ The contracting officer determined that this modification increased the cost to and time required from the contractor, thus entitling the contractor to an equitable adjustment under the changes clause. Thus, the modification relates back to an antecedent liability of the original contract, and the additional price resulting from the modification is properly obligated against amounts available for the original contract—here, amounts available from the fiscal year 2019 Operations and Maintenance, Army appropriation.

The certifying officer contends that the *bona fide* need to connect the buildings to the new water main did not arise until fiscal year 2020. He states that Fort Carson decided to abandon the buildings and that it removed the buildings from the scope of the contract to repair or replace the water main.¹⁷ He states after the buildings were removed from the contract, Fort Carson then decided to connect the buildings to the water main.¹⁸ Accordingly, the certifying officer states that Fort Carson should obligate the increased price of the modification against fiscal year 2020 Operations and Maintenance, Army appropriations. Request Letter, at 2; *see, e.g.*, B-206283-O.M., Feb. 17, 1983 (concluding that missiles deleted from a previous fiscal year's contract are *bona fide* needs of the fiscal year in which they are later purchased). However, our review of the documents before us shows that Fort Carson did not decide to abandon the buildings. While Fort Carson had conducted a study in 2019 that recommended demolishing the four buildings at issue here, Fort Carson did not follow the recommendations of that study.¹⁹

Accordingly, the Fort Carson legal counsel informed us that officials never removed the four buildings from the scope of the original contract.²⁰ Furthermore, the contracting officer determined that connecting the four buildings to the new water main remained within the scope of the original contract at the time that the modification was issued, a determination with which the Fort Carson legal counsel agreed.²¹ We see no basis to disagree with the determinations of the contracting officer and of the Fort Carson legal counsel.

¹⁵ Request Letter, Encl. 3.

¹⁶ Response Letter, at 2.

¹⁷ Request Letter, at 2.

¹⁸ *Id.*

¹⁹ Response Letter, at 1.

²⁰ *Id.*

²¹ Request Letter, Encl. 3; Request Letter, Encl. 4, at 2.

CONCLUSION

A modification to a firm-fixed-price contract that is within the scope of the original contract may result in an increase to the contract price. Where such a price increase arises from and is enforceable under a provision in the original contract, the agency must obligate the price increase against appropriations available when the contract was originally executed, not against appropriations available when it made the modification. Accordingly, Fort Carson must obligate the increased price against the fiscal year 2019 Operations and Maintenance, Army appropriation.



Edda Emmanuelli Perez
General Counsel