

## Decision

**Matter of:** Cornische Aviation & Maintenance, LTD

**File:** B-405013.4

**Date:** January 25, 2013

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Jimmy Rafiee, for the protester.

Robert A. Burton, Esq., and Rebecca E. Pearson, Esq., Venable LLP, and Stephen J. O'Connor, Esq., Tobin, O'Connor & Ewing, for Science and Engineering Services, Inc., an intervenor.

Debra J. Talley, Esq., and David C. Sabine, Esq., Department of the Army, for the agency.

Jonathan L. Kang, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Challenge to the modification of a delivery order for the overhaul of Mi-17 helicopters is denied where the modification is within the scope of the underlying contract.

2. Challenge to the modification of a delivery order that essentially argues that the current contractor lacks the ability to perform the work is dismissed as GAO does not review matters of contract performance.

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### DECISION

Cornische Aviation & Maintenance, LTD, of Dubai, United Arab Emirates, protests the decision of the Department of the Army to modify the Logistics Support Facility (LSF) contract, No. W52P1J-07-R-0082, held by Science and Engineering Services, Inc. (SES), of Huntsville, Alabama. The protester argues that the modification of a delivery order issued under the LSF contract, which directed SES to perform overhauls of Mi-17 helicopters,<sup>1</sup> is improper because it exceeds the scope of the underlying LSF contract, and because SES cannot perform the work.

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<sup>1</sup> The term Mi-17 here refers generally to a number of variants of the Russian-made Mi-17 helicopter. AR at 4 n.2.

We deny in part and dismiss in part the protest.

## BACKGROUND

On August 31, 2007, the Army Sustainment Command awarded the LSF contract to SES, which is a single-award, indefinite-delivery, indefinite-quantity contract. The scope of the LSF contract includes a broad range of aircraft repair, modification, overhaul, fabrication, and sustainment support activities. Agency Report (AR), Tab C, Contract 0082 Statement of Work (SOW), at 1-3. The contract had a maximum value of \$409 million. AR at 1. On June 11, 2009, responsibility for the LSF contract was transferred to the Army Contracting Command, and the LSF contract was redesignated as contract No. W58RGZ-09-D-0130. Id. at 1-2. The underlying terms and scope of work of the LSF contract remained the same.

On August 17, 2010, the Army issued a justification and approval (J&A) increasing the ceiling of the LSF contract by \$275 million, based on the authority provided under 10 U.S.C. § 2304(c)(1) for other than competitive contract awards or modifications where there is only one responsible source available. AR, Tab F.1, 2010 J&A, at 3, 5. This J&A was publicized on the FedBizOpps website on August 19. AR, Tab E.4, FedBizOpps Synopsis (Aug. 19, 2010).

On April 11, 2011, the Army issued modification No. 4 to LSF contract delivery order No. 102, which directed SES to overhaul five Mi-17 helicopters in support of the government of Pakistan. AR at 2. On November 3, 2011, the Army issued a J&A increasing the ceiling of the LSF contract to \$1.16 billion, based on the authority of 10 U.S.C. § 2304(c)(1). AR, Tab F.2, 2011 J&A, at 3, 6-7. The J&A stated that the agency was in the process of conducting a competition for the requirements currently provided under the LSF contract, and that the increase in the ceiling was required to meet the agency's needs until the competition was complete.<sup>2</sup> Id. at 8. This J&A was publicized on the FedBizOpps website on December 21. AR, Tab E.5, FedBizOpps Synopsis (Dec. 21, 2011).

On September 25, 2012, the Army issued modification No. 39 to delivery order No. 102, which directed SES to overhaul and modify five Mi-17 helicopters, and provide technical support and training, in support of the Afghanistan Air Force. AR, Tab G.4, Mod. 39 SOW, at 1, 14. Portions of the required work involve performance in Afghanistan. Cornische filed its protest challenging modification No. 39 with our Office on October 19.<sup>3</sup>

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<sup>2</sup> As of the date of the protest, the competition had not been completed.

<sup>3</sup> Although the Army acknowledges that it never publicized modification No. 39, the Army and SES argue that the protest is untimely because Cornische did not

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## DECISION

Cornische argues that modification No. 39 was improper for two primary reasons.<sup>4</sup> First, the protester argues that the requirements of the modification were outside the scope of the underlying LSF contract. Second, Cornische argues that the Army should not have issued the modification because, the protester contends, SES is not capable of performing the work. Cornische contends that it could have provided the parts and services required under the modification, and that it would have competed for the award had it been subject to full and open competition. For the reasons discussed below, we deny the first argument, and dismiss the second argument.

Once a contract is awarded, our Office generally will not consider protests against modifications to that contract, because such matters are related to contract administration and are beyond the scope of our bid protest function. 31 U.S.C. § 3552 (2006); 4 C.F.R. § 21.5(a); DOR Biodefense, Inc.; Emergent BioSolutions, B-296358.3, B-296358.4, Jan. 31, 2006, 2006 CPD ¶ 35 at 6. An exception to this general rule is where, as here, a protester alleges that a contract modification is beyond the scope of the original contract, because, absent a valid sole-source determination, the work covered by the modification would be subject to the statutory requirements for competition. Lasmer Indus., Inc., B-400866.2 et al., Mar. 30, 2009, 2009 CPD ¶ 77 at 6.

In determining whether a modification triggers the competition requirements under CICA, we look to whether there is a material difference between the modified contract and the contract that was originally awarded. Engineering & Prof'l Servs.,

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establish when it learned of the modification, and thus did not meet its obligation to demonstrate that its protest was timely. See Bid Protest Regulations, 4 C.F.R. § 21.1(c)(6) (2012). The protester states that it became aware of the modification on October 17, 2012, based on a conversation with “a friend who is working in support of the Army Mi-17 program,” whom the protester did not wish to identify based on concerns that the individual might face retaliation. Protest at 2; Email from Cornische to GAO (Nov. 27, 2012). In light of the agency’s acknowledgement that it never publicized the modification, we think that the facts here demonstrate that the protest was timely filed within 10 days of when Cornische knew or should have known of the basis of its protest.

<sup>4</sup> Cornische raises numerous collateral arguments. We have reviewed all of the issues identified by the protester and find that none provides a basis to sustain the protest.

B-289331, Jan. 28, 2002, 2002 CPD ¶ 24 at 4; see AT&T Commc'ns, 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 changes in the type of work, costs, and performance period between the contract as awarded and as modified. Overseas Lease Group, Inc., B-402111, Jan. 19, 2010, 2010 CPD ¶ 34 at 3. We also consider whether the solicitation for the original contract adequately advised offerors of the potential for the type of changes found in the modification, and thus whether the modification would have materially changed the field of competition. Atlantic Coast Contracting, Inc., B-288969.2, June 21, 2002, 2002 CPD ¶ 104 at 4.

Here, Cornishe argues that modification No. 39 is outside the scope of the underlying LSF contract because it requires performance of aircraft overhauls, which the protester argues are not within the scope of the LSF contract. The protester also argues that performance of requirements outside the Continental United States is not within the scope of SES's LSF contract.

The Army argues that the SOW for modification No. 39 is expressly within the scope of the LSF contract. We agree. As noted above, the SOW for the LSF contract specifically addresses aircraft repairs, overhauls and related logistics support. It does not limit the type of aircraft for performance, and instead broadly addresses the following categories of work:

(1) Repair, update, integrate, overhaul or modify various items of Communications-Electronics (C-E), navigational fire control, aircraft and . . . associated hardware.

(2) Repair, update, overhaul or modify end items (example: aircraft, shelters, tooling) that contain, use or transport other Class VII (Major End Items), e.g., mobile communication or aircraft systems as required.

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(6) Perform modification and repair on designated aircraft and on components at locations in and outside of the continental United States. This includes aircraft engine overhaul, aircraft refurbishment, transmission overhaul, etc.

AR, Tab E, Contract No. 0130 SOW, at 1-2.

The record here shows that overhauls were clearly within the scope of the LSF contract. The record further shows that the SOW clearly anticipated performance of work "at locations in and outside of the continental United States." Id. at 2. For this

reason, we find no merit to the protester's argument that the requirements of modification 39 are outside the scope of the LSF contract.

The protester also argues that the requirements of modification 39 are outside the scope of work authorized by the November 2011 J&A, in that the J&A did not mention overhauls of Mi-17 helicopters. In this regard, the protester notes that the November 2011 J&A stated that the agency anticipated ordering cockpit modifications for Mi-17 helicopters, but not overhauls.<sup>5</sup> The protester also contends that the 2011 J&A authorized work in support of the Pakistan government, but not the Afghanistan government.

As the Army contends, however, the purpose of the J&As was to increase the ceiling value of the LSF contract, and while each J&A cited estimates of work to be performed, the work estimates did not modify the scope of the LSF or otherwise restrict the scope of work under the LSF contract. We agree, and conclude that the LSF contract, rather than the 2011 J&A, is the relevant document for determining whether modification No. 39 was an in-scope modification. On this record, we deny Cornishe's argument that modification No. 39 is outside the scope of the LSF contract.

Cornishe's second argument does not directly challenge the scope of modification No. 39. Instead, the protester contends that SES is not capable or authorized to perform the requirements of the modification. Cornishe alleges that SES will perform the contract through a contractual relationship with Avia Baltica and Spark, companies that the protester contends have been recommended for debarment or are otherwise unable to meet the performance requirements of modification No. 39. The protester also argues that overhaul work for Mi-17 helicopters must be performed at facilities specifically certified for that purpose, and that SES does not have such facilities. The protester also alleges that SES has been accused of other procurement-related improprieties, that the Army chose not to investigate.

These arguments relate solely to the ability or eligibility of SES to perform under its existing contract, and do not relate to the scope of the modification. As discussed above, our Office considers challenges to the award or proposed award of contracts. 31 U.S.C. § 3552. Whether a contractor performs in accordance with the requirements of a solicitation or resultant contract is a matter of contract administration that we do not review as part of our bid protest function. 4 C.F.R. § 21.5(a); ARINC Eng'g Servs., LLC, B-403471.2, Nov. 5, 2010, 2010 CPD ¶ 270 at 5; Public Facility Consortium I, LLC; JDL Castle Corp., B-295911, B-295911.2,

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<sup>5</sup> Cornishe does not separately argue that the 2011 modification to provide Mi-17 overhauls for the Pakistani government were not within the scope of the 2011 J&A.

May 4, 2005, 2005 CPD ¶ 170 at 4-5. For this reason, we dismiss the protester's second argument.

The protest is denied in part and dismissed in part.

Susan A. Poling  
General Counsel