

United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** Cornische Aviation & Maintenance, Ltd.

**File:** B-408065; B-408065.2

**Date:** June 7, 2013

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Jimmy Rafiee for the protester.

Tina M. Pixler-Wood, Esq., Department of the Army, for the agency.

Paula J. Haurilesko, Esq., and Guy R. Petrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Protest that an order issued on a cost-reimbursement basis under a single-award, indefinite-delivery/indefinite-quantity contract exceeds the scope of that contract is denied where the order was placed before the end of the contract's performance period, and where the contract expressly authorized the issuance of cost-reimbursement orders.

2. Allegation that an agency's issuance of an order under a single-award, indefinite-delivery/indefinite-quantity contract reflected bias for the contract holder concerns a matter of contract administration that is not within GAO's bid protest jurisdiction.

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### DECISION

Cornische Aviation & Maintenance, Ltd., of the United Arab Emirates, protests the issuance of order No. 0183 to Science and Engineering Services, Inc. (SES), of Huntsville, Alabama, by the Department of the Army for the overhaul of Mi-17 aircraft.<sup>1</sup> The order was issued under an Army contract (No. W58RGZ-09-D-0130), which Cornische held for the performance of various support services.

We deny the protest.

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<sup>1</sup> The Mi-17 aircraft is a Russian-made helicopter.

## BACKGROUND

On April 19, 2007, the Army Sustainment Command issued request for proposals (RFP) No. W52P1J-07-R-0082 for the award of a single indefinite-delivery, indefinite-quantity (ID/IQ) contract for various mission support services for the agency's Program Executive Office for Aviation's Logistics Support Facility (LSF). The RFP's scope of work (SOW) included a broad range of aircraft repair, modification, overhaul, fabrication, and sustainment support activities. For example, the SOW required the contractor to:

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

Agency Report (AR), Tab D, SOW, at 2.

During the competition, the RFP was amended to provide answers to offerors' questions. As relevant here, the Army provided the following responses to questions concerning off-site work:

Off-site is other than at the contractor[']s facility or Redstone Arsenal. The work contemplated under this contract is anticipated to be performed at two sites. Those two sites are the hangar facility at Redstone Arsenal and the contractor's facility located within reasonable commuting distance of Redstone Arsenal.

Comments, Attach. 1, RFP amend. 4, Answer to Question No. 71.

[O]ff-site work isn't significant enough for the Government to request contractors to develop separate off-site [labor] rates.

Id., Answer to Question No. 72 citing Answer to Question No. 22.

Question: Is it the Government's intent to establish one labor rate/overhead pool to accomplish both on-site and off-site Contract performance?

Answer: Yes.

Id., Question and Answer No. 74.

On August 31, 2007, the Army Sustainment Command awarded contract No. W52P1J-07-D-0039 to SES. As awarded, the contract had a \$409 million

maximum value. AR, Tab E, Contract No. -0039, at 2. The contract provided for the issuance of cost-reimbursable and fixed-price orders through September 30, 2012. Id.

On June 15, 2009, responsibility for the LSF contract was transferred to the Army Contracting Command, and the contract was redesignated as contract No. W58RGZ-09-D-0130. Contracting Officer's Statement at 2; AR, Tab F, Contract No. -0130, at 1, 3. The underlying terms, including period of performance, and scope of work of the LSF contract remained the same.<sup>2</sup>

On August 17, 2010, the Army increased the maximum value of the LSF contract by \$275 million pursuant to 10 U.S.C. § 2304(c)(1), which provides for noncompetitive contract awards or modifications where there is only one responsible source available. AR, Tab L, 2010 Justification and Approval (J&A), at 3, 5; Tab H, Contract -0130, Mod. 8, at 2. The J&A was posted on the FedBizOpps website on August 19. AR, Tab I, FedBizOpps Synopsis, Aug. 19, 2010.

On November 3, 2011, the Army again increased the maximum value of the contract to \$1.16 billion under 10 U.S.C. § 2304(c)(1). AR, Tab M, 2011 J&A, at 3, 6; Tab J, Contract -0130, Mod. 14, at 2. In the J&A, the Army stated that the contract provides, among other things, for support of non-standard rotary wing aircraft, such as the Mi-17 helicopter, for which there are no available original equipment manufacturers in the continental United States. AR, Tab M, 2011 J&A, at 4. The Army also 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 completed.<sup>3</sup> Id. at 8. The J&A was posted on the FedBizOpps website on December 21. AR, Tab K, FedBizOpps Synopsis, Dec. 21, 2011.

On September 27, 2012, the Army issued order No. 0183, on a cost-reimbursement basis, to SES under the LSF contract for the assessment, overhaul, and return to service and aircraft modification of seven Mi-17 helicopters. AR, Tab O, Task Order No. 0183, at 2. The order provides for overhaul of two helicopters by May 31, 2013, and for completion of the order by September 30, 2013. Id. at 3. The Army did not post the order on the FedBizOpps website or otherwise publicize it.

On March 4, 2013, Cornische protested the issuance of this order to our Office.

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<sup>2</sup> When responsibility for the contract was transferred to the Army Contracting Command, there was \$209 million of the \$409 maximum value remaining under the contract. AR, Tab F, Contract No. -0130, at 3.

<sup>3</sup> On April 25, 2013, the Army awarded two follow-on contracts. Army e-mail, May 31, 2013; FedBizOpps Award Notice, Apr. 25, 2013.

## DISCUSSION

Cornische raises numerous objections to the issuance of the task order, including that the order is not within the scope of the underlying LSF contract and that the Army's decision to issue the order to SES was the result of bias for that firm. We have considered all of Cornische's arguments, although we only specifically address the major ones, and find that none merit sustaining the protest.

### Scope of the Underlying Contract

In determining whether a task order is beyond the scope of the contract, GAO and the courts look to whether there is a material difference between the task order and that contract. DynCorp Int'l LLC, B-402349, Mar. 15, 2010, 2010 CPD ¶ 59 at 6; MCI Telecomms. Corp., B-276659.2, Sept. 29, 1997, 97-2 CPD ¶ 90 at 7; see also AT&T Commc'ns, Inc. v. Wiltel, Inc., 1 F.3d 1201, 1204 (1993); CCL, Inc., 39 Fed. Cl. 180, 191-92 (1997). Evidence of such a material difference is found by reviewing the circumstances attending the procurement that was conducted; examining any changes in the type of work, performance period, and costs between the contract as awarded and as modified by the task order; and considering whether the original contract solicitation adequately advised offerors of the potential for the type of task order issued. See Anteon Corp., B-293523, B-293523.2, Mar. 29, 2004, 2004 CPD ¶ 51 at 5; Data Transformation Corp., B-274629, Dec. 19, 1996, 97-1 CPD ¶ 10 at 6. The overall inquiry is whether the task order is of a nature that potential offerors would reasonably have anticipated. Anteon Corp., supra, at 5.

Cornische first contends that issuing this cost-reimbursement order two days before the end of the contract performance period places the order outside the scope of the contract, such that the order effectively constitutes a new procurement. See Protest at 3; Comments at 2. We disagree. The contract expressly provides for the issuance of cost-reimbursement orders through September 30, 2012--the contract expiration date. See AR, Tab F, Contract -0130, at 3, 35; see also Tab G, Contract -0130, attach. 1, SOW, at 1. In this regard, the Federal Acquisition Regulation (FAR) provides that orders be issued within the contract's performance period, see FAR § 16.505(a)(2), which is the case here.<sup>4</sup> See also Exide Corp., B-276988, B-276988.2, Aug. 18, 1997, 97-2 CPD ¶ 51 at 5 (order running more than 1 year beyond contract expiration date is within contract scope). Although Cornische apparently believes that only fixed-price orders can be issued up to the last day of the contract's performance period, see Comments at 2, neither the contract nor the

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<sup>4</sup> FAR § 16.505(a)(2) provides, in pertinent part, that "[o]rders shall be within the scope, issued within the period of performance, and be within the maximum value of the contract."

FAR distinguish between orders placed on a fixed-price or cost-reimbursement basis with respect to the timing of when orders are issued.

Cornische also argues that SES's order is not within the scope of the firm's underlying contract because the November 2011 J&A, which increased the maximum value of the contract, does not justify the issuance of a 12-month order and does not specifically state that the maximum value was increased to allow for Mi-17 overhauls. Protest at 4; Comments at 3, 6-9. In this regard, Cornische argues that the Army's J&A provided that work under the increased contract value would be complete in time for the LSF facility to be made available to the winner of the agency's recompetition of this requirement. Comments at 3.

Cornische's arguments reflect a fundamental misunderstanding of the 2011 J&A, the purpose of which was to increase the maximum value of the LSF contract, and did not modify or otherwise restrict the scope of work under the contract. See AR, Tab M, 2011 J&A, at 4. As noted above, determining whether a task order is beyond the scope of the underlying contract is based on whether there is a material difference between the task order and that contract--not the J&A. See e.g., DynCorp Int'l LLC, supra. Moreover, the Army's justification specifically recognized that support for non-standard rotary wing aircraft, such as the Mi-17, for which there were no available original equipment manufacturers in the continental United States, was included within the scope of the LSF contract. See AR, Tab M, 2011 J&A, at 4. We also find no merit to Cornische's contention that the J&A required that work ordered under the contract must be completed in time for the LSF facility to be available to the winner of the agency's recompetition. The justification actually states that "[i]t is expected that the work will be completed to allow the hangar to be included in the competitions for orders under the follow-on-contract." Id. at 8.

Cornische also argues that SES's order is outside the scope of the firm's contract, because SES will perform the overhaul services in a facility in the Czech Republic. Cornische contends that RFP, as amended, limited the place of performance to Alabama. Protest at 4. For example, Cornische identifies the following language in the amendments:

Off-site is other than at the contractor[']s facility or Redstone Arsenal. The work contemplated under this contract is anticipated to be performed at two sites. Those two sites are the hangar facility at Redstone Arsenal and the contractor's facility located within reasonable commuting distance of Redstone Arsenal.

Comments, Attach. 1, RFP Amend. 4, Answer to Question No. 71.

[O]ff-site work isn't significant enough for the Government to request contractors to develop separate off-site [labor] rates.

Id., Question No. 72 citing Answer to Question No. 22.

We do not agree that the solicitation, as amended, or that the contract as awarded, limited performance of orders under the contract to Alabama or the continental United States. The SOW, as provided in the RFP and included in the contract, states that the contractor would be required to “[p]erform modification and repair on designated aircraft and on components at locations in and outside the continental United States.” See AR, Tab D, SOW, at 2. Although RFP amendment 4 informed offerors that the agency anticipated that the work would be performed on-site, the amendment also stated that off-site work would not be “significant enough” to provide off-site labor rates, thus indicating the some off-site work could be performed. We find that, rather than stating that no off-site contract performance would occur, the amendment confirmed that it was the government’s intention to establish one labor rate or overhead pool for both on-site and off-site contract performance. See Comments, Attach. 1, RFP Amend. 4, Question and Answer No. 74. To the extent that Cornische argues that SES’s order provides for off-site work that is more significant than was contemplated, we note that the value of the order is \$45.6 million dollars, or 11 percent of the contract value as awarded, and less than 3 percent of the cumulative \$1.66 billion maximum value of the LSF contract. See Techno-Sciences, Inc., B-277260.3, May 13, 1998, 98-1 CPD ¶ 138 at 8 (task order valued at more than 9 percent of the contract value does not constitute an out-of-scope modification of the contract).

Cornische also complains that the contracting officer failed to perform a cost justification for the order, which Cornische argues is required by FAR § 15.404-1. See Comments at 9-10; see also Supp. Protest, Apr. 15, 2013, at 2-3. There is no merit to this argument. This section of the FAR provides proposal analysis techniques for use in conducting negotiated procurements under FAR Part 15. SES’s order was issued pursuant to FAR subpart 16.5. Cornische has not identified any applicable regulation that required the contracting officer to perform a cost justification prior to issuing the order to SES.

#### Bias

Cornische raises numerous allegations contending that the Army’s decision to issue an order to SES under that firm’s ID/IQ contract with the agency reflects bias in favor of SES. Supp. Protest, Apr. 11, 2013, at 11-20. Because, as we explain above, the order issued to SES was within the scope of that firm’s contract, the agency’s issuance of an order under a single ID/IQ contract is a matter of contract administration, which we do not review under our bid protest function. 4 C.F.R.

§ 21.5(a) (2013). Thus, Cornische's allegations of bias in the agency's exercise of its contractual rights are not within our bid protest jurisdiction.<sup>5</sup>

Cornische contends, however, that our Office has broad jurisdiction over this protest ground because the order is valued at over \$10 million. See Supp. Protest, Apr. 11, 2013, at 11; Supp. Comments at 8-9. The protester misunderstands our statutory basis for reviewing bid protests involving task or delivery orders. The 2008 amendment to the Federal Acquisition Streamlining Act authorizes GAO to resolve protests of task or delivery orders valued at over \$10 million that were issued under multiple-award ID/IQ contracts, as well as protests that an order (of any value) increases the scope, period, or maximum value of the underlying contract. See Pub. L. No. 110-181 (codified at 10 U.S.C. § 2304c(e)). The jurisdiction based on the \$10 million threshold does not apply to task orders placed under single-award ID/IQ contracts.<sup>6</sup>

The protest is denied.<sup>7</sup>

Susan A. Poling  
General Counsel

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<sup>5</sup> Moreover, to the extent that Cornische requests our Office to conduct an investigation in response to its bias allegations, our Office does not conduct investigations as part of our bid protest function. RMI, B-405409, Oct. 20, 2011, 2011 CPD ¶ 224 at 3 n.5.

<sup>6</sup> The Senate report accompanying S. 1547 clarifies that the provision was to authorize bid protests "for task or delivery orders in excess of \$5.0 million under such multiple award contracts." S. Rpt. No. 110-77, at 367. The threshold was subsequently changed to \$10 million. See Pub. L. No. 110-181, § 843(a)(2).

<sup>7</sup> On April 15, Cornische filed a protest of modification No. 39 to order No. 102 under the LSF contract, alleging bias in favor of SES and a failure to perform a cost justification before amending the order. See Supp. Protest, Apr. 15, 2013. As explained above, these allegations are without merit or outside our protest jurisdiction.