



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Access Research Corporation

File: B-281807

Date: April 5, 1999

J. Hatcher Graham, Esq., for the protester.

Col. Barry S. Wilson, Department of the Air Force, for the agency.

Aldo A. Benejam, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging contracting agency's decision to issue an initial modification to existing contract is untimely where protest was not filed until 3-1/2 years after issuance of the modification, protester acknowledges that it was aware of the agency's action when the modification was issued, and there is no indication that protester ever formally protested the agency's action.
 2. Modification is within the scope of existing contract for the digitization of paper-based technical orders, where that basic contract contemplated the complete digitization of the agency's existing paper-based system, the modification at issue requires the contractor to complete the digitization effort, and the modification does not change the fundamental nature and purpose of the contract.
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DECISION

Access Research Corporation (ARC) protests the issuance by the Department of the Air Force of modification No. 16 to contract No. F09603-93-G-0012-0005, awarded to Mercer Engineering Research Center (MERC). The modification calls for MERC to complete digitization of paper copy technical orders (TO).

We deny the protest.

On September 30, 1993, the Air Force issued contract No. F09603-93-G-0012-0005 to MERC for certain engineering services.¹ On May 31, 1995, the Air Force issued

¹The contract was issued as delivery order No. 0005 under a basic ordering agreement (BOA) between MERC and the Air Force. The order required MERC to investigate various computer-aided design (CAD) software programs to determine how CAD files could be converted from one format to another. The order was issued on a sole-source basis pursuant to a justification and approval (J&A)

(continued...)

modification No. 06 to MERC's contract, to acquire digitization of the agency's entire TO warehouse, estimated to encompass approximately 10 million pages of documents.² The statement of work (SOW) accompanying modification No. 06 requires the contractor to establish a document capture system and indexed image repository for the conversion of TOs stored in the agency's warehouse from paper to digital form. SOW, May 4, 1995, at ¶ 1.0. The SOW explains that Warner Robins Air Logistics Center (WR-ALC) is responsible for the management and distribution of approximately 44,000 active, non-classified, paper-based Air Force TOs for major weapons systems, comprising approximately 10 million pages. *Id.* ¶ 2.0.

According to the agency, modification No. 06 funded the digitization of only 2 million pages, and MERC's contract was subsequently modified several times to incrementally fund the total requirement. For example, modification No. 07, dated September 27, 1995, funded the digitization of an additional 2 million pages for a cumulative funded total of 4 million pages; modification No. 12, dated September 27, 1996, decreased the estimated number of pages to be digitized from 4 million to approximately 3 million pages; and modification No. 14, dated September 30, 1997, funded the digitization of an additional 1 million pages, bringing the cumulative funded total to approximately 4 million pages.

The agency explains that the modification which ARC protests, No. 16, dated September 28, 1998, was intended to complete funding for the digitization of the balance of the TOs in the warehouse, estimated at 4.5 million additional pages, bringing the cumulative funded total to 8.5 million pages of paper-based TOs stored in the warehouse--15 percent less than the original estimate of 10 million pages. As such, the Air Force states that modification No. 16 was merely an incremental funding action that was intended to complete the requirement contained in modification No. 06 to digitize the agency's entire TO warehouse, and therefore is within the scope of MERC's contract.

ARC challenges the Air Force's actions, initiated with issuance of modification No. 06, to acquire digitization of the paper-based TOs through modifications to MERC's existing contract. ARC argues that the modifications are outside the scope of the contract under which they were issued--delivery order No. 0005 awarded pursuant to MERC's BOA in 1993.

¹(...continued)
executed on June 2, 1992, which cited 10 U.S.C. § 2304(c)(3) (1988) (maintenance of an essential engineering capability).

²Modification No. 6 and subsequent modifications also relied on J&A's and cited 10 U.S.C. § 2304(c)(3) and (c)(1).

Once a contract is awarded, our Office will generally 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. 4 C.F.R. § 21.5(a) (1998); Stoehner Sec. Servs., Inc., B-248077.3, Oct. 27, 1992, 92-2 CPD ¶ 285 at 4. The exception to this general rule is where, as here, 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). Neil R. Gross & Co., Inc., B-237434, Feb. 23, 1990, 90-1 CPD ¶ 212 at 2, aff'd, The Dept. of Labor-Recon., B-237434.2, May 22, 1990, 90-1 CPD ¶ 491.

As a preliminary matter, we conclude that the protest is untimely to the extent it challenges the Air Force's decision, initiated with modification No. 06, to acquire digitization of the TOs through modifications to MERC's existing contract. As indicated above, modification No. 06 was issued in May 1995, 3-1/2 years before ARC filed its current protest. ARC itself acknowledges that it was aware at the time of the Air Force's actions to procure these services from MERC,³ yet there is no indication in the record that ARC ever formally protested the agency's actions. Accordingly, ARC's protest, to the extent it challenges the agency's acquisition of the digitization effort through issuance in 1995 of modification No. 06 to MERC's underlying contract, is untimely since it was not filed until 3-1/2 years after that modification was issued. See 4 C.F.R. § 21.2(a)(2).

To the extent ARC challenges only the issuance of modification No. 16, while the protest on this ground appears to be timely, we see no basis to conclude that modification No. 16 is outside the scope of MERC's contract as amended by modification No. 06 because it does not change the fundamental nature and purpose of the contract.

In determining whether a modification triggers the competition requirements in the Competition in Contracting Act of 1984, 10 U.S.C. § 2304(a)(1)(A) (1994), we look to whether there is a material difference between the modified contract and the contract that was originally awarded. Neil R. Gross & Co., Inc., supra, at 2-3; 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

³Specifically, in its protest at 4, ARC states that "[b]etween the years 1995-1998 Protester has spoken with representatives [of the Air Force and the Small Business Administration] inquiring why [the] Contracting Agency was maintaining a sole-source position with regards to the digitization effort . . . in spite of the fact that large numbers of commercial firms could perform the work."

costs between the contract as awarded and as modified. MCI Telecomms. Corp., B-276659.2, Sept. 29, 1997, 97-2 CPD ¶ 90 at 7-8.

As explained above, MERC's basic contract was awarded in 1993 for certain engineering services. That contract was subsequently modified to change the terms to include the digitization of the TOs in the agency's warehouse. Specifically, paragraph 3.13 of the SOW accompanying modification No. 06 to MERC's contract states in pertinent part:

The contractor shall design, develop, and deploy, at WR-ALC, an electronic document capture system and indexed image repository for the electronic storage, retrieval and distribution of the currently paper-based TOs stored in the WR-ALC TO warehouse. . . . The contractor shall conduct a pilot project to design, develop, and deploy the document capture system and indexed image repository; and digitize a minimum of [2 million] pages of paper-based TOs stored in the TO warehouse.

Modification No. 06 SOW, May 4, 1995, ¶ 3.13.

The record shows that subsequent modifications to MERC's contract, up to and including modification No. 14, dated September 30, 1997, funded the digitization of approximately 4 million pages to be digitized. Modification No. 16, issued on September 28, 1998, called for digitization of the remaining pages and increased funding by \$1.6 million to cover the work.

Based on our review of these modifications, there is no basis to conclude that modification No. 16 added any new tasks that materially changed the purpose or nature of MERC's basic contract--the digitization of the entire TO warehouse. The SOW accompanying modification No. 06 stated that "[a] document capture system and indexed image repository will be established for the conversion of [TOs] stored in the WR-ALC TO warehouse from paper to digital form." SOW, May 4, 1995, ¶ 1. The background section of the SOW went on to describe the agency's responsibility for managing and distributing approximately 44,000 paper-based TOs for major weapons systems, comprising an estimated 10 million pages stored in its warehouse, and described how cumbersome the existing system is to manage and operate. Although modification No. 06 tasked the contractor to digitize a minimum of 2 million pages of paper-based TOs, given the SOW's description of the challenges faced by the agency as a result of the paper-based TOs, a reading of the SOW as a whole leads to a conclusion that the SOW contemplated that the contractor would digitize the entire TO warehouse, estimated at 10 million pages. In this connection, the SOW specifically stated that WR-ALC's objective was to eliminate the existing paper-based system, lending further support to our conclusion that modification No. 06 contemplated that MERC would digitize the entire TO warehouse. Clearly, since the SOW accompanying modification No. 06 estimated the number of TOs in the warehouse at 10 million pages, and tasked the contractor to digitize a minimum

of 2 million, it is reasonable to conclude that MERC's contract would have to be subsequently modified to achieve the agency's goal of digitizing the entire TO warehouse.

ARC argues that modification No. 16 should be compared with the original contract awarded to MERC in 1993--i.e., delivery order No. 0005, issued pursuant to MERC's BOA--and not to any subsequent modifications to MERC's contract. Comments at 7. According to the protester, "[b]y definition, a modification cannot be considered as the basic or original contract." Id. We disagree.

Modifications, such as the one here, issued pursuant to the contract's changes clause serve several useful purposes. For example, a modification provides the government flexibility by allowing alterations in the terms of the contract to accommodate changes in the government's needs and requirements. See, e.g., Federal Acquisition Regulation § 43.101 (a contract modification means any written change in the terms of the contract); John Cibinic, Jr. and Ralph C. Nash, Jr., Administration of Government Contracts, ch. 4, § I.A(1) at 282 (2nd ed. 1985). Modifications also allow procurement authority to the contracting officer to order additional work within the general scope of the contract, without using the procedures required for conducting a new procurement. Id. § I.A(3) at 284. A modification to a contract operates to create new legal relations between the parties, thus essentially creating a new agreement, the terms of which are partly to be found in the original agreement and partly in the new. 2 CORBIN ON CONTRACTS §§ 303-304 (1950).

ARC's argument here overlooks the fact that with each modification, the terms of MERC's basic contract were changed to accommodate the agency's overall need, as reflected in modification No. 06, to digitize the entire TO warehouse. Accordingly, a comparison of modification No. 16 to delivery order No. 0005, without regard to the impact of the intervening modifications--especially modification No. 06, which contemplated the digitization of the entire TO warehouse--on the terms of MERC's basic contract, would not be appropriate, since such a comparison would disregard the new contract requirements.

The protester has not established that the fundamental nature and purpose of MERC's contract, as modified, were materially changed by modification No. 16 so as to require a separate competition. See Hughes Space and Communications Co., B-276040, May 2, 1997, 97-1 CPD ¶ 158 at 4; Master Sec., Inc., B-274990, B-274990.2, Jan. 14, 1997, 97-1 CPD ¶ 21 at 6. Modification No. 16 is merely an incremental

action that was intended to complete the requirement contemplated in modification No. 06 to digitize the entire TO warehouse.

The protest is denied.

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of the United States