GAO

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Funding for Air Force Cost Plus Fixed Fee Level of Effort Contract

File: B-277165

Date: January 10, 2000

DIGEST

Air Force (AF) treatment of modifications to cost-plus-fixed-fee level of effort (term) contracts for Launch Vehicle Integration analysis and support as severable services and charging the cost against appropriations current when the services were rendered was presumptively reasonable and nothing in the record overcomes presumption. In one instance, where AF did not treat one modification consistent with other similar modifications, AF should adjust accounting records to reflect obligation in the records of the appropriation current when the services were rendered.

Nature of the work determines whether a service is severable or nonseverable for obligational purposes. However, agency determination whether to use a cost plus fixed fee (CPFF) term or completion contract necessarily involves consideration of same factors that are relevant to determining whether the contract is severable or nonseverable for obligational purposes.

DECISION

This decision responds to a request from a contracting officer asking whether repeat launch vehicle integration analysis and support are severable or nonseverable services for purpose of determining the proper appropriation to charge with contract modifications extending the period of contract performance. The contracting officer also asks whether a single or multiple factor approach is correct for making a serverability determination.

BACKGROUND

Beginning in 1967, the Defense Support Program (DSP) designed, developed, and deployed a series of infrared technology satellites. The satellites are composed of a sensor (for data gathering) mated to spacecraft segment (for communications, attitude control and telemetry). A satellite is placed in orbit by a launch vehicle.

Dedicated ground stations that perform data readout, reduction and dissemination to government users provide support for the DSP satellites.

In 1986, Aerojet was the contractor for production of the sensors for DSP satellites 14-17 (referred to as DSP Block 14) and TRW was the contractor for the production of spacecraft for DSP Block 14. (Other contractors produced the launch vehicles and other elements of the launch effort.) The Air Force (AF) determined that Aerojet and TRW as production contractors were uniquely qualified to perform the necessary Launch Vehicle Integration (LVI) analysis and support effort necessary to ensure compatibility between DSP satellites and launch systems.[1] Thus AF negotiated and awarded separate contracts to Aerojet for Sensor/Launch Vehicle Integration Support (LVI) (contract F04701-86-C-0029 (Contract 0029), effective March 6, 1987) and to TRW (contract F04701-86-C-0050 (Contract 0050), effective January 23, 1987) for Spacecraft/Launch Vehicle Integration Support (LVI) for DSP Block 14. The Statement of Work (SOW) for Contract 0029 initially stated that the contractor would perform specified tasks and activities by September 30, 1990. The SOW for Contract 0050 initially stated that the contractor would provide DSP support through September 1990.

Option 2 of each contract allowed the government to order the contractor to perform LVI support for DSP Flight 17. Option 2 of both contracts was structured as a cost-plus-fixed-fee (CPFF) (term) arrangement. Option 2 is comprised of contract line items numbers 006 and 007 (CLIN 006 and CLIN 007, respectively). The contracting officer's inquiry relates solely to the funding of CLIN 006 under the two contracts.

The government exercised Option 2 on March 30, 1990 with respect to contract 0050 and on August 24, 1990 with respect to contract 0029. The period of performance for Option 2 of both contracts ended on September 30, 1992 and both options were funded by three-year Air Force Missile Procurement (AFMP) appropriations available for obligation from October 1, 1989 to September 30, 1992.

The AF modified Contract 0029 to extend the period of performance for Option 2 to September 30, 1993. The modification increased the CPFF for Option 2 and the increase was obligated against AFMP appropriations available from October 1, 1991 to September 30, 1994, to support the extended period of performance. The period of performance was again extended to September 30, 1994, by a modification that increased the CPFF for Option 2, obligating AFMP appropriations available from October 1, 1992 to September 30, 1995.

The AF modified Contract 0050 to extend the period of performance for Option 2 to September 30, 1993. The modification increased the CPFF for Option 2 and the

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[1] The term "launch system" includes the launch vehicle, launch facilities and launch complexes.

increase was obligated against AFMP appropriations available from October 1, 1992 to September 30, 1995. The period of performance was again extended to September 30, 1994, by a modification that increased the CPFF for Option 2, obligating AFMP appropriations available from October 1, 1990 to September 30, 1993. The period of performance was extended one more time to November 15, 1994 at no additional cost. Two additional modifications were made during fiscal year 1992 that increased the CPFF for Option 2, and that were covered by AFMP appropriations available from October 1, 1991 to September 30, 1994.

Late in calendar year 1994, when it became necessary to extend the period of performance again, a difference of opinion arose within the program office concerning whether the extensions were severable services (funded with current funds) or within scope modifications of nonseverable contracts (funded with original year funds). Apparently as a result of the disagreement (and concerns over funding availability should the contracts be viewed as nonseverable and modified by within scope changes),[2] the AF allowed DSP Block 14 LVI contracts to expire. The AF awarded letter contracts to Aerojet and TRW to complete Flight 17 LVI effort using current year funds. Flight 17 was launched in December 1994.

The Contracting Officer believes that the contracts are level of effort completion type contracts and that the modifications are within scope for funding purposes. The program attorney and the Air Force Office of General Counsel view the contracts as severable service contracts.[3]

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[2] Based upon the contracting officer's submission, there apparently were not sufficient FY 90-92 AFMP appropriations continuously available at the program level to cover all the modifications (presumably at the time they were made). Thus if the contract was a completion as opposed to a term agreement and the modifications were within scope, there would be Antideficiency Act implications at the program level. However, sufficient funds were available at the appropriation level to cover the modifications.

[3] Interestingly, the record shows that both the contracting officer and the program attorney supported both sides of the question at different times, although both apparently did not support the same side of the question at the same time.

BONA FIDE NEED RULE

Obligating Service Contracts

An appropriation is available only to fulfill a genuine or bona fide need of the period of availability for which made. 31 U.S.C. § 1502(a) (1994).[4] Service contracts are typically viewed as chargeable to the appropriation current at the time the services are rendered particularly where the services are continuing or recurring in nature.[5] However, a need may arise in one fiscal year for services, which by their very nature cannot be separated for performance in separate fiscal years. The question whether to charge the services to the appropriation current on the date of contract award or to charge the appropriation current on the date the services are rendered turns on whether the services are severable or nonseverable ("entire"). 71 Comp. Gen. 428, at 429 (1992).

A task is severable if it can be separated into components that independently meet a separate and ongoing need of the government.[6] Thus to the extent that a need for a specific portion of a continuing service arises in a subsequent fiscal year, that portion is severable and chargeable to appropriations available in the subsequent fiscal year. 60 Comp. Gen. 219, 220-221 (1981). However, where the service provided constitutes a specific, entire job with a defined end-product that cannot feasibly be subdivided for separate performance in each fiscal year, the task should be financed entirely out of the appropriation current at the time of award, notwithstanding that performance may extend into future years. B-240264, February 7, 1994. Thus a nonseverable contract is essentially a single undertaking that cannot feasibly be subdivided. B-259274, May 22, 1996. Whether the subdivision is feasible or not is a matter of judgment that includes as a minimum a determination of whether the government has received value from the service rendered. 58 Comp. Gen. 321 (1979). These general rules apply to all fixed period appropriations, whether for one year or three years. 65 Comp. Gen. 170, 171 (1989).

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[4] Congress has relaxed the constraints of the bona fide need rule by enactment of a number of statutes that authorize either incremental or upfront funding of severable or nonseverable service contracts. See, e.g., 41 U.S.C.S. § 254c, 253l and 10 U.S.C. §§ 2306(g), 2410a (1994). The purpose of these statutes is provide the agencies greater flexibility to structure contract funding to meet their needs.

[5] 1 GAO, Principles of Federal Appropriations Law, 2d Ed., 5-22 to 5-26 (GAO/OGC-91-5 (July 1991).

[6] This corresponds to the notion that a severable service confers value to the government as it is rendered, and by logical extension would typically authorize the agency to pay the contractor for value received. Cf. 31 U.S.C. § 3324 (1994).

Obligating CPFF term (level of effort) Contracts

In 65 Comp. Gen. 154 (1985) we were asked to address the propriety of issuing a nonseverable work assignment under a cost reimbursement, level of effort (term), contract when the bulk of the effort furnished is extended beyond the contract's base period of performance and after the period of availability of the appropriation obligated by the contract. The agency proposed to charge the entire amount of the work assignment against the unused hours provided by the contract's base period of performance (term). We advised that cost reimbursement level of effort term contracts are by their nature severable[7] since they require the performance of a certain number of hours within a specified period of time rather than requiring the completion of a series of work objectives. Thus extending the contractor's effort beyond the expiration of the base period of performance using prior year funds would violate the bona fide need rule. We also pointed out that the hypothetical work assignment was severable since it did not require an identifiable end product.[8]

Subsequently, in B-235678, July 30, 1990, we were again asked to address the issue of severability in the context of level of effort contracts. We pointed out that level of effort contracts are not defined by severability but instead represent a contracting arrangement driven by the government's inability to define needed work in advance with sufficient detail to support a completion contract. Severability, and the bona fide need rule, are appropriation concepts that concern the extent to which the needed work can be divided into independent components meeting separate needs. With respect to severability issues, it is the nature of the work being performed, not the contract type, that must be taken into account in reaching a judgment on that issue.[9] We also pointed out that, in the first instance, it is for the agency to make that judgment.

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[7] At the time of our decision, the Federal Procurement Regulation (FPR) § 1-3.405(e)(2) defined "term contracts" as one that describes the scope of work to be done in general terms and which obligates the contractor to devote a specified level of effort for a stated period of time for the conduct of research and development. FPR § 1-3.405(e)(5) provided that in no event should the term form of contract be used unless the contractor is obligated by the contract to provide a specific level-of-effort within a definite period of time. The FAR replaced the FPR effective April 1, 1984.

[8] For a discussion of the competition and funding implications of modifying a term contract to a completion contract, see 65 Comp. Gen. at 157.

[9] Air Force Regulation 170-8, para. 4c(2)(4) (January 15, 1990), in effect when Options 2 were exercised and the contracts were modified to extend the period of

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DISCUSSION

Under the regulations in effect at the time we rendered our decision in B-235678, an agency determination to use a CPFF term or a CPFF completion contract necessarily involved a consideration of the same factors necessary to determine whether the contract is severable or nonseverable. The FAR § 16-306 (d)(1) (1991) made it clear (and still does) that the SOW of the CPFF completion contract states a definite goal or target and specifies an end product.[10] However, we recognized that even though a contract is denoted a CPFF term contract, the value of the required performance could in some theoretical instance be an end product. In such a case, the contract should be treated for obligational purposes as a nonseverable service contract. Thus, fairly read, B-235678 stands for the proposition that a CPFF term contract is presumptively a severable service contract, unless the actual nature of the work warrants a different conclusion (i.e., clearly calls for an end product). Further, one might reasonably conclude that the initial agency determination whether the contract is for funding purposes severable or nonseverable takes place roughly contemporaneously with agency selection of contract type (term or completion).

The Nature of the Contracts

We start with the presumption that the services under Contract 0029 and Contract 0050 are severable. 65 Comp. Gen. 154 as modified by B-235678. The AF structured the contracts as CPFF level of effort (term). The Acquisition Plan states that the effort to be procured under contracts 0029 and 0050 was predominately studies. The Acquisition Plan also states that the level of effort form of contract was most desirable, among other things, because of the inability to precisely define completion of the effort. This was consistent with the Federal Acquisition Regulation, § 16.306(d)(3) (1991) in effect when the contracts were entered into and when the Options were exercised. CPFF term contracts are to be used when the work or the specific milestones for the work can not be defined well enough to permit development of estimates within which the contractor can be expected to complete the work.

While there are instances in the record demonstrating that some AF officials relied on language in the SOW to conclude that CLIN 006 was nonseverable and its extension was within scope, they are insufficient to overcome the presumption that

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performance states: "Primarily the question of whether a contract is entire or severable is one of intention, to be determined from the language which the parties have used, the subject matter, and circumstances of the agreement." This criterion is narrower than the criteria applied in our decisions for determining contract severability.

[10] See also FAR § 16.306(d)(2) (1991), regarding CPFF term contracts.

the services under a contract structured as CPFF term contract were severable. For example, the SOW for Contract 0050 provides that the primary objective of the SOW is to provide integration analysis and support that will insure the successful launch of DSP satellite on the T-IV launch vehicles. In a memorandum for the record dated September 14, 1993, one contracting officer cited this language to support the view that CLIN 006 was a CPFF completion contract. She first stated that Contract 0050 was a CPFF level of effort (term) contract but went on to reason that extension of CLIN 006 beyond the original completion date and adding hours to the contract were within scope changes and not segregable nor severable. Thus she concluded that the modification would not violate the competition in contracting act. It is unclear whether she also reasoned the modification was within scope for obligational purposes.

We agree that the scope and objective of CLIN 006 in Contract 0050 (and Contract 0029 for that matter) was in a general sense the successful launch of the satellite on Flight 17. However, this is not dispositive of the severability issue since most services have some identifiable goal to be achieved by their completion. For example, while we view employee services as severable for bona fide need purposes, the result of employee services are always directed towards the accomplishment of some goal that often includes identifiable end products that meet the needs of the government. While the SOW generally may state that contract 0050 is intended to insure a successful launch and orbiting of the satellites,[11] such a general goal does not in and of itself make the required repeat LVI effort a completion, as opposed to a term, contract. Nor does it constitute an end product requiring the contract be treated as nonseverable for obligating purposes.

In another instance, the Statement of Work for Contract 0029 defines "those tasks and activities to be performed . . . by the DSP Sensor Contractor . . . to support the completion and maintenance of DSP Sensors 14-17 integration with the Space Transportation System launch system . . . and the parallel integration of the DSP sensors 15-17 with the Titan IV/IUS launch system." In a memorandum dated May 18, 1992, the program attorney referred to that language in the SOW for Contract 0029 to concur in the determination of the DSP Director of Contracts that CLIN 006 on Contract 0029 was a completion effort and therefore, the extension of the contract beyond five years to complete the LVI for spacecraft 17 was within scope.[12]

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[11] Even without such a statement one might presume that such was intended under both contracts since no one could reasonably argue that the CLINs 006 were intended to support an unsuccessful launch of the satellite for Flight 17.

[12] The Determination with which the attorney concurred also stated that Contract 0029 is a CPFF LOE (term) contract.

The language relied on by the attorney to support the conclusion that Contract 0050 is a CPFF completion contract is no more dispositive of the severability issue than is the language relied on by the contracting officer with respect to Contract 0029 to support her determination that the modification adding hours and extending the period of availability was not in violation of the Competition in Contracting Act. Further, based on a more detailed analysis of the nature of the work required and the applicable law, the same program attorney in memorandum dated December 11, 1996, in which he concludes that in both contracts CLIN 006 called for severable services and that using current appropriations to extend and modify the contracts was correct except in one instance.

Finally, while the submission does not disclose a written determination to the effect that the extensions of the period of performance were for severable services at the time each modification was made, this was how the AF treated them since all but one modification was charged against the appropriation current when the services were rendered. Further, the one exception was a modification to Contract 0050 that was obligated against the three year appropriation expiring on September 30, 1993 (rather than the three year appropriation expiring on September 30, 1992 that was obligated by the exercise of Options 2). Thus this modification was also inconsistent with the notion that it was a within scope change to a nonseverable (completion) service contract. Thus both the CPFF term structure of the two contracts and the nature of the services acquired support the AF's treatment of the two contracts as being for severable services.

Nature of the Services

In addition to the presumption that services rendered under the CPFF term contract are severable, there is other support for concluding that the services were severable. The SOW, Option 2 of the Contract 0029 called for the contractor to perform the effort set forth in CLINs 006 and 007.[13] CLIN 006 was for "Flight 17 Repeat Integration Analysis and Support," over 12 months. It required the contractor to perform repeat integration analysis and support utilizing hours as defined in a separate schedule for an estimated cost plus fixed fee (CPFF). Briefly summarized, the activities included (1) support integration document change activity, (2) review integration document updates, (3) support mission interface working group meetings and technical interchange meetings and safety reviews, (4) track and report the

[13] CLIN 007 of Option 2 of Contract 0029 and Contract 0050 required certain data and reports relating to LVI effort. CLINs 007 were separately priced as CPFF items and added to the CPFF for CLINs 006 to provide the overall CPFF for Option 2 of each contract. AF FAR Supp. 15.871 required separately priced line items for each major category of data to be delivered. However, while CLIN 007 may be an ancillary product resulting from CLIN 006, it does not require treating CLIN 006 as a nonseverable service.

status of DSP interface verification activities, (5) support launch planning and implementation, input updates to the launch Base Test Plan Addendum, support ground operations work group meetings and assess the existing pre-launch requirement and planning documentation to determine the need for change, and (6) support formal pre-flight reviews.[14]

In response to our inquiry for additional information on CLIN 006, the Director, DSP Space System Acquisitions, Headquarters Space and Missile Systems Center, Department of the Air Force, submitted a paper prepared by the Aerospace Corporation technical staff explaining the LVI effort. The paper states that the primary objective of the LVI effort was to ensure compatibility between DSP satellites and launch systems through a series of paper analysis. It further explains that the LVI contractors did not do any of the physical work necessary to launch the satellites. However, various launch support contractors used the results of the LVI contractors' analysis to insure a successful launch.

The paper points out that for first time integration, the LVI contractors worked with the launch vehicle contractors to develop satellite-to-launch system interface, definition, control, and verification.[15] For repeat integration, the LVI contractors worked with the same launch vehicle contractors to insure that the already developed interface definitions are accurate and reflect any changes that may be necessary. In addition LVI contractors developed plans for use during launch operations for first flights that were updated for subsequent flights (repeat integration) when and if necessary. Finally, supporting meetings was an important task for LVI contractors in order to ensure that requirements and/or changes in one system did not adversely affect other systems and/or organizations.[16]

The paper concludes that while the end result of the LVI effort was the successful deployment of the satellites to correct orbit, there was no final product or report required by the contracts. Rather they prepared and/or updated the various

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[14] CLIN 006 activities of contract 0050 also included support post flight analysis, analysis review, and interface identification/resolution.

[15] Interface requirements are defined in the Interface Control Documents (ICD), controlled by engineering drawings, and verified by one or more of the following methods: (a) analysis (b) inspection (c) demonstration (d) test or (e) similarity. For example, the LVI contractors would have defined the interface and prepared the ICD for the first integration and then verified that the interface was accomplished correctly by inspecting the drawings.

[16] Working Group (WG) and Technical Interchange Meetings (TIM) are means to get LVI issues discussed and resolved. In addition LVI contractors support Mission Readiness Review (MRR) and Launch Readiness Review (LRR)

Interface Control Documents to insure a successful launch and attend the various meetings to insure that their analyses were properly considered and implemented.

Based on the SOW and the nature of the LVI effort as described in the submission by the Director, DSP Space Systems Acquisition, CLINs 006 appear to be severable services. The contractors provided services on an ongoing basis. Although Aerojet and TRW also produced paper products as a necessary part of the overall services provided throughout the LVI support effort, the government received either directly or through government contractors, the value of the LVI support effort when rendered by TRW and Aerojet. Thus the services were severable.

CONCLUSION

Nothing in our analysis of the information available provides the basis to overcome the presumption that the CLIN 006 of Contract 0029 and 0050 were severable services or that the treatment of modifications as severable services for funding purposes was improper. Thus, based on the foregoing, we concur in the view of the contracting officer. To the extent necessary, the accounting records should be adjusted with respect to the one modification that obligated funds inconsistent with the approach of treating the modifications extending the period of performance for CLIN 006 as severable services.

Comptroller General
of the United States