



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: MCI Telecommunications Corporation

File: B-276659.2

Date: September 29, 1997

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Thomas C. Papson, Esq., and C. Stanley Dees, Esq., McKenna & Cuneo, and Nathaniel Friends, Esq., and Robert L. Petersen, Jr., Esq., for AT&T Communications, Inc., an intervenor.
Michelle Harrell, Esq., General Services Administration, for the agency.
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DIGEST

Modification of dedicated transmission services portion of the contract by which the federal government purchases domestic inter-city telecommunications services to add an option permitting the contractor to design, operate, and maintain custom dedicated networks for government agencies is beyond the scope of the original telecommunications services contract and must be purchased in accordance with the statutory requirements for competition.

DECISION

MCI Telecommunications Corporation protests a decision by the General Services Administration (GSA) to modify the FTS 2000 contract held by AT&T Communications, Inc. MCI maintains that the Network Service Assurance Plan II (NSAP II), added by modification PS273 to the dedicated transmission service portion of AT&T's contract, exceeds the scope of the original FTS 2000 contract. Thus, MCI argues that GSA was required to hold a competition for these services.

We sustain the protest.

BACKGROUND

On December 31, 1986, GSA issued request for proposals (RFP) No. KET-JW-87-02 seeking offers to replace the existing Federal Telecommunications System and to provide all of the federal government's domestic inter-city telecommunications services for a 10-year period. The resulting contract became known as the

FTS 2000 contract, and is the largest acquisition ever undertaken by a civilian federal agency.¹

The RFP for the FTS 2000 contract set forth six types of services covered by the procurement: (1) switched voice service, (2) switched data service, (3) switched digital integrated service, (4) packet switched service, (5) video transmission service, and (6) dedicated transmission service. RFP § C.1.3.1. Dedicated transmission service--the service affected by the modification at issue here--was defined in the solicitation as "point-to-point private line transmission of voice and data." RFP § C.2.1.1. In essence, this means that the transmission capacity is reserved for the user, available at all times, and always connected to the same party at the other end of the line. In addition, the RFP explained that "dedicated transmission service includes analog, digital, and T1 transmission service." RFP § C.2.7. These services "differ primarily in their transmission rates." AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d 1201, 1203 (Fed. Cir. 1993).

Three offerors responded to GSA's original RFP: Sprint, Martin Marietta (with MCI as a subcontractor), and AT&T. At the conclusion of the competition, on December 7, 1988, GSA made two awards: Network A, covering 60 percent of federal domestic inter-city service, was awarded to AT&T; Network B, covering the remaining 40 percent of inter-city service, was awarded to Sprint. Both contracts are indefinite delivery, indefinite quantity contracts, and both permit federal agencies to order the same comprehensive set of telecommunications services. The maximum value of the Network A contract is \$15 billion; the maximum value of the Network B contract is \$10 billion.² The protest here is limited to AT&T's Network A contract.

Over the life of the FTS 2000 contract, the growth of computer networks has triggered significant growth in the use, speed, and sophistication of dedicated transmission services. Since the RFP anticipated advances in commercial service and required the contractor to provide these same advances to the government, RFP § C.2.1.8, there have been numerous modifications to the contract. Two major

¹Staff of House Committee on Government Operations, FTS 2000: Management Reforms and Intensive Congressional Oversight Ensure Savings of \$500 Million for the Taxpayers, H.R. Doc. No. 102-1056 at 2 (1992).

²Despite the magnitude of these contracts, their value does not represent the majority of federal spending on telecommunications services. During fiscal year 1995, the General Accounting Office concluded that the federal government spent at least \$2.4 billion on telecommunication services, of which 32 percent, or \$761 million, was spent via the FTS 2000 contracts. GAO, Telecommunications Costs Reported by Federal Organizations for Fiscal Year 1995 at 2, 5 (AIMD-96-105, B-271967, June 17, 1996); Hearing Transcript (Tr.) at 209-210.

modifications to the dedicated transmission services portion of the FTS 2000 contract--the addition of multipoint service and T3 transmission capability--triggered legal disputes resulting in opinions discussed in detail later in this decision.

The NSAP II Modification

The work added by the June 13, 1997, NSAP II modification to the FTS 2000 contract is set forth in the modification at paragraph E, including sub-paragraphs E.1 through E.7, on pages 2 through 6. As shown in detail below, the general thrust of this modification is to permit AT&T to design and maintain customized dedicated networks for agencies.

The text of the modification anticipates that federal government customers will order NSAP II using a request for service form, on which they will specify the parameters of the service desired. Mod. § E.4. The form, attached to the modification as Appendix 00.1, allows customers to indicate their preferred transmission protocol (choices are: internet protocol, multicast internet protocol, DECNET, ATM, or TDM). Customers also specify their traffic and performance requirements. Under traffic, which is specified in bandwidth (bits per second) or throughput (packets per second), customers specify the average, peak, burst duration, busy hour, and average packet size (in bytes) of their transmission traffic. Under performance, customers specify their requirements for availability, time to restore service (mean time and maximum time), lost packet rate, packet group delay, and packet group delay variance. Customers may also specify their needs for AT&T engineers and technicians to be available on-site.

Using this information, the modification anticipates that the contractor will submit a design, in the form of a quote for service, to meet the customer's individual networking needs, and identify the equipment needed to accomplish the task.³ Mod. § E.4. In addition, the contractor will assemble the network, including "operations, administration, maintenance and network management services." Mod. § E.5. Further, the contractor will "provide sustaining engineering to oversee the ongoing growth, network design, and life cycle engineering of the NSAP II network services in meeting the customer's evolving requirements." Mod. § E.5.2. Included within these services, the contractor will be responsible for providing network security, such as risk assessment, illegal entry prevention measures, acceptable use policy, and authentication and privacy. Mod. § E.5.4. For example, the change pages to the contract's technical manual (identified on pages 8 and 9 of the modification, and appended to the text of the modification) show that the

³In response to MCI's earlier agency-level protest of this modification, discussed in greater detail below, which GSA sustained in part and denied in part, the equipment identified by the contractor will be provided as government furnished equipment (GFE).

contractor will design and provide security firewalls for agencies as part of these services. Revised Contract Page 5.1.7-29.

With the purchase of NSAP II service, government agencies will be able to specify enhanced performance above the levels in the basic FTS 2000 service. For example, the table below shows the current performance parameters of FTS 2000 service (amended several times since original contract award) compared to the maximum performance levels available under NSAP II⁴:

PERFORMANCE FEATURES	CURRENT FTS 2000	NSAP II MODIFICATION
Availability	99.87 percent	up to 99.98 percent
Trouble Identification Time	less than 2 hours	up to less than 1 minute
Time to Repair/Restore Service	less than 4 hours mean time to repair	up to less than 1 minute to restore
Error Rate	AT&T commercial practice	up to 1×10^{-6} lost packet rate for a 100 byte pkt.

Although agencies are able to purchase increases in performance with NSAP II services, as shown above, and although GSA and AT&T claim that the purpose of this modification is to enhance performance, the modification clearly permits the purchase of network design and maintenance services regardless of whether doing so increases transmission reliability.⁵ In fact, during the course of the hearing on this protest, AT&T testified that there was no requirement to purchase performance above the levels of the standard FTS 2000 contract, and that AT&T intended to market these services to agencies whose performance requirements are not as stringent as the maximums specified in the modification. Tr. at 271-272. Thus, we find that there is no per se requirement to increase transmission reliability as part

⁴The stringency of the maximum performance parameters available in the NSAP II modification have been designed to meet certain unique requirements related to the National Aeronautics and Space Administration (NASA). Since NASA was involved in developing the performance requirements, it is the first agency to have placed an order for NSAP II services. To date, no other agency has ordered the NSAP II services.

⁵For example, on the request for service form, described above, government customers may specify any level of availability between the current FTS 2000 standard of 99.87 percent and the NSAP II ceiling of 99.98 percent. Modification, Appendix 00.1, at fourth unnumbered page.

of the purchase of network design and maintenance services offered in this modification to the contract.

Chronology of the Dispute Regarding NSAP II

GSA explains that since 1994 there has been "an explosion of data networking" placing a burden on agencies faced with integrating and selecting the appropriate transmission approach for dedicated networks. Tr. at 75, 84. In addition, the record shows that GSA and AT&T had been discussing ways to provide technical assistance to agencies with their dedicated networks, and also discussing ways to address higher reliability requirements for certain government networks, such as NASA's requirements for its Earth Observing Systems Data Information Systems Backbone Network (Ebnet), which provides wide-area communications and facilities between NASA ground stations. Tr. at 84; Contracting Officer's Statement, July 23, 1997, at 5. These discussions led to a decision to add the NSAP II services, described above, to AT&T's FTS 2000 contract.

MCI learned of the discussions, and of GSA's intent to modify the FTS 2000 contract, via a segment of NASA's Internet Web Page providing an overview of the Ebnet project. MCI apparently asked GSA to keep it informed of the agency's actions, and the record shows that GSA provided notice of its intent to proceed with the modification on February 13, 1997. MCI challenged the scope of the modification--as it understood it--in an agency-level protest filed on February 20. On March 24, MCI's agency-level protest was sustained in part and denied in part.

On April 2, MCI filed a protest with our Office challenging both the proposed remedy for the sustained portions of its agency-level protest, and the portions of the decision denying its protest. On April 14, our Office dismissed the protest without prejudice pursuant to an agreement between the parties under which GSA would review its actions and advise MCI of the agency's intended approach.

On June 13, GSA notified MCI that it was executing modification number PS273 to AT&T's FTS 2000 contract, and on June 20, MCI reinstated its protest here. MCI's June 20 protest incorporated by reference its April 2 protest, and added one additional protest ground. On June 30, GSA provided MCI with the core documents related to the modification pursuant to the terms of a protective order issued by our Office. This was the first opportunity MCI had to review any of the documents related to this issue, including the text of the modification, the agency in-scope determination, and the contracting officer's statement and AT&T's response to MCI's agency-level protest.

DISCUSSION

Procedural Issue

GSA requests dismissal of MCI's complaint, claiming that it fails to state a valid basis for protest and, alternatively, that the issues MCI raises are untimely. AT&T joins the agency in this request. We disagree on both counts.

GSA argues that since MCI did not have a copy of the modification until June 30, MCI's protest was necessarily based on "information and belief" and not the facts of the procurement. Although GSA does not contend that the protest filed with our Office was initially insufficient to challenge the procurement, it argues that MCI was required to amend its protest after receiving the text of the modification and the other related documents to more accurately reflect the details of the modification, and more clearly reflect MCI's concerns. Since the protest was not amended after receipt of the documents, GSA urges that it be dismissed. Alternatively, GSA urges that any specific challenges to the modification not expressly mentioned in the initial filings be considered untimely at this juncture. MCI answers that it was not required to amend its protest because its review of the modification documents confirmed its challenge as already filed.

Our Office will dismiss a protest which lacks a detailed statement of the factual and legal grounds for challenging a procurement, or which fails to state legally sufficient grounds of protest. 4 C.F.R. § 21.5(f) (1997). In this regard, we have explained that a protester's allegation of a procurement impropriety, without an explanation of how the procurement was flawed, is insufficient to support a bid protest. Federal Computer Int'l Corp.--Recon., B-257618.2, July 14, 1994, 94-2 CPD ¶ 24 at 2.

Our review of MCI's protest filings shows that the April 2 filing raises six specific challenges to the scope of the NSAP II modification and that the June 20 filing incorporates the challenges raised in April and adds one more. While certain of MCI's issues were addressed between the April 2 filing and the June 20 filing--for example, after GSA sustained MCI's agency-level protest claim that the NSAP II modification improperly permitted the purchase of network hardware from AT&T for the first time since the award of the FTS 2000 contract, the purchase authority was deleted from the modification--other contentions continued to accurately reflect MCI's view of the procurement. In this regard, we note that the April 2 protest argues that the modification will permit AT&T

[t]o become a single point of contact for change, fault, performance, accounting and security management. These types of management services go well beyond what is contemplated under the FTS 2000 contracts, and are not merely incidental to providing the telecommunications services.

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[t]o provide a centralized Network Management System in which AT&T will have total responsibility for *all* NASA equipment and circuits, and become the single point of contact for *all* NASA network modifications. There is nothing comparable to this sweeping scope of work under the FTS 2000 contracts.

MCI Initial Protest, April 2, 1997, at 3-4 (emphasis in original).

While we agree with the agency that the better practice would have been for MCI to amend its protest to more precisely reflect the issues remaining in dispute after reviewing the actual text of the modification, we do not think it was required to do so in this case, given that the April 2 filing, in most respects, continued to accurately reflect MCI's concerns about this procurement. In fact, the protest was sufficient to permit the agency to prepare a response in defense of its actions. With respect to the alternative contention that any detailed grounds of protest about the modification first raised in MCI's comments should be considered untimely because they were not raised within 10 days of MCI's review of the modification documents, see 4 C.F.R. § 21.2(a)(2), we view the initial allegations as sufficiently detailed to cover the arguments subsequently developed. As a result, we will consider the merits of MCI's protest.

Standard of Review

The Competition in Contracting Act (CICA) requires "full and open competition" in government procurements as obtained through the use of competitive procedures. 41 U.S.C. § 253(a)(1)(A) (1994). Once a contract is awarded, however, our Office will generally not review 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); Stoehner Security Servs., Inc., B-248077.3, Oct. 27, 1992, 92-2 CPD ¶ 285 at 4. The exception to this rule is where 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., 69 Comp. Gen. 292, 294 (1990), 90-1 CPD ¶ 212 at 2, aff'd, The Dept. of Labor--Recon., B-237434.2, May 22, 1990, 90-1 CPD ¶ 491.

In determining whether a modification triggers the competition requirements in CICA, 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, 90-1 CPD ¶ 212 at 2-3; see AT&T Communications, Inc. v. Wiltel, Inc., supra, at 1205. 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 costs between the contract as awarded and as modified. Neil R. Gross & Co., Inc., *supra*, 90-1 CPD ¶ 212 at 3. We also consider whether the solicitation for the original contract adequately advised offerors of the potential for the type of change found in the modification, CAD Language Sys., Inc., B-233709, Apr. 3, 1989, 89-1 CPD ¶ 342 at 4, or whether the modification is of a nature which potential offerors would reasonably have anticipated at the time of the original award. American Air Filter Co.--DLA Request for Recon., 57 Comp. Gen. 567, 573 (1978), 78-1 CPD ¶ 443 at 9-10.

The Scope of FTS 2000

At the outset, we recognize the broad nature of the FTS 2000 contract and that the competitors for the contract clearly contemplated that extensive modifications would be made to the contract over its 10-year life. AT&T Communications, Inc. v. Wiltel, Inc., *supra*. On its face, the RFP explained that the procurement was designed to permit the government "[t]o obtain a comprehensive set of telecommunications services" and "[t]o obtain telecommunications services through two prime service contractors responsible for providing all services and network management." RFP § C.1.3. To achieve these objectives, the RFP explains:

The government intends to procure the following six telecommunications services: switched voice service, switched data service, switched digital integrated service, packet switched service, video transmission service, and dedicated transmission service. This solicitation describes these services, as well as specific features of these services that the government is likely to procure. It is the government's intent that these services conform as closely as possible with those offered commercially.

RFP § C.1.3.1 (emphasis added).

In addition, the solicitation's expansive Service Improvements clause advised offerors that after award:

the Government may solicit, and the Contractor is encouraged to propose independently, improvements to the services, features, or other requirements of the contract. These improvements may be proposed to save money, to improve performance, or for any other purpose which presents a service advantage to the Government.

RFP § H.16.

Despite the broad nature of this contract, however, we do not agree that the kind of networking services at issue here reasonably fall within the scope of the original FTS 2000 contract. Our reasons for this conclusion are set forth below.

Focusing first on the type of work at issue, the discussion above shows that the original FTS 2000 contract purchased telecommunications services, and for purposes of this review, dedicated transmission services. RFP §§ C.1.3; C.1.3.1. Under the FTS 2000 contract, as awarded, transmission services ended at a government facility's "service delivery point." RFP § C.2.1.7. Beyond this point (or in some cases a "secondary service delivery point"), a facility's network was not the responsibility of the telephone services contractor.⁶ Id.

In contrast, the kind of effort purchased by the NSAP II modification is described in common industry parlance as "network outsourcing." Outsourcing of an entity's network design and management is a business not traditionally performed by the companies that provide transmission services like those purchased under the FTS 2000 contracts. For example, a list of the "Top 10 Network Outsourcing Vendors" published in a leading trade magazine and appended to MCI's Comments on the Agency Report, identifies companies like Hewlett-Packard, Computer Sciences Corporation, and I-NET.⁷ In addition, network outsourcing can generally be purchased without regard to any changes in dedicated transmission capabilities.

While the type of work purchased by the NSAP II modification is different from dedicated transmission services as procured to date, we recognize that there is some ambiguity about whether the original FTS 2000 contract anticipated that the contractors would perform some network management services. Specifically, the RFP states that one purpose of the FTS 2000 contract is to procure from two contractors all of the government's telecommunication "services and network management." RFP § C.1.3.

In our view, however, the term "network management" as used in the original FTS 2000 contract has a different meaning from the term as used in the NSAP II modification. As the court pointed out in reversing the GSA Board of Contract Appeals's Wiltel decision (discussed further below), certain of the terms used in the FTS 2000 contract have more than one meaning. See AT&T Communications, Inc. v. Wiltel, Inc., supra, at 1206-1207 ("The Board erred in assuming that the term 'service' has one and the same meaning in various contexts. To the contrary, the FTS 2000 contract uses 'service' in many distinct ways.").

The original management requirements for the FTS 2000 contracts were identified at RFP § C.3, entitled "Management and Operations." Within this section, 12 functional management tasks are identified, one of which is entitled "network operations and

⁶This distinction is also present in home telephone service. Generally, without the purchase of an additional service, the telephone company's responsibility for wiring does not extend beyond the point where the telephone lines enter the home.

⁷For the record, however, the list also includes AT&T Solutions and MCI/SHL.

management." RFP § C.3.1.3. In the section describing network operations and management, the RFP identifies service continuity, and "the development and execution of restoration and contingency plans covering the loss of facilities or switching capabilities, network overload, and other service-disrupting conditions." RFP § C.3.2.5. None of these services, however, cross the threshold from the publicly available transmission network, into an agency's "private" network. Under NSAP II, however, AT&T's network management will move from managing its own assets--i.e., its domestic, inter-city long distance calling network--to designing and managing customized agency networks for conducting federal government business. Mod. § E.5; see Tr. at 90. Thus, we conclude that, notwithstanding the use of the term "network management," the type of work performed under the modification is different from the work procured under the original contract.

We next consider the cost of the NSAP II service and the performance period involved for these services. Currently, NASA is the only agency that has placed orders against AT&T's FTS 2000 contract for NSAP II service. As a result, GSA has estimated the cost of NSAP II as \$7.8 million. On the other hand, several factors lead us to conclude that the relatively small cost estimate for NSAP II services should not control our determination of whether the modification is within the scope of the original contract.

For example, AT&T's technical representative stated during our hearing on this protest that the company intends to market this service throughout the government to agencies that may not need increased reliability, but would like to purchase assistance with network design and maintenance--i.e., outsourcing. Tr. at 271. If AT&T is successful in its efforts, the value of this modification could be significantly higher than GSA's current estimate. In addition, we reject GSA's contention that this modification occurs so late in the 10-year life of the FTS 2000 contract that it is unlikely that enough purchasers will order the service to cause the modification's value to become a significant portion of the overall cost of the original contract. Clearly, the opportunity to design, choose equipment for, and manage an agency's communication network could have value--and opportunities for extended performance--beyond the life of the FTS 2000 contract.

In sum, in light of the significant difference in the type of services to be performed under the NSAP II modification, we conclude that the modification is outside the scope of the original contract.

Finally--and as an overlay to the analysis above--we review this modification with an eye to the two prior legal disputes in which MCI alleged that modifications to the contract's dedicated transmission services exceeded the scope of the original contract.

In 1992, AT&T's FTS 2000 contract was amended to add multipoint service to the contract's dedicated transmission service. MCI's challenge to the addition of this

service was considered and denied in MCI Telecommunications Corp. v. General Servs. Admin., GSBCA No. 11963-P, 93-1 BCA ¶ 25,541, 1992 BPD ¶ 287. While the original RFP described dedicated transmission service as "point-to-point private line transmission of voice and data," RFP § C.2.1.1., multipoint service is used to link three or more locations together on a single dedicated circuit. MCI, 93-1 BCA at 127,219, 1992 BPD ¶ 287 at 9. The GSA Board concluded that multipoint service was a foreseeable improvement to dedicated transmission services, and was well within the scope of the original contract. Id. at 127,222, 1992 BPD ¶ 287 at 14.

Also in 1992, AT&T's contract was amended to add T3 transmission service to the dedicated transmission portion of the FTS 2000 contract. The GSA Board sustained a challenge to this modification filed by Wiltel, Inc. (with MCI as an intervenor). Wiltel, Inc. v. General Services Admin., GSBCA No. 11857-P, 93-1 BCA ¶ 25,314, 1992 BPD ¶ 201. The T3 service considered in Wiltel uses fiber-optic cable to transmit dedicated data and voice signals at a rate of 45 million bits per second, approximately 28 times faster than the T1 transmission rate (the rate identified in the original contract) and 672 times faster than a voice grade circuit. Id. at 126,104, 126,106, 1992 BPD ¶ 201 at 2, 5; Tr. at 34. Since the GSA Board considered T3 service a new service, as opposed to an improvement to an existing service, it concluded that the modification adding the service violated the scope of the original FTS 2000 contract. Wiltel, 93-1 BCA at 126,113, 1992 BPD ¶ 201 at 19-20.

The GSA Board's Wiltel decision on T3 transmission service was reversed by the United States Court of Appeals for the Federal Circuit. AT&T Communications, Inc. v. Wiltel, Inc., supra. The court concluded that the GSA Board erred in focusing on the differences between T1 and T3 service, and should have instead recognized that T3 service was an improvement to dedicated transmission service. Id. at 1207. Thus, the court considered the addition of T3 transmission services to be within the scope of the original FTS 2000 contract. Id.

The network design and management services purchased under NSAP II are distinguishable from the services procured in these earlier modifications. Both multipoint transmission and T3 transmission were technological improvements to dedicated transmission services, and as such, were anticipated by the FTS 2000 contract's stated intention of remaining current with developing technology. By comparison, while it is clear that an entity can obtain improvements in reliability by redesigning its network, the design, maintenance, and operation of a customized data network for agency-specific use is a distinctly different effort from improving the reliability of the transmission service connecting it. In short, the ability to improve reliability through better networking cannot reasonably be termed an improvement in dedicated transmission.

RECOMMENDATION

We conclude that the modification to the FTS 2000 contract adding NSAP II services is beyond the scope of the original contract, and that GSA was required to procure these services in accordance with the competition requirements of CICA, 41 U.S.C. § 253(a). Accordingly, we recommend that GSA terminate the NSAP II services added to the FTS 2000 contract pursuant to modification number PS273, and either hold a competition for these services or prepare the appropriate justification required by CICA for a sole-source procurement.⁸

We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protest including attorneys' fees. 4 C.F.R. § 21.8(d)(1). In accordance with 4 C.F.R. § 21.8(f)(1), MCI's certified claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

Comptroller General
of the United States

⁸During the course of this protest, GSA determined that it was in the best interests of the government to continue performance notwithstanding the protest and executed a "best interest" override of the statutory stay of AT&T's performance of this modification to the contract. See 31 U.S.C. § 3553(d)(3)(C)(i)(I) (1994). In such cases, CICA requires our Office to make our recommendation "without regard to any cost or disruption from terminating, recompeting, or reawarding the contract." 31 U.S.C. § 3554(b)(2).