



GAO

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Poly-Pacific Technologies, Inc.

File: B-296029

Date: June 1, 2005

Ron Ward for the protester.

Bradley S. Adams, Esq., and Eric Kattner, Department of the Air Force, for the agency.

Jonathan L. Kang, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's modification of a contract is sustained where modification improperly changed the scope of work anticipated by the underlying solicitation.

DECISION

Poly-Pacific Technologies, Inc. protests the modification of contract No. F09650-02-D-0005 awarded to U.S. Technology Corporation (UST) by the Department of the Air Force for the lease and the recycling of acrylic plastic media. Poly-Pacific argues that the agency improperly relaxed the performance requirements in the contract beyond what was reasonably contemplated by the underlying solicitation.

We sustain the protest.

BACKGROUND

The underlying request for proposals (RFP), No. F09650-02-R-0007, was issued on February 28, 2002 and anticipated the award of a fixed-price, indefinite-delivery, indefinite-quantity contract for a 1-year base period with up to four 1-year option periods. The RFP sought proposals to lease "Type V acrylic plastic media" to Robins Air Force Base for use as an abrasive in the removal of organic and other coatings from aircraft, components, and equipment. Statement of Work (SOW) at 1. After the plastic media is used as an abrasive and is no longer usable for that purpose, it is deemed "spent blast media" (SBM). At this point in its lifecycle, the SBM is intermixed with paint chips, organic compounds, and heavy metals as a result of its

use as an abrasive. U.S. Environmental Protection Agency (EPA) regulations treat the SBM as a “solid waste” that must be disposed of using approved methods. See 40 C.F.R. § 264.1 (2005); see also Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6939e (2000). EPA regulations also provide, however, that the SBM may be excluded from the definition of solid waste if the SBM is recycled according to approved criteria, thereby avoiding the need to follow disposal procedures. See 40 C.F.R. § 261.2.

The RFP required offerors to propose a means of removing the SBM from the agency’s worksites and recycling it consistent with EPA regulations. SOW attach. 1. During the course of the contract, the contractor retains legal title to the plastic media, including liability for handling and proper recycling of the resulting SBM. SOW at 1.

Poly-Pacific did not submit a proposal in response to the RFP, as it was not on the list of qualified providers of type V plastic media at the time proposals were due. Poly-Pacific has subsequently become an approved source to provide type V plastic media, as well as other types of plastic media. Agency Supplemental Responses, May 5, 2005, ¶ 1.¹

The agency awarded the contract to UST on April 23, 2002. The agency became aware of an investigation of UST by EPA in late 2002 regarding the alleged improper disposal of the SBM by UST’s subcontractor. AR, Tab 7, Letter from Poly-Pacific to Agency, Dec. 23, 2004, exh. 1, Nov. 15, 2002 News Article.² As a result of the

¹ Although Poly-Pacific did not submit a proposal for the original contract, we conclude that it is an interested party to protest the modification of UST’s contract because, as the parties agree, Poly-Pacific is currently a qualified source to provide type V plastic media. Poly-Pacific was placed on the agency’s list of qualified offerors shortly after the contract was awarded, and before the modification was executed. Comments, exh. 8, “Media Approved for Air Force Use.” Because Poly-Pacific argues that the contract as modified resulted in a reduced scope of work that requires only the lease of the plastic media, Poly-Pacific is a prospective offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. Bid Protest Regulations, 4 C.F.R. § 21.0(a) (2005); McRae Indus., Inc., B-287609.2, July 20, 2001, 2001 CPD ¶ 127 at 3.

² In January 2005, the Department of Justice filed a complaint against UST under the False Claims Act, 31 U.S.C. § 3729 (2000), in the U.S. District Court for the Northern District of Ohio. Protest, exh. 4, ¶ 3. The complaint alleged that UST sent the SBM generated under the Air Force contract to UST’s subcontractor for recycling in accordance with UST standards, but knew that the subcontractor was improperly disposing of the SBM by pouring it into the ground instead of recycling it. Id. ¶¶ 20-24.

investigation, the agency issued modification No. P0003 to the UST contract on May 27, 2003. The modification stated that UST was still required to provide type V plastic media, but amended the contract to allow the agency to either return the SBM to UST for recycling, or to order disposal of the SBM in lieu of recycling. AR, Tab 6, Contract Modification No. P0003, at 2. The disposal of the SBM would either be done by UST at the agency's direction, or it could be sent to a third party for disposal; in either case, the modification held UST responsible for the additional costs of disposal. Id. The contract costs were not otherwise changed by the modification, i.e. UST's price for leasing the plastic media remained the same, and the period of performance was not changed. Poly-Pacific became aware of the modification in February 2005, and filed this protest.³

DISCUSSION

Poly-Pacific argues that the modification of UST's contract improperly relaxed the performance requirements, thereby changing the scope of work anticipated by the RFP and resulting in an improper sole-source contract of the modified work.

The Competition in Contracting Act (CICA) requires "full and open competition" in government procurements as obtained through the use of competitive procedures. 31 U.S.C. §§ 3551-3556 (2000), amended by the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 326, 118 Stat. 1811 (2004). 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); Sprint Comm. Co., B-278407, B-278407.2, Feb. 13, 1998, 98-1 CPD ¶ 60 at 5-6. An exception to this rule arises where a protest alleges that a contract modification changes the work from 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. Although challenges to the relaxation

³ Although the modification of UST's contract occurred approximately 2 years ago, we find that Poly-Pacific's protest is timely. Upon learning through news accounts that UST was under investigation for allegedly failing to recycle the SBM according to the contract, Poly-Pacific diligently pursued information regarding UST's performance. Poly-Pacific made several unsuccessful attempts to obtain information from the agency regarding UST's contract following the news accounts of the investigation of UST. The agency did not inform Poly-Pacific of the modification until February 25, 2005. AR, Tab 8, Letter from Agency to Poly-Pacific, Feb. 25, 2005, at 1. We conclude that Poly-Pacific diligently pursued the information that forms the grounds for this protest, and its filing of the protest within 10 days of its notice of the modification is timely. 4 C.F.R. § 21.2(a)(2).

of contract requirements are less common than challenges to contract modifications that enlarge a contract's scope of work, our Office recognizes that both fall within this exception, and we will consider whether modifications of performance requirements result in work that should be subject to competition. See Marvin J. Perry & Assoc., B-277684, B-277685, Nov. 4, 1997, 97-2 CPD ¶ 128; Avtron Mfg., Inc., B-229972, May 16, 1988, 88-1 CPD ¶ 458.

In determining whether a modification triggers the competition requirements in CICA, our Office looks to whether there is a material difference between the modified contract and the contract that was originally awarded. Marvin J. Perry & Assoc., *supra*, at 3; Avtron Mfg., Inc., *supra*, at 4; see also AT&T Comms., Inc. v. Wiltel, Inc., 1 F.3d 1201, 1205 (Fed. Cir. 1993). In assessing whether a contract modification is outside the scope of the original agreement, we examine whether the original nature or purpose of the contract is so substantially changed by the modification that the original and modified contracts are essentially and materially different. In assessing whether the modified work is essentially the same as the effort for which the competition was held and for which the parties contracted, we consider factors such as the magnitude of the change in relation to the overall effort, including the extent of any changes in the type of work, performance period, and costs between the modification and the underlying contract. HG Props. A, LP, B-290416, B-290416.2, July 25, 2002, 2002 CPD ¶ 128 at 3-4. Where an agency has relaxed a contract's performance requirements, our Office also looks to whether the change in requirements was the type that reasonably would have been anticipated under the solicitation, and whether the modification materially changed the field of competition for the requirement. Marvin J. Perry & Assoc., *supra*, at 3; Avtron Mfg., Inc., *supra*, at 4.

The scope of work in the RFP here required the contractor to lease type V plastic media to the agency, to collect the SBM, and to recycle it in accordance with EPA regulations. SOW at 1. The contract as modified added provisions that allowed the agency either to direct UST to recycle the SBM, or to order the disposal of the SBM as a hazardous waste at UST's expense by UST or by a third party. AR, Tab 6, Contract Modification No. P0003, at 2. Despite the modification's retention of the agency's ability to direct UST to recycle the SBM, however, the agency acknowledges that the modification in fact "suspended the recycle portion of the contract." Contracting Officer's Statement at 1. The agency further acknowledges that, as a result of the modification, "UST is now only required to lease the blasting media to the agency, and [] UST is required to reimburse the government for disposal costs." Agency Supplemental Responses, May 5, 2005, ¶ 2a.

The agency characterizes the contract modification as a reasonable effort to ensure that the agency remains in compliance with EPA regulations for handling of the SBM. The agency contends that, due to UST's subcontractor's failure to properly recycle the SBM, UST's ability to comply with the contract's recycling component was called into question. Thus, the agency states that in the absence of a viable recycling option, it modified the contract to allow for disposal consistent with EPA

regulations. The agency argues that the government's ultimate need for plastic media and the obligation to comply with EPA regulations regarding the handling of the SBM have not changed and, thus, the modification was proper.

We disagree with the agency's view that the modification does not materially change the requirements of the contract or result in a fundamental change to the nature of the work. The original solicitation sought proposals that required offerors to both lease plastic media and recycle the resulting SBM in compliance with regulations, and offerors were thus required to propose technical solutions and pricing for both the lease and recycling components of the work. The fact that the agency still requires plastic media for its equipment needs and still requires removal of the SBM from its facilities does not afford the agency unlimited latitude to modify the way in which it contracts to meet those requirements.

An agency may not modify a contract by changing or relaxing requirements where the resulting work is fundamentally different from the work anticipated by the original solicitation. Marvin J. Perry & Assoc., supra, at 4-5; Avtron Mfg., Inc., supra, at 4-5. Here, the RFP did not anticipate that the contractor could be relieved of the recycling requirement or that a disposal effort could be ordered in lieu of recycling.⁴ Furthermore, Poly-Pacific contends, and the agency does not dispute, that the costs of leasing plastic media with no recycling requirements is as much as 50 percent less than the costs of leasing plastic media with recycling requirements.⁵ There also appear to be at least 4 approved sources for providing type V plastic media, including Poly-Pacific and UST, without the recycling requirement. Comments, exh. 8, "Media Approved for Air Force Use." Evidence suggesting that proposals submitted on the basis of a modified contract's relaxed requirements could result in more competition and lower prices generally weighs in favor of finding that the contract modification was improper. Avtron Mfg., Inc., supra, at 5. In sum, the

⁴ The RFP stated that, in the event that the contractor mishandles the SBM by causing a spill or leak, the SBM must be disposed of as a solid waste. SOW at 1. This provision, however, outlines the contractor's responsibilities in the event of mishandling of the recycling portion of the contract and does not give the agency the right to direct disposal of the SBM in lieu of recycling.

⁵ The agency describes the modification as a "stop-gap measure," and states that it intends for UST to resume recycling of the SBM "as soon as the agency is confident UST's recycling process is again compliant with applicable laws and regulations." Agency Supplemental Responses, May 5, 2005, ¶ 2c. UST has not been required to recycle the SBM since the contract modification in May 2003, and we do not believe that the possibility that that agency might someday reinstate the requirements changes the fact that the contract was modified to relax the performance requirements. In any event, the agency does not provide any evidence that UST will be able to meet the now optional recycling requirements under this contract in the near term.

agency's suspension of the recycling requirement relaxed the performance requirements and modified the contract beyond the scope of work anticipated by the underlying solicitation and unmodified contract. In our view, the modification resulted in a material and fundamental change to the nature of the work that changed the field of competition and that work, therefore, should have been competed on a full and open basis, unless the agency followed the steps required to conduct the procurement without full and open competition.

Finally, we find that the protester was prejudiced by the agency's improper modification of the contract. As discussed above, Poly-Pacific is a qualified source to provide type V plastic media, and thus could participate in a competition for the work now required under modification No. P0003, i.e., the lease of the plastic media.⁶

RECOMMENDATION

From the record, we conclude that modification No. P0003 relaxed the contract performance requirements, resulting in work that improperly changed the scope of work anticipated by the underlying solicitation and original contract. Accordingly, we recommend that the agency terminate modification No. P0003 of the contract. If, after the termination of the modification, the agency determines that it is not able to obtain the required performance of the original contract from UST, we recommend that the agency terminate the underlying contract and compete the lease of plastic media on a full and open basis, with or without the recycling requirements, as appropriate, unless the agency determines that a procurement without full and open competition is warranted, and the required steps are taken to conduct such a procurement. We further recommend that the agency reimburse Poly-Pacific the reasonable costs of filing and pursuing the protest, including any reasonable attorneys' fees incurred. Poly-Pacific's certified claim for costs, detailing the time expended and the costs incurred on this issue, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Anthony H. Gamboa
General Counsel

⁶ The record does not discuss and, therefore, our decision does not address whether Poly-Pacific would be able perform the SBM recycling requirements of the original contract.