

Government Contracts Blog

Posted at 7:42 AM on November 11, 2010 by Sheppard Mullin

Let Bygones Be Bygones - Except When It Comes To "Out of Scope" Modifications

By [Marko W. Kipa](#)

After an unsuccessful bid protest, many contractors assume that their chance at getting a piece of the action has passed. They assume that they have exhausted their remedies and that all of the spoils inevitably will go to the victor. They let bygones be bygones and move-on to the next capture opportunity and ignore their competitor's performance under the awarded contract.

The contractors' actions are not completely unjustified. Sometimes it is best to cut your losses and move on. As a general matter, the GAO does not review matters pertaining to an agency's contract administration decisions. 4 C.F.R. § 21.5(a). Contract modifications and changes fall into this category and bid protests raising issues related to the issuance of modifications or changes generally will not be considered by the GAO. *Id.*

At other times, however, it may be to a contractor's benefit to have a long memory and a watchful eye. The Competition in Contracting Act ("CICA") requires agencies to use full and open competition when acquiring goods or services. 10 U.S.C. § 2304. Unless an agency invokes an exception, an "out of scope" modification or change is essentially an improper sole-source award that circumvents CICA's competition requirements. The GAO will thus entertain a protest challenging a contract modification or change when the contractor alleges that the modification or change is "out of scope" of the awarded contract. If the GAO sustains the protest, it may order the agency to terminate the contract and re-solicit its modified requirements on a competitive basis, as it should have done in the first place. This remedy may afford a contractor another opportunity to compete for the agency's requirements. A contractor should thus keep a watchful eye on its competitor's contract to ensure that the work its competitor is being asked to perform falls within the scope of the contract as awarded and that it preserves its right to file a timely challenge at the GAO.

To prevail on a protest alleging an "out of scope" modification, a contractor must show that the contract as modified is materially different from the contract as awarded. Several key factors can be distilled from the case law and secondary sources. For instance, the GAO and the Court of Federal Claims have consistently asked the following types of questions when determining whether a modification or change is "outside the scope" of the original contract:

- Was there a change to the nature and type of work?
- Could potential offerors have reasonably anticipated the change?
- What effect would the change have had on the field of competition?
- Were there a substantial number of changes?

- Was there a change to the quantity or volume of goods or services ordered?
- Did the contract price substantially increase?
- Was the period of performance substantially extended?
- Was the change directed at performance difficulties?
- What was the cumulative impact of the changes?
- What was the contract type (Cost Reimbursement, Fixed Price, etc.)?
- How broad were the Solicitation terms and the Statement of Work?
- What impact did the change have on the parties' fundamental obligations?

While no one factor is dispositive, the contract type and changes to the nature and type of work have received heightened attention in bid protest decisions. A contractor's chances for success increase based on the number of factors that support the conclusion that the modification or change was "out of scope." However, there is "no exact formula" for determining whether a modification or change is "out of scope" and each situation is examined on a case-by-case basis.

Despite the lack of a bright-line rule, one thing remains certain. A contractor that lets bygones be bygones and ignores the manner in which its competitor's contract is proceeding may never have an opportunity to make this showing and may be deprived of an opportunity to compete for a requirement that should have been subject to competition. Maintaining a vigilant guard could thus provide a piece of the pie that had appeared previously to be out of reach.

Authored By:

[Marko W. Kipa](#)

(202) 772-5302

mkipa@sheppardmullin.com