BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND	)	
	)	Docket No. MSBCA 1194
Under DGS Procurement of Interim Telecommunications	)	

July 30, 1984

Jurisdiction - Where the Department of General Services (DGS) proposed to direct its contractor to perform work which was within the scope and price of an existing service agreement, the Board concluded that the performance of such work neither would require a new contract nor constitute a modification of the existing agreement. Accordingly, the proposed action did not give rise to a dispute relating to the formation of a State contract and a competitor's protest of this proposed directive thus was dismissed on jurisdictional grounds.

Jurisdiction - Where a contract modification is outside the scope of the original agreement, it is tantamount to a new contract award made on a sole source basis. Regardless of whether the modification is made to a pre-July 1, 1981 contract, such an action would be violative of the Article 21 requirements mandating competition. Where a party complains of its inability to compete for those services awarded by modification, there exists a contract formation dispute and, hence, bid protest jurisdiction.

Jurisdiction - Contracts for services with public utility companies are not exempt from the competition requirements of Article 21. Further, where DGS proposed to purchase telecommunications equipment which had been detariffed and for which competition then existed, such a purchase clearly was found to be within the requirements of Article 21. A vendor who was deprived of the opportunity to bid under such circumstances had grounds to protest and subsequently appeal an adverse agency decision to this Board.

Timeliness - Although an offeror willingly participated in a non-competitive procurement process for several months prior to filing its protest, the protest was deemed timely since the items to be awarded under the non-competitive procurement process were not apparent until the process was nearly completed. The offeror protested within seven days of when it knew or should have known that the actions contemplated by DGS went beyond what could be considered permissible contract modifications and instead constituted new sole source procurements in apparent violation of Article 21.

Waiver - Appellant's request, made concomitant with its protest, that it be given two weeks to submit a revised proposal did not constitute an implied waiver of the protest where it subsequently submitted its appeal in a timely manner and never exercised the requested option to amend its proposal.

Estoppel - Although DGS, at Appellant's request, delayed Board of Public Works approval of planned modifications to existing telecommunications service agreements, such a delay was not shown to be prejudicial to the State. Accordingly, Appellant was not estopped from pursuing its appeal of the DGS procurement officer's final decision rejecting its bid protest.

Interested Party - Where Appellant was unable to demonstrate that it had the capability to offer telephone equipment in the event of a rebid, it was not an interested party and had no standing to protest. Appellant, however, did demonstrate that it was capable of offering a network system and, hence, had standing with regard to this limited aspect of its protest.

Modifications - A contract modification is considered to be outside the scope of the original agreement where the alteration to performance significantly changes the field of competition for the work involved. Here the purchase of detariffed telecommunications equipment was outside the scope of the lease agreements originally entered into between the State and Appellant because no competition existed for the original lease agreements, purchase of the equipment was not contemplated or permissible at the time of original agreement, and substantial competition now exists for the purchase of the type of equipment previously under lease. Accordingly, the proposed modification was tantamount to a new procurement and subject to the requirements of Article 21.

Negotiated Contracts - Emergency - A non-competitive negotiation is permissible under Maryland law where the procurement officer, with approval of his agency head or designee, determines in writing that an emergency warrants such action. Maximum practicable competition still must be obtained and a report filed with the Board of Public Works.

Negotiated Contracts - Emergency - The need to take immediate measures to reduce an anticipated $5 million deficit in the State's FY 1985 telecommunications budget reasonably was determined by DGS to warrant non-competitive negotiation. Data essential to ascertain the effects of divestiture on FY 1985 telecommunications costs was not available early enough to permit either budget appropriations to be increased or competitive negotiations as to cost reduction measures to proceed in a timely manner.

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OPINION BY CHAIRMAN BAKER

This appeal concerns the legality of the Department of General Services' (DGS') proposed actions to reduce Maryland State Government's anticipated telecommunications costs by modifying existing relationships with the State's three current providers of telecommunications service. The three providers are recognizable to many of us who receive multi-page monthly telephone bills as the severed remains of "Old Ma Bell", namely, Appellant, AT&T Communications (ATTCOM), and AT&T Information Systems (ATTIS).

Appellant contends that the planned modifications to the ATTIS and ATTCOM service agreements are so significant as to constitute new sole source procurements in violation of Maryland's procurement law. DGS, ATTIS and ATTCOM all respond that the modifications to existing service are not governed by Maryland Procurement Law (Md. Ann. Code, Art. 21) and that, even if they are, the modifications were minor in nature. Further, under Article 21, noncompetitive negotiation was justified in view of the immediate need to effect measures calculated to reduce fiscal year 1985 budget expenditures. DGS, ATTIS and ATTCOM additionally have raised jurisdictional grounds for dismissal of all or parts of the appeal.

I. Findings of Fact

Introductory

1. Prior to January 1, 1984, telecommunications services to the State of Maryland were provided by Appellant as the local operating company for AT&T. These services included the transmission of voice communications and

data over local lines, Marcom lines,[1] and long distance lines (including FX and WATS lines[2]), and any installation and maintenance associated with equipment leased or purchased from Appellant.

2. Aside from the transmission lines provided by common carriers, a telecommunications system requires hardware in order to function. Hardware items include telephone sets (stations), private branch exchanges (PBXs), switches and data equipment.

3. In its simpliest form, a telephone switch is a device located on a customer's premises enabling calls to go from one line to another within the customer's telecommunications system or subsystem. This, in effect, provides intercom service. Incoming and outgoing calls also are routed through the switch.

4. A PBX is a sophisticated switch which, depending upon its configuration and the software purchased, can expand the dimensions of a telecommunications system. PBX technology permits the routing of calls between separate facilities, call transfers, conference capabilities, electronic tandem tie line networks, and station message detail recording (SMDR).[3]

5. PBX technology also is significant with regard to transmission line structure. Those State facilities without a PBX must utilize Appellant's Centrex system[4] in order to obtain intercom, call transfers and other modern features of the State's telecommunications system. This necessitates that each station line be connected to the Centrex exchange on a one to one basis. Where a PBX is used, however, station lines feed into it. A trunk line then is run from the PBX to Appellant's exchange. For each six station lines feeding into a PBX, only a single trunk line to the central switching office is necessary. This is important from a cost standpoint in that the number of lines accessing the central exchange is what Appellant charges for.

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[1]Marcom is a network of leased telecommunication lines linking many, but not all, State government facilities across Maryland. By bundling these lines in telpaks and transmitting messages over different voice channels, more economical service is obtained.

[2]FX service permits a customer to call an area outside of his local exchange area and be billed at the local per call rate. Similarly, a person outside the local exchange area can place a call to the customer over the FX line without incurring a toll charge. FX lines are leased at a per month rate. WATS is a bulk billing service which provides discounted rates for long distance calls. Specific lines likewise are leased for this purpose. WATS service may be obtained statewide, regionally or nationally.

[3]The SMDR feature provides a computer record of telephone calls made from each station. It provides details such as where a call was made to and the cost thereof.

[4]Centrex serves the same purpose as a PBX except that it is located at Appellant's central exchange office and is capable of servicing a geographic area rather than just a single building.

6. For some time now, telecommunications hardware has been available from a number of vendors. The State of Maryland, in fact, has purchased hardware on at least 31 occasions during the past two and one-half years. Appellant, as an arm of AT&T prior to January 1, 1984 and as a marketing representative for Bell Atlanticom during the first six months of 1984, has been the successful vendor on nine occasions. All purchased hardware has been assembled by vendors in the form of telecommunications subsystems serving specific State locations or agencies. This hardware is referred to as customer premises equipment (CPE).

7. Notwithstanding the number of telecommunications purchases made by the State to date, the vast majority of CPE essential to the State's telecommunications is being leased. This includes 55,000 telephones and approximately 100 PBXs. The lease agreements, for the most part, were entered into with Appellant many years prior to January 1, 1984. All equipment being leased as of January 1, 1984 is referred to as embedded CPE.

8. The monthly cost of leased telecommunications lines always has been regulated by the Federal Communications Commission (FCC) and the Maryland Public Service Commission (PSC).

Divestiture

9. On August 24, 1982, an antitrust consent decree was entered, in modified form, by the U.S. District Court for the District of Columbia ordering, among other things, the divestiture by AT&T of its local operating companies. (Exh. 18 to Agency Report). This Order officially was carried out as of January 1, 1984.

10. Appellant, as a result of divestiture, began operating as an independent entity on January 1, 1984. The scope of its service, however, was limited by the consent decree to the furnishing of exchange telecommunications and exchange access functions. (Exh. 18 to Agency Report). Exchange access was referred to at the hearing in this appeal as dial tone service. Simply put, Appellant is to provide central office equipment and the necessary trunk lines from this equipment to a customer's premises. Within a

given exchange area,[5] Appellant is permitted to continue providing all telecommunications service. Appellant, however, cannot provide either CPE[6] such as telephones, PBXs and switches, or long distance (including inter-LATA) telecommunications service. All of Appellant's services remain subject to regulation.

11. One year prior to divestiture, AT&T formed ATTIS as an independent subsidiary to supply equipment to its operating companies and sell new CPE and related systems on a non-regulated basis. On January 1, 1984, as a direct result of the divestiture Order, ATTIS also received title to all embedded CPE which customers had been leasing from local operating companies. At this time, the FCC detariffed the embedded CPE subject to a number of conditions. First, customers were to be given the opportunity to purchase this equipment at a price to be determined based upon prescribed accounting guidelines relating to cost. Second, in order to provide a transition period to a completely deregulated CPE marketplace, both lease and purchase prices were to be fixed[7] for a two year period under a Price Predictability Program so as to provide customers with an opportunity to analyze their systems and determine whether to buy and from what vendor. Ground rules were established by the FCC for determining the applicable lease rates. At the end of this transition period, those customers continuing to lease will pay rates established by market factors.

12. Inter-LATA and long distance telecommunications service formerly being provided by Appellant now is furnished by ATTCOM. ATTCOM is a tariffed common carrier and is prohibited from selling CPE or furnishing non-tariffed services.

13. The divestiture Order also required local operating companies to provide interexchange carriers, on a tariffed basis, with exchange access equal in type and quality to that provided for the interexchange telecommunications services of ATTCOM. This requirement has a phase-in period of several years and eventually will permit full and free competition for long distance telecommunications services.

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[5]An exchange area or local access transport area (LATA) refers to a geographic area encompassing one or more contiguous local exchange areas servicing common social, economic, and other purposes. LATAs may cross municipal or local government boundaries but not State boundaries. In Maryland, four such LATAs have been established. Calls made between two points within a given LATA are considered local service and are made over Appellant's lines.

[6]For the first six months of 1984, Appellant was permitted to market CPE on behalf of its independent subsidiary, Bell Atlanticom.

[7]If lease rates in Maryland as of December 31, 1983 were lower than the maximum charge permissible under the Price Predictability Program, these rates could be increased in four increments over the two year period to arrive at the maximum rate.

14. While customers such as the State will be given a choice as to which long distance carrier they wish to utilize, Appellant has been authorized to bill customers on a tariff basis for access to its switching system and these interexchange communications. As presently established by PSC Order, these access charges, when effective, are scheduled to be $2 per line per month for Centrex lines in operation prior to June 1983 and $3.22 per line per month for those lines leased after this date. The effective date for these charges presently is December 1984.

State Concern as to Divestiture and the Changing Nature of Telecommunications

15. In February 1982, Governor Hughes issued an Executive Order appointing an Inter-Departmental Committee for Telecommunications Master Planning ("ICTMP"). The ICTMP was comprised of seven members of the Governor's cabinet and met first in April 1982. At this time, subcommittees and a working group were formed. The working group, chaired by Mr. Jerome Klasmeier, the Deputy Secretary to DGS, presented a detailed report to the ICTMP in September 1983 recognizing that Maryland State Government was not ". . . organizationally, functionally, or technically prepared to respond effectively to today's changing telecommunications environment." The report further recommended that the State retain an expert to assist it in devising a Master Telecommunications Plan. This report was adopted by the ICTMP and forwarded to the Governor.

16. The ICTMP recognized that the Master Telecommunications Plan would take several years to develop. It further recognized that the interim ordering of extensive upgrades and new interconnect systems would be unwise and contrary to the orderly and intelligent growth which the Master Plan was intended to accomplish.

17. Of a more immediate concern, the deregulation of the telephone industry was creating confusion with regard to how using agencies within the State should obtain essential telecommunications services. On August 16, 1983, DGS Secretary Seboda and Budget and Fiscal Planning Secretary Stettler jointly issued a letter to other cabinet secretaries and heads of independent agencies detailing how requests for new, revised or updated telephone equipment should be processed. This was intended to bring "order to the house" by providing a mechanism for overseeing telecommunications purchases and assuring that Maryland's procurement law was being adhered to.

18. In addition to the concern over the purchase of new telecommunications systems and hardware pending development of a Master Plan, the State concomitantly had to consider the effect of divestiture on existing service. Mr. Frank Robey, the DGS Director of Central Services, and other DGS officials began meeting with Appellant in the summer of 1983 to gain an understanding of the cost implications of divestiture. Unfortunately, throughout the summer and fall of 1983, clear cost projections were not possible as the ground rules for divestiture still were evolving.

19. The difficulties being caused by the impending divestiture on immediate State fiscal planning were addressed in an October 23, 1983 memorandum from Mr. Lawrence Mitchell, the DGS Telecommunications Officer, to Mr. Fred Chew, Jr., a legislative analyst for the Department of Fiscal Services wherein it was stated that:

1. On January 1, 1984, C&P no longer would be able to provide FX service or the special GOV-9 rate[8] for intrastate calls. The loss of this service was expected to increase the State's annual telecommunications bill by $2,147,291.

2. C&P's rate increase request filed with the PSC could result in increases of from 10 to 40 percent over the $24 million telecommunications cost incurred in fiscal year 1983.

3. New methods of measuring mileages for data and radio control circuits could increase their present $1 million cost to ten times that amount.

4. FY 1984 and FY 1985 telecommunications costs possibly could exceed FY 1983 expenditures by a factor of 50 or 100%.

(Exh. 5 to Agency Report).

20. In an effort to effectively deal with the cost implications of divestiture and resolve telecommunications issues arising before the implementation of a comprehensive Telecommunications Master Plan, Governor Hughes signed Executive Order 01.01.1983.21, on December 26, 1984, directing as follows:

> The Department of General Services is assigned responsibility to provide guidelines and direction in the procurement, use and maintenance of telephones and telephone systems until implementation of a comprehensive Telecommunications Master Plan for State government. The Department's responsibilities shall include:
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> a. Development of telephone systems procurement procedures for all Departments, Boards, Commissions or other Executive Branch agencies consistent with Article 21 of the Code and regulations adopted thereunder;
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> b. Periodic estimation of State budgetary impacts resulting from structural and technological changes in the telephone communications field;
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> c. Identification of possible cost reduction measures in telephone communications management; and
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> d. Identification of other telecommunications-related policies and procedures which may be necessary to resolve issues arising as the divestiture and deregulation of the Bell System continues.

21. In response to the Governor's Executive Order, DGS' Mr. Klasmeier wrote to representatives of Appellant, ATTIS and ATTCOM on January 31, 1984

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[8]GOV-9 was a billing arrangement offered by Appellant under which a State employee could make an intrastate long distance call at a fixed rate of $0.15 per minute. Appellant, as a result of divestiture, no longer can offer inter-LATA service. Such calls now are subject to ATTCOM's tariffed rates.

requesting that each ". . . identify, within your current service sphere, those measures which the State might consider to minimize costs resulting from the recent divestiture of the Bell System and to maximize telephone efficiencies for Maryland State Government." Mr. Klasmeier concluded his letter by stating as follows:

> Please understand that the State reserves the right to dispose of any suggestions which you may make in a fashion which is consistent with State procurement laws governing the acquisition of telephone systems and services.
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> If you prefer to discuss this matter further, please let me know. If we could hear from each of you relating to the timetable which you expect to follow in response to this request, it would be most helpful. Obviously, we expect interest from the Governor and the Legislature relating to improvements which we can make to reduce cost and increase efficiencies.

(Exh. 2 to Agency Report).

Proposal Process

22. In March 1984, ATTIS, ATTCOM and Appellant each responded with cost reduction proposals. Although a privilege was asserted in these proceedings as to the proprietary data set forth in these proposals, the essential elements of each proposal was outlined for the record.

23. Appellant's submissions of March 21, 21 and 29, 1984 included three cost reduction measures. These were:

a. Centrex Rate Stabilization - This is a tariff rate item on file with the PSC. Under this program, if the State agrees to keep 90% of its system in place for the time period from September 1983 to September 1986, it receives a reduced monthly service rate.

b. Band "O" WATS[9] - Band "O" WATS offers reduced rates for certain intra-state long distance calls.

c. Facilitator Agreement - Under this agreement, Appellant would agree to deal with vendors on behalf of the State and process repair and service orders.

Appellant's representatives testified at the hearing that more ambitious proposals were not submitted because of their understanding that the State was not interested in extensive upgrades of its telecommunications system prior to the development of the Master Plan. Nevertheless, Appellant's representatives did recommend, during a March 22, 1984 meeting with Secretary Seboda, that a complete network analysis be performed. Appellant, in fact, proceeded to conduct such a study and prepare a plan calling for an

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[9]Although it is clear from the record that Appellant is able to offer such service, the reason it may provide this service and not inter-LATA service is not apparent.

electronic tandem network (ETN) and a repricing of Centrex service. As of May 25, 1984, however, this study and plan had not been completed and never was presented to DGS. (Exh. 6 to Agency Report, p. 2).

24. The ATTIS proposal may be summarized as follows:

a) The 14,811 telephones associated with Centrex installations should be purchased.

b) The 10,115 telephones associated with existing electro-mechanical PBX switches which will be replaced in the next three to five years should be purchased.

c) The 3,140 telephones associated with 25 PBX systems having a useful life of five years or more also should be purchased. Additionally, the 25 PBXs should be purchased.

d) A five hub ETN network should be established to permit State agencies to reduce inter-LATA calling charges. This will require the purchase of five new PBXs and the 4,487 telephones associated therewith.

e) Seven old technology switches should be replaced by new PBXs to add more reliable service to hospitals and correctional services. These new PBXs would become part of the ETN network. Additionally, 2,685 telephones associated with these switches should be purchased.

f) Of the approximate 35,000 telephone sets to be purchased under the foregoing plan, 7,000 are to be new. These will replace existing rotary phones which are incompatible with an ETN system.

g) The installation of the PBXs, in addition to the networking benefits, was proposed to reduce the number of trunk lines connecting to Appellant's central switching offices. This would reduce the access charges scheduled to begin in December 1984.

h) Similarly, the use of PBXs was proposed to reduce the number of Centrex lines for which the State is being billed. At the Madison exchange alone, this would amount to a reduction of one half of the State's 4,000 Centrex lines.

i) By taking advantage of dedicated technicians who would perform all of the State's maintenance work, a reduction in the $60.00 per hour rate currently being charged could be obtained.

j) ATTIS offered, as did Appellant, to act as the facilitator for all State agency requests for maintenance, new service and upgrades.

k) ATTIS offered to provide third party financing so as to reduce monthly equipment cost payments to no more than the pre-existing lease payments.

l) ATTIS provided a guaranteed buy-back provision which assures the State that any purchased PBXs can be sold if the Master Telecommunications Plan obviates their use.

25. The State presently has a telecommunications system known as Marcom which serves 33 locations and contains 127 lines. (Mr. Kahn's July 17, 1984 letter, attachment 2). Facilities served by Marcom are located throughout the State. Under this system, a switch exists at each Marcom location. Calls from a particular Marcom station are routed through the building switch to a central hub[10] located in Baltimore. The hub then routes the call to the desired Marcom location. Thus a call made from one Marcom location in Salisbury to another Marcom location in the same area would be routed through the Baltimore hub.

A call routed in the above manner not only is inefficient but, in the post-divestiture world we live in, would constitute an inter-LATA call. Marcom rates thus were expected to increase as a result of the loss of bulk rate billing (telpak) and the substitution of higher common carrier long distance rates.

The ETN system provided for in the ATTIS proposal is more efficient than the single hub system in use. By locating at least one hub in each LATA, local Marcom calls no longer would have to be transmitted across LATA lines to a central hub in Baltimore. Additionally, under this system, the ETN hubs would be able to select automatically the least cost route for any call dialed. This likewise would reduce the need for complicated dialing instructions where WATS, FX or long distance lines are required.

26. The essential element of the ETN system is a sophisticated, PBX known as the Dimension 2000 FP-8 switch. This is an electronic, computer based switch which is software driven. The software gives it the capability of providing up to 201 special features.

27. The seven new PBX's recommended to be purchased in addition to the five FP-8 switches essential to the ETN network will replace older "701" switches. These latter switches are electro-mechanical in nature and do not have the capability of being upgraded by software. The seven new PBX's shall be a combination of Dimension 2000 FP-8 switches and Dimension 600 switches.

28. The ATTCOM proposal offered the following two measures:

a) Establishing an accurate data base that will lead to the continuing monitoring of the State's telephone network.

b) Optimizing Marcom by coordinating the routing of all traffic, inter-state and intra-state, On-net and Off-net, for all existing Marcom locations.

These measures were to be provided at no cost.

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[10]A hub is a sophisticated PBX having the ability to route communications traffic to multiple locations.

The establishment of an accurate data base was essential to the task of optimizing Marcom use. The necessary data, in fact, was purchased from Appellant. The optimization of network operations, based on an analysis of the purchased data, is the type of service which a long lines carrier, such as ATTCOM, would be expected to provide free to its customers.

In devising a plan to optimize the Marcom network by coordinating it with other services, ATTCOM designed an ETN system. ATTIS' Mr. Nussbaum testified that his company, if allowed to proceed with work under its proposal, probably would utilize the ATTCOM design provided that it received access to it.

DGS' Consideration of Proposals

29. DGS representatives reviewed the proposals submitted by ATTIS, ATTCOM and Appellant with the following criteria in mind:

a. Cost avoidance at existing locations.

b. Modification of existing relationships which are consistent with the State's goal to institute a telecommunications master plan within the next three to five years.

c. Minimum disruption during this interim period prior to the institution of the telecommunications master plan.

d. A schedule of implementation which will provide maximum cost avoidance during this interim period.

(See Exh. 9 to State Agency Report).

30. As a result of this review, completed in May 1984, DGS proposed to accept ten of the measures collectively suggested by the three existing providers of telecommunications services. These measures have been referred to by the parties as the "Maryland 10" and appear in Appendix 1 to this decision. Appendix 1 also indicates which provider(s) recommended the measure and who is expected to implement each.

Budgetary Considerations

31. The State's total telecommunications budget is a composite of the appropriations authorized each department and independent agency for this service. DGS representatives were responsible only for preparing their own telecommunications budget request.

32. The Legislature approved a fiscal year (FY) 1985 appropriation of $31,529,475 for telecommunications services to all State agencies.[11] Fiscal year 1985 costs now are projected at $36,700,000. A shortfall in excess of $5 million thus is predicted. (See Table of Projected State Telephone Costs, Exh. 19 to Agency Report).

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[11] Again this figure is derived by totalling the appropriations to each department and independent agency. (Exh. 4 to Agency Report).

33. The shortfall in telecommunications appropriations is especially egregious in FY 1985. Secretary Seboda testified that departments and agencies are being required to fund one-third of the six percent pay increase given to their employees. Further, negotiations pending on the State's new health care contract may result in additional expenses which also were not budgeted for.

34. In view of the foregoing, Secretary Seboda was prepared to recommend to the Board of Public Works that the "Maryland 10" measures be implemented on July 1, 1984. The resulting savings (cost avoidance), he estimated, would have totalled $4,514,000 in FY 1985 and have avoided any reduction in essential services. (See Exh. 19 to Agency Report). Although public advertising was not utilized in obtaining the cost saving proposals, Secretary Seboda testified that such was not mandated under the existing circumstances; namely, that the modification of a pre-July 1, 1981 contract was not subject to Maryland's Procurement Law and, even if it was, this clearly was an emergency situation.

35. Pursuant to the "Maryland 10" measures, DGS proposes to purchase telecommunications equipment from ATTIS having a cost, with interest added and discounts applied, of $13,089,751.[12] This sum is to be paid over a three to five year term. Lease payments over this five year period, if allowed to continue, would total $26,258,126. Thus, a savings of $13,168,375 in equipment costs is projected over five years, if the purchase is consummated under the terms offered. (See Appendix 2 to this decision). Estimated savings in service charges over the next five years are $11,805,000. (See Appendix 3 to this decision). Cumulative cost avoidance for the next five years obtainable by implementing the "Maryland 10" measures, thus is estimated at $24,973,375.

The Protest

36. Mr. Scott Corey, Appellant's Marketing Manager, testified that his company wanted to propose new systems when Mr. Klasmeier's January 31, 1984 letter was received. However, based upon prior conversations with Mr. Klasmeier and his knowledge of the August 16, 1983 letter signed by Secretaries Seboda and Stettler (Exh. A-5), it was his understanding that the State was not interested in a "sales pitch."

37. Mr. Bruce Griffin, Appellant's Sales Manager, likewise testified that he was told by Frank Robey, in the fall of 1983, not to solicit new business pending development of the Master Telecommunications Plan.

38. Messrs. Klasmeier and Robey both testified that they made clear to vendors in the fall of 1983 that telecommunications purchases which potentially could conflict with the implementation of the Master Plan would not be made. Mr. Robey further testified that Appellant and other vendors were instructed not to solicit new business from using agencies pending

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[12]Appendix 2 to this decision shows expected equipment lease costs of $26,258,126 over the next five years if no action is taken. Savings which will accrue as a result of purchase are said to be $13,168,375. The difference represents the net cost of equipment.

development of the Master Plan. Both gentlemen, however, denied making any statements concerning the magnitude of the changes which DGS would consider pursuant to Mr. Klasmeier's request for cost reduction measures.

39. There is no evidence that DGS representatives advised Appellant to limit proposed cost avoidance measures to minor changes. Appellant's representatives knew that DGS was seeking to reduce a sizable deficit in telecommunications appropriations. The only explanation for Appellant's confusion as to what could be offered was its understanding that major telecommunications purchases would not be made pending completion of the Master Telecommunications Plan.

40. Appellant's limited cost savings proposals were presented to DGS on March 22, 1984. From this date until late May 1984, Appellant had no indication as to what ATTIS or ATTCOM had proposed or what approach DGS planned to follow.

41. On or about May 24, 1984, Mr. Robert Herrman, an account executive for Appellant, told Mr. Corey of DGS' plan to present proposed contract modifications to the Board of Public Works. Under this plan, a significant procurement from ATTIS was to be endorsed.

42. Mr. Bruce Griffin called DGS' Mr. Klasmeier to verify the information related by Mr. Herrman. Upon obtaining verification that PBXs would be purchased, Mr. Griffin apprised his supervisor, Mr. Corey who then wrote Mr. Klasmeier, on May 25, 1984, to protest the planned procurement without competitive bidding.

43. Mr. J. Henry Butta, Appellant's Vice-President, called Governor Hughes to similarly protest the planned action. Governor Hughes requested that Secretary Seboda and Mr. Robey meet with Mr. Butta to explain the proposed modifications. This meeting occurred on May 29, 1984. By letter dated May 30, 1984, Mr. Butta again protested DGS' proposed plan to procure PBXs and an electronic tandem network without competitive bidding. He stated, in this regard, that Appellant also had the capability to provide such a system.

44. By letter dated May 30, 1984, Mr. Butta also wrote Governor Hughes and apprised him of the protest filed with DGS Secretary Seboda. He further requested that the Board of Public Works delay its decision until July 1, 1984 so as to provide Appellant with an opportunity to prepare a proposal offering the State comparable or better savings. It was stated that this proposal would be submitted so as to provide the State two weeks of review before the date of decision.

45. By letter dated June 1, 1984, Secretary Seboda responded to both of Mr. Butta's May 30, 1984 letters by restating the reasons for his recommendation. Although Secretary Seboda rejected Appellant's protest, he did grant Appellant an opportunity to submit additional proposals by June 11, 1984. Mr. Butta further was advised that a final recommendation would be presented to the Board of Public Works on June 27, 1984.

46. On June 11, 1984, Mr. Butta wrote Governor Hughes to apprise him that Appellant would not be submitting a revised proposal and instead would pursue its appeal to this Board.

47. Appellant filed its appeal from Secretary Seboda's June 1, 1984 letter on June 15, 1984.

48. On or about June 26, 1984, Appellant obtained a copy of the Action Agenda filed with the Board of Public Works in preparation for the scheduled June 27, 1984 meeting. At this time, Appellant first learned precisely of the ten cost saving measures which were recommended for implementation. Appellant also learned on this date that an award was to be made to ATTCOM as well.

49. The Board of Public Works approved DGS' "Maryland 10" plan and authorized implementation of the measures contained therein at its June 27, 1984 meeting.

50. On June 26, 1984, this Board received a request from Appellant's counsel asking that the appeal be expedited. In order to accommodate this request, the Board set a prehearing conference for Friday, June 29, 1984. At this time, an expedited schedule was established. Additionally, the parties stipulated that Secretary Seboda's June 1, 1984 letter would be treated as a procurement officer's final decision and that no motion would be filed alleging that the appeal was premature.

51. By letter dated July 3, 1984, Appellant also protested the action taken by the Board of Public Works.

52. During this Board's prehearing conference of July 10, 1984, counsel for DGS brought the July 3, 1984 letter to the Board's attention believing that it was redundant and unnecessary. Appellant stated that its intent was to make sure that the entire procurement, as contemplated by DGS, was covered by its protest. Rather than require Secretary Seboda to respond to this new protest letter and perhaps delay administrative resolution, the parties agreed to the following stipulation:

> IF ARTICLE 21 [Md. Ann. Code] APPLIES TO THIS PROCUREMENT, C&P PROPERLY IS BEFORE THIS BOARD SUBJECT ONLY TO THE JURISDICTIONAL QUESTIONS WHICH HAVE BEEN RAISED BY ATTCOM AND DGS TO DATE.

In return, Appellant withdrew its July 3 letter.

53. A hearing was conducted on July 23 and 24th, 1984.

II. Decision

A. ATTCOM's Motion to Dismiss

During the hearing and in pleadings previously filed, ATTCOM raised five grounds upon which a dismissal allegedly was warranted. ATTCOM's Motion on the five grounds addressed only that portion of the appeal challenging implementation of ATTCOM's proposals. The five grounds for dismissal were:

1. Appellant did not challenge the implementation of ATTCOM's proposals in its May 30, 1984 protest letters to Secretary Seboda and Governor Hughes and is thus precluded from addressing them on appeal.

2. Any protest as to the implementation of the ATTCOM proposals was not timely raised.

3. Appellant had ample opportunity to compete for those cost savings measures proposed for implementation by ATTCOM.

4. Appellant's appeal as to the implementation of ATTCOM's proposal was premature in that it never was presented to the DGS procurement officer.

5. Implementation of ATTCOM's proposal would constitute neither a procurement nor a contract modification.

In our view, the fifth ground for dismissal clearly has been demonstrated and warrants dismissal of that portion of the protest affecting implementation of the ATTCOM proposals.

The evidence shows that ATTCOM suggested two cost saving measures. These have been identified as "Maryland 10" measures two and four. (See Appendix 1 to this decision). Appellant's own witness, Mr. Griffin, testified that these measures represented typical services which long lines common carriers, such as ATTCOM, provide to their customers.

ATTCOM, as a regulated common carrier, may charge for its services only in accordance with a tariff schedule established by FCC Order. A separate tariff has not been established for work of the type included in the two measures suggested and ATTCOM appropriately has offered these services at no charge. We conclude from the foregoing, therefore, that implementation of measures two and four simply would constitute a directive to ATTCOM to perform work within the scope and price of its existing service agreement with the State of Maryland. A modification of the existing agreement to exact these services thus is not necessary.

This Board's jurisdiction is limited to disputes relating to the formation of a State contract. Art. 21, Md. Ann. Code, §§7-202(C)(1), 7-201(d). Since existing contract relations between ATTCOM and the State of Maryland would not be modified by implementation of measures two and four, Appellant has not alleged a dispute subject to our jurisdiction.

B. DGS' Motion to Dismiss

DGS has moved to dismiss the entire appeal on the following five grounds:

1. A modification to a pre-July 1, 1981 contract is not within the Board's jurisdiction.

2. The existing relationships with ATTIS, ATTCOM and Appellant are not Article 21 contracts.

3. Appellant waived its right to protest by willingly participating in the allegedly flawed process.

4. Appellant's request for an extension to file a new proposal constituted an implied waiver of its bid protest rights and estopped it from thereafter pursuing an appeal.

5. Appellant has no standing in that there is no substantial chance that it would receive an award if successful on the merits.

These grounds will be considered seriatim.

DGS' initial ground for dismissal rests on its construction of Maryland's Procurement Law. DGS notes that Article 21, with minor exception, was to be applied prospectively so as not to impair any existing obligation or contract right.[13] In this regard, the term contract was defined as follows:

> (f) Contract. — (1) "Contract" means every agreement entered into by a State agency for the procurement of supplies, services, construction, or any other item and includes:
>
> (i) Awards and notices of award;
> (ii) Contracts of a fixed-price, cost-reimbursement, cost-plus-a-fixed-fee, fixed-price incentive, or cost-plus incentive fee type;
> (iii) Contracts providing for the issuance of job or task orders;
> (iv) Leases;
> (v) Letter contracts;
> (vi) Purchase orders;
> (vii) Supplemental agreements with respect to any of these; and
> (viii) Orders.

(Underscoring added). Md. Ann. Code, Art. 21, §1-101(f)(1). Since the term contract includes any modification thereto, it is argued that modifications to a pre-July 1, 1981 contract would constitute part of those earlier agreements and not be subject to Article 21 requirements.

Whether post-July 1, 1981 modifications to earlier contracts are governed by Article 21 is irrelevant to this dispute. The issue before us concerns whether a new contract is about to be entered into without formal

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[13] §25 of Chapter 775 of the Laws of 1980 expressly provided that:

> . . . although a presently existing obligation or contract right may not be impaired in any way by this Act, the procedural provisions of this Act, including those requiring review by the Maryland State Board of Contract Appeals, may, at the option of the contractor, apply to contracts in force on the effective date of such provisions.

The effective date of the Act was July 1, 1981.

advertising, or whether proposed modifications to an existing (albeit pre-July 1, 1981) agreement would be outside the scope of that agreement. In the latter situation, the modifications would be tantamount to a sole source award under a new procurement. Tilden-Coil Constructors, Inc., Comp. Gen. Dec. B-211189, Aug. 23, 1983, 83-2 CPD ¶236.

It is the public policy of this State ". . . that competitive sealed bidding shall be the preferred method for awarding contracts." Md. Ann. Code, Art. 21, §3-201(b). Where a present modification of a pre-July 1, 1981 contract would be tantamount to a new contract award, it would be violative of the foregoing provision. Compare Mayor and City Council of Baltimore and Enviro-Gro v. Bio Gro Systems, Inc. and Hyman A Pressman, No. 26 (Md C.A. July 12, 1984). Since Appellant has alleged that the proposed modifications constitute new contract awards made in violation of Article 21 and that this procedure improperly denied it a chance to compete, there is a dispute within our jurisdiction to resolve. Compare Kent Watkins & Associates, Inc., Comp. Gen. Dec. B-191078, May 17, 1978, 78-1 CPD ¶377 (1978), p. 2.

DGS' second ground for dismissal is premised upon the type of relationship existing between it and the three providers of telecommunications services. In this regard, it is stated that each of these contractual relationships and any modification thereto is governed and defined by tariff schedules. Under such circumstances, they are not Article 21 contracts and thus are not subject to this Board's jurisdiction. We disagree.

Maryland's procurement regulations are not silent with regard to contracts entered into with regulated companies. While competitive sealed bidding need not be followed where the price of any service or supply required is regulated by the PSC pursuant to Article 78 of the Code,[14] this does not mean that agencies are free to do as they please. COMAR 21.05.05.02(5) permits sole source procurements only "[when certain public utility services are to be procured and only one source exists."[15] Thus, while prices may be set in a regulated industry, Article 21 does not ignore the need for certain guidelines governing the State's procurement of such services.

Notwithstanding the foregoing, we are not dealing with a procurement of regulated services here. This appeal concerns the ATTIS proposal and the purchase of CPE recommended therein. ATTIS was established to operate in a non-regulated environment. As testified to by ATTIS' Mr. Nussbaum, his company cannot provide tariffed services and it competes with numerous other vendors to provide CPE and systems design. Despite the fact that the

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[14]See COMAR 21.05.03.02B.

[15]An example of when a sole source procurement may not be permissible in a regulated environment ultimately may be provided when the State selects a long lines carrier. Although these service costs will be tariffed, competition as to quality and service areas still may be required under a competitive negotiation process. See Las Vegas Communications, Inc., Comp. Gen. Dec. B-195966, July 22, 1980, 80-2 CPD ¶57.

sale of embedded CPE is, for the next year and a half, subject to certain price restrictions imposed by the FCC, other vendors can provide this same equipment at competitive prices. Accordingly, we reject the notion that the purchase of CPE, embedded or otherwise, is not subject to Article 21 and the requirement for competition it imposes.

As to the third ground for dismissal, there is no dispute that Appellant willingly participated in the cost reduction program initiated by Mr. Klasmeier's January 31, 1984 letter. Its participation continued, without complaint, until late May 1984 when Appellant first learned that certain purchases of PBX equipment were to be made from ATTIS. It was at this point that a protest was filed. We agree with DGS that a bidder who knows or has reason to know of an impropriety in the solicitation process may not permit the process to proceed, participate in it, and then, after failing to obtain the desired contract, scream out in protest. Such actions not only would be in violation of the timeliness requirements set forth at COMAR 21.10.02.03A,[16] but would constitute an implied waiver of the right to protest. Kennedy Temporaries v. Comptroller of the Treasury, No. 484 (Ct. of Special Appeals, January 4, 1984), 57 Md. App. ____ (1984). Here, however, Appellant clearly believed from Mr. Klasmeier's letter and previous discussions with both he and Mr. Robey that purchases of equipment were not to be offered. Appellant had no reason to understand otherwise until late May 1984 when it was told of the ATTIS proposal and protested immediately. Under these circumstances, there neither was an implied waiver of the right to protest nor a failure to adhere to the timeliness requirements set forth in COMAR.

DGS has argued that Appellant should have known that it was looking for measures strong enough to help it avoid the predicted significant shortfall in telecommunications appropriations for FY 1985 and that minor adjustments to existing service would not accomplish this. However, DGS never issued a request for proposals (RFP) outlining either the problem to be addressed or the evaluation criteria it would apply in reviewing proposals. All that Appellant knew was that the suggestions sought were to be limited to its "sphere of service." Its actions, therefore, were not unreasonable.

Turning to the fourth ground for dismissal, DGS contends that Appellant had two choices at the time it learned of the proposed purchase of equipment from ATTIS. It could have protested, as it did, and stood on its right to have this Board decide the propriety of the proposed course of action; or,

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[16]This regulation provides that:

> Protests based upon alleged improprieties in any type of solicitations which are apparent before bid opening or the closing date for receipt of initial proposals shall be filed before bid opening or the closing date for receipt of initial proposals. In the case of negotiated procurements, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated in it shall be protested not later than the next closing date for receipt of proposals following the incorporation.

it could have, as it also did, elect to request that the process continue with the further opportunity to participate. We are told by DGS that "[t]he two choices are obviously inconsistent, and, by invoking the second, C&P [Appellant] elected to forego the first."

By letter dated May 30, 1984, Mr. J. Henry Butta protested DGS' proposed action in a letter to Secretary Seboda. The basis for this protest was that Appellant had the capability of providing an ETN network using existing and new central offices as switching nodes and that it improperly had been deprived of an opportunity to bid. (Exh. 7 to Agency Report). On the very day Mr. Butta protested, he asked Governor Hughes to reopen the process to permit Appellant to demonstrate how it could better provide these services. (Exh. 8 To Agency Report). What Appellant was seeking, therefore, was an opportunity to compete fairly.

Appellant did not submit a new proposal by the June 11, 1984 deadline established by DGS. Instead Mr. Butta submitted a letter on this date to Governor Hughes reiterating his concern over the procedure and evidencing an intent to appeal to this Board.

Appellant had until June 16, 1984 to appeal Secretary Seboda's June 1, 1984 final decision pursuant to COMAR 21.10.02.09A. Although it had requested an opportunity to submit a new proposal, it concluded, within this 15 day period, that it would not be in its best interests to do so. The issue, therefore, is whether such actions constituted an implied waiver of the bid protest.

A waiver is ". . . the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such a right, and may result from an express agreement or be inferred from the circumstances." Gould v. Transamerican Associates, 224 Md. 285, 294 (1960). In Kennedy Temporaries v. Comptroller of the Treasury, supra, the Court of Special Appeals found an implied waiver where a disappointed bidder had knowledge that his claim was rejected as early as November 27, 1981 but waited until January 15, 1982 to note an appeal to this Board. Although the bidder alleged that he had not received a written final decision, his actions, in view of the planned January 1, 1982 start date for the contract, demonstrated that he had relinquished his right to continue the protest.

In the instant appeal, Appellant's actions were not sufficient to demonstrate a relinquishment of its appeal rights. While it did request an opportunity to submit a new proposal, it did so concomitant with its notice of protest. DGS responded to Appellant's protest by denying it on substantive grounds on June 1, 1984. Although both sides perhaps hoped that the opportunity to submit a proposal would obviate the need for further appeal, such was not the case and Appellant's appeal was noted in a timely manner. Had Appellant submitted a proposal or waited beyond the June 16, 1984 date to appeal, its actions may have constituted an implied waiver. Under the present circumstances, we do not see how its conduct could be interpreted in this manner.

We recognize further that DGS delayed taking its proposals to the Board of Public Works for two weeks so as to permit Appellant an opportunity to submit its new proposal. This change in position, however, was not so detrimental as to estop Appellant from proceeding with its appeal. DGS

has not shown that the presentation of the intended contract actions to the Board of Public Works on June 27, 1984, as opposed to June 13, 1984, delayed the planned July 1, 1984 implementation of the measures. The evidence to the contrary indicated that negotiations were delayed by the protest itself, thus pushing back implementation until August 1, 1984. Accordingly, the fourth ground for dismissal is denied.

Finally, both DGS and ATTIS question whether Appellant has standing to challenge the proposed award to ATTIS. Both parties have focused in their briefs on Appellant's failure to offer those items proposed by ATTIS, namely, measures 2, 4, 5, 6, 7, 8 and 9. It is argued that since Appellant is not in line for an award on these measures, it has no standing to complain of DGS' decision to award a contract to someone else.

Whether or not one has standing to protest under Maryland law depends upon whether he is an interested party. An interested party means ". . . an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract, or by the protest." COMAR 21.10.02.01A. As to when a party is aggrieved, this Board previously has stated as follows:

> "The concept of formally advertised procurement, insofar as it relates to the submission and evaluation of bids, goes no further than to guarantee equal opportunity to compete and equal treatment in the evaluation bids." 40 Comp. Gen. 321, at 324 (1960). It does not confer upon bidders any right to insist upon the enforcement of provisions contained in an invitation, stated policy or other regulations, the waiver of which would not result in an unfair competitive advantage to one bidder over another. Such provisions are solely for the protection of the interests of the Government and their enforcement or waiver can have no effect upon the rights of bidders to which the rules and principles applicable to formal advertising are directed.

Delmarva Drilling Co., MSBCA 1096 (January 26, 1983) at. p. 4; RGS Enterprises, Inc., MSBCA 1106 (April 8, 1983) at p. 6.

Again, the basic issue underlying this dispute is whether a contract award is being made without obtaining the competition mandated by Article 21. Whether Appellant is aggrieved is not dependent upon it having offered the measures which ATTIS did under the non-competitive procedure utilized, but rather is contingent upon Appellant's ability to compete for these measures if a new procurement is mandated pursuant to Maryland law. Compare Webcraft Packaging, Division of Beatrice Foods Co., Comp. Gen. Dec. B-194087, Aug. 14, 1979, 79-2 CPD ¶120.

It is uncontroverted that Appellant no longer can sell CPE. Accordingly, in the event that a competitive procurement would be required for CPE, it no longer would be able to compete for an award. Pursuant to the standards previously enunciated, therefore, Appellant is not an interested party with regard to the proposed award of either embedded or new CPE.

Appellant, however, contends that it could provide an ETN system using existing or new switching equipment of its own. This presumably would permit it to offer the State significant cost avoidance measures and perhaps obviate the need for the State to purchase PBXs under the ATTIS plan.

Since it is uncertain as to how any new RFP would be drafted, we cannot say for certain that Appellant would be precluded from offering proposals satisfying the State's networking needs.

While the foregoing may appear to be dispositive of a substantial part of the appeal, it in fact may be dispositive of very little. The ATTIS proposal apparently was offered as a package with discounts applicable to the bulk purchase. The effect of removing the ETN measure from its package would have a considerable effect on the cost savings possible. Accordingly, it is imperative for us to fully review the substantive aspects of the appeal in order to determine whether a more definitive result is warranted.

C. Validity of Proposed Modifications To ATTCOM Service Agreement

With regard to the effect of divestiture on its service agreement with the State, ATTIS contends as follows:

> It is important to note that nowhere in the divestiture decisions, whether written by the Court or by the FCC, is there any order which severs the existing contractual ties between AT&T and its long-standing customers. There has certainly been some judicial and administrative redrafting of these contracts, but at no time has a customer been without a telephone contract. Indeed, the FCC has made it very clear that divestiture was never intended to void pre-existing contracts and agreements. (citations omitted).

ATTIS Comments To State Agency Report, p. 7. Whether this statement legally is precise, we are not prepared to say. Appellant has not challenged it. It is sufficient to say, however, that since January 1, 1984, the State has been leasing CPE from ATTIS at the monthly rate established by the Price Predictability Program. Further, the State has the option to continue with this lease for two years at the rate established under the foregoing program or elect to buy the embedded CPE for a fixed price. This, at a minimum, reflects a contract relationship between the State and ATTIS.

DGS contends that what it is doing is simply modifying the contractual method of billing for embedded CPE from a lease payment to an installment purchase. Additionally, it is purchasing what is described as minor quantities of new equipment which, for administrative convenience, is being included in the modification. Since it is still obtaining virtually the same telecommunications equipment and services from ATTIS under the modification as it was under the original agreement, DGS contends that the proposed modification would not be outside the scope of that original agreement.

Appellant, however, contends that the scope of the so-called modifications to ATTIS' service agreement are so significant as to constitute a new contract. DGS at the outset, responds that the ". . . object and scope of a modification in relation to the object and scope of the contract and the benefits to be achieved by a new procurement in relation to the benefits of modifying an existing relationship are two of a number of assessments which may influence the judgment as to which course is in the State's best interests." Agency Report, p. 29. The standard of review of this type of discretionary decision is said to limit the Board's consideration to a determination of whether DGS' actions were fraudulent or so arbitrary as to constitute a breach of trust. We disagree.

The determination of whether a contract modification is within the scope of the original bargain is a legal issue. A conclusion by DGS personnel regarding the legal implications of their actions carries no more weight than any other conclusion of law. American Air Filter Co. — DLA, Request for Reconsideration, Comp. Gen. Dec. B-188408, June 19, 1978, 78-1 CPD ¶443. Accordingly, we are free to consider the issue de novo.

Maryland's Procurement Law was enacted, in part, to foster effective broad-based competition through support of the free enterprise system. Md. Ann. Code, Art. 21, §1-201(b)(7). In this manner, it was hoped that costs to the State for comparable goods and services could be reduced.

Whether a modification falls within the scope of the original undertaking, in a public contract context, depends upon whether the alteration to performance is within the scope of the competition which originally was conducted. American Air Filter Co. — DLA, Request For Reconsideration, supra. Ordinarily, a modification falls within the scope of the procurement provided that it is of a nature which potential offerors reasonably would have anticipated under the contract changes clause. Id., at p. 9; Tilden-Coil Constructors, Inc., Comp. Gen. Dec. B-21118913, Aug. 23, 1983, 83-2 CPD ¶236. Where a modification does not meet this standard, it is subject to the statutory requirement of competition.

These principles are illustrated clearly in Webcraft Packaging, Division of Beatrice Foods Co., supra., a bid protest involving the procurement of 1980 census packets. The packets were required by the specifications contained in the invitation for bids to be made out of paper having a certain brightness and porosity measure. Webcraft conducted a survey of paper suppliers and determined that an inadequate quantity was available to fill the Government's needs. After offering alternate paper samples and having them rejected, Webcraft declined to bid. Later, the Government learned from the three awardees that there indeed was an inadequate supply of the specialty type paper required by the specifications. Accordingly, the specifications were relaxed permitting the use of an "off the shelf" paper of which there was sufficient quantities. Webcraft protested and, in sustaining this action, the Comptroller General of the United States, at page 10 of his opinion, stated that:

> It is the objective of our bid protest function to insure attainment of full and free competition. This was demonstrated in American Air Filter Co., Inc., supra, [Comp. Gen. Dec. B-188408, Feb. 16, 1978, 78-1 CPD ¶136], where we fully examined how, if at all, the field of competition would be affected by the modification to the original contract. Therefore, based on the record, we can only conclude that the reason for the original paper's unavailability at the time of award was that it is a specialty product, produced only by a few sources. Moreover, the fact that there were at least nine potential sources of supply for the revised paper demonstrates that the field of competition was materially changed due to the modification. . . .

Turning to the instant appeal, ATTIS inherited the State's telecommunications lease agreements from Appellant on January 1, 1984. These lease agreements, of course, originally were entered into subject to tariff schedules and without competition. The leases are open ended and can be terminated

at any time by the State should it elect to purchase equipment of its own. Only ATTIS, and its predecessor Appellant, have been able to provide this type of agreement.

What is proposed by ATTIS here is the purchase of a substantial quantity of equipment for which competition now exists. Since the field of competition materially has changed as a result of DGS' decision to buy instead of lease equipment, any modification of the existing lease purporting to accomplish a purchase would be contrary to the requirements of Maryland's Procurement Law.

DGS argues that the bulk of its intended purchase is embedded CPE which no one else can offer. While this is certainly a true statement, the fact remains that the embedded CPE is simply a collection of hardware, the equivalent of which now is available through a number of vendors. Although the FCC has set limits on the price to be charged by ATTIS for the embedded CPE, DGS has no way of knowing whether it is the best price to be obtained absent competitive bidding. Compare Comp. Gen. Dec. A-66501, 15 Comp. Gen. 573 (1935).

Notwithstanding the foregoing, ATTIS contends that the "Maryland 10" measures are not a modification at all, but rather agreed upon maintenance or support of embedded CPE. In this regard, the FCC has defined these terms to include ". . . all levels of support for continued usefulness to a customer of embedded CPE, including maintenance and repair, moves, rearrangements, changes and growth." In the Matter of Procedures, supra, FCC 83-551 at p. 87 [Footnote 113]. The required scope of ATTIS' support and maintenance service further was set forth by the FCC as follows:

> In this section, we determine whether AT&T's plans for maintenance and related support of embedded CPE following its detariffing and transfer are consistent with the purposes of the tariffing transition plan prescribed by this Order. A purpose of the transition plan is to assure that AT&T's embedded base customers will have full opportunity to assess their equipment needs and to select the provider best able to meet those needs. As discussed in Part VII.A through VII.C, supra, we believe that the terms of AT&T's price predictability, as modified, provide adequate assurance that the customer will be afforded the necessary financial repose in which to make these determinations. If AT&T, however, fails to provide maintenance support sufficient to assure the usefulness of the customer's equipment during the price predictability period, the repose provided by AT&T's price assurances can be undermined. Also, the usefulness to a customer of installed equipment can be undermined by failure to support for moves, rearrangements, or growth. (Underscoring added).

In the Matter of Procedures, supra, p. 87. As a result of these rulings, we are told that ATTIS is permitted, within the scope of its service agreements, to make whatever changes are essential to the continued usefulness of a customer's telecommunications system. All that it is doing here allegedly is ". . . some badly-needed maintenance on a telephone network which has become in many ways obsolete." ATTIS' Comments To Agency Report, p. 14.

Our reading of the FCC Orders referenced is that ATTIS was commanded to perform whatever maintenance is deemed necessary to support its leased systems so as to assure their viability for the two year period of financial repose during which customer's were to decide whether leasing or buying made the most economic sense. Therefore, to the extent it was necessary to repair, move or upgrade leased equipment, ATTIS was to do so. The sale of equipment to improve telecommunications was not contemplated by the FCC in these Orders.

D. Was there An Exception Under Maryland Law Permitting a Non-Competitive Procurement?

Although we have determined that the planned purchase of telecommunications equipment by DGS would constitute an Article 21 procurement, the statutory requirement for competition may be avoided if the procurement officer, with the approval of his agency head, makes a determination that either a single source exists for the services desired, or an emergency justifies the need for non-competitive negotiations. Md. Ann. Code, Art. 21, §3-205; COMAR 21.05.01.01D. Here DGS contends that the proposed award is justified to ATTIS under the statutory exception governing emergencies. We agree.

An emergency is defined under COMAR 21.01.02.28 as:

> . . . a sudden and unexpected occurrence or condition which agency management reasonably could not foresee, posing an actual and immediate threat to the continuance of essential normal operation of a State agency or need to cope with public exigency condition. . . .

When such a situation arises, State agencies are authorized to utilize whatever procurement measures are reasonable and necessary to obtain the supplies, services or construction essential to meet the emergency.

In order to achieve some degree of economy and to assure that agency procurement officials are accountable for their decisions to avoid full and free competition, COMAR 21.05.06.04 imposes two conditions on the process. These conditions are set forth as follows:

> A. General. The purchase used shall assure that the required supplies, services, or construction items are procured in time to meet the emergency. Given this constraint, such competition as is practicable shall be obtained.
>
> B. Determination. Upon approval of the agency head or his designee, the procurement officer shall authorize, by written determination, the selection of a particular contractor for an emergency procurement. (Underscoring added).

COMAR 21.05.06.05 further requires that a notice of the emergency procurement be placed in the Maryland Register and that a full record of the procurement be prepared and forwarded to the Board of Public Works.

Whether an emergency condition exists is a decision left by the Legislature to the discretion of State procurement officials. In reviewing decisions of this type, our task is to ascertain whether the decision of the

procurement officials had a reasonable basis. Our judgment cannot be substituted for that of the agency officials charged with decision-making responsibility of this type. University of Maryland, Baltimore County Campus v. Solon Automated Services, Misc. Law Nos. 82-M-38 and 82-M-42, (Cir. Ct. Balto. Co. October 13, 1982).

In the instant appeal, the evidence establishes that the State's FY 1985 telecommunications budget request collectively was prepared, in the summer of 1983, by its various departments and independent agencies based on their existing usage patterns and a Maximum Allocation Request Ceiling (MARC) set by the Governor. During the next six months, as the State's FY 1985 budget was being reviewed and finalized by the Department of Budget and Fiscal Planning, there was considerable confusion as to the potential effect of divestiture on both the FY 1984 and 1985 budgets. (See Exh. 5 to State Agency Report). A total FY 1985 telecommunications request of $31,529,475 ultimately was submitted by the Governor to the Legislature. This represented an increase of approximately $4 million over the prior year's appropriation. (See Exh. 4 to State Agency Report). The Legislature approved this amount in full.

The extent of the potential budget shortage for FY 1985 was not evident until sometime in late April or early May 1984. At this time, cost figures for the first three months of operations under divestiture became available for analysis. DGS determined from this data that the State was facing a FY 1985 budget shortfall exceeding $5 million.

To its credit, DGS had recognized that cost reduction measures would be necessary well before the divestiture order became effective. However, since the final ground rules for divestiture were not set in place by the FCC until December 1983, there was little which could have been accomplished in terms of concrete planning. By December 1983, DGS had made ATTCOM, ATTIS and Appellant aware of its budgetary concerns and the need to reduce telecommunications costs.

The problem faced by DGS was one of maintaining present service while reducing costs and avoiding measures which potentially could impact implementation of the Master Telecommunications Plan. Lacking the internal expertise either to arrive at a solution to this complex problem or prepare an RFP, DGS went to its three current providers of service to request their assistance. Proposals from each were submitted in late March 1984 and were reviewed over the next two months. From its analysis of these proposals, DGS concluded that implementation of ten of the cost reduction measures by July 1, 1984, would avoid most of the telecommunications budget shortfall. Further, for every month that implementation of the measures was delayed, nearly $400,000 in cost savings would be lost.

The evidence further shows that had DGS elected to advertise the procurement, it would have had to hire a consultant both to prepare an RFP and assist it in evaluating proposals. This process alone would have taken months. By the time a competitive award could have been made for telecommunications equipment, at least half of FY 1985 would have been gone and some considerable savings along with it.

State agencies are precluded by law from spending in excess of each line item in its appropriation. While we take administrative notice of the fact that some budgetary flexibility exists to shift funds from item to item within an agency's budget, the total expenditures of an agency by law cannot exceed its total appropriation. Here State agencies were faced with sizable shortfalls in telecommunications, salary and perhaps related fringe benefits. Accordingly, the sum of these deficits reduced budgetary flexibility and posed an actual and immediate threat to the continuance of essential telecommunications services. Given this factor, it is clear that some action had to be taken immediately to avoid disaster.

Nevertheless, Appellant contends that the budget problem was not caused by a sudden and unexpected occurrence or a condition which agency management reasonably could not foresee. Although we agree that divestiture was foreseeable, its effects were not accurately predictable. Given the timetable in which State agencies were required to prepare their FY 1985 budgets, the confusion surrounding divestiture, and the complexity of the State's telecommunications system, DGS could not get a true picture of FY 1985 telecommunications costs until the budget for that year had been set in concrete. Under these circumstances, the magnitude of the budget shortage was not foreseeable and DGS' decision to declare an emergency was reasonably founded.

We further note that DGS obtained the maximum competition practical under the circumstances. Witnesses for both Appellant and ATTIS agreed that analyzing and redesigning a telecommunications network takes many months. Only those suppliers familiar with the existing system reasonably could have responded in a manner timely enough to permit the necessary savings for FY 1985. Further, despite the fact that Appellant did not realize initially that networking and new equipment could be offered, it was given the opportunity by DGS to revise its proposal to include such offerings. Accordingly, the requirements of COMAR 21.05.06.04A, mandating maximum competition practicable, were adhered to.

With regard to the documentary requirements set forth in COMAR, it is clear from the evidence that Secretary Seboda declared the emergency and authorized the non-competitive process. Secretary Seboda additionally appeared before the Board of Public Works in public session to explain his recommendation and those in attendance understood from his explanation that, if this was an Article 21 procurement, the emergency exception to the requirement for competitive bidding was being invoked. (Exh. 16 to Agency Report, p. 81).

Finally, Appellant contends that the foregoing result is untenable because it would invite State agencies to manipulate budget requests and expenditures so as to permit sole source procurements. We disagree.

The emergency process is set up so as to safeguard, as much as possible, the integrity of the competitive process. A procurement officer's decision to declare an emergency is subject to mandatory review both by his agency head and the Board of Public Works. Further, because a determination that an emergency exists must be made in writing and maintained in the agency's procurement files, it is subject to question by the State's Legislative Auditors. As a final measure, the procurement officer must announce his actions to all concerned with Maryland procurement by publishing notice of

the emergency award in the Maryland Register. If the emergency is declared or created solely to avoid the statutory requirements of competition, it is likely to be challenged under such scrutiny.

In the instant appeal, there is no evidence that DGS sought to favor ATTIS in declaring an emergency and proceeding with non-competitive negotiations. Appellant, ATTCOM and ATTIS all were given a fair and equal opportunity to propose cost reduction measures for possible implementation. ATTIS' proposals were selected only because they offered the greatest potential for reducing the anticipated shortfall while avoiding impact to the ultimate implementation of the State's Master Telecommunications Plan.

For all the foregoing reasons, therefore, the appeal is denied.

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	Provider Selected	Offered by C&P	Offered by ATT COM	Offered by ATT IS
1. Stabilizing the rates of 80% of the States existing Centrex installations.	C & P	X		
2. Establishing an accurate data base that will lead to the continuing monitoring of the State's telephone network.	ATT COM		X	X
3. Lease Expanded WATS Service	C & P	X	X	
4. Optimizing Marcom by coordinating the routing of all traffic, inter-state and intra-state, On-Net and Off-Net, for all 32 existing Marcom locations.	ATT COM		X	
5. Purchasing approximately 35,000 of existing telephone stations.	ATT IS			X
6. Establishing a limited network in five "hub" locations within the State.	ATT IS			X
7. Upgrading a minimum number of "701" switches that are a high cost to maintain.	ATT IS			X
8. Buying existing switches that are now leased.	ATT IS			X
9. Obtaining a service agreement that will provide for a fixed cost for maintenance instead of paying on "time and materials" basis.	ATT IS			X
10. Allowing a single telephone company to act as the State's agent while master plan is being developed.	ATT IS	X	X	X

Table I
EQUIPMENT SAVINGS

	A CENTREX STATIONS	B EBO STATIONS	C EBO GOING FORWARD 1/	D 5 HUB ETN 2/	E 7 UPGRADES 3/
Stations	14,811	10,115	3,140	4,487	2,[illegible]
Lease Purchase Term	3	3	3	5	5
Financial Analysis Term	5	5	5	5	5
Projected 5 Year Costs (Assumes Lease Continuance)	$8,560,686	$6,081,431	$3,316,497	$5,683,264 4/	$2,616,248
Financed Purchase and Maintenance 5/	4,561,522	2,139,825	1,700,195	6,339,495	2,449,183
Savings/Cost Avoidance 5/	3,999,164	3,941,606	1,616,302	-656,232	167,065

Total savings/cost avoidance including discounts $13,168,375

1/ 25 PBXs

2/ 5 PBXs

3/ 7 PBXs

4/ Includes Centrex charges

5/ Does not include discounts

APPENDIX 2

TABLE II
ATT IS ESTIMATE
SAVINGS IN CALLILNG CHARGES

Projected Five-year Cost if no Change		
(Actual calling volume in calendar 1983 for intrastate toll charges at $.32 per minute[1]		
plus		
Actual 1983 MARCOM volume in calendar 1983 at R)[2]		
x 5 years	=	$25,830,000
Projected Cost with Network		
Actual calling volume in calendar 1983 for intrastate toll calls x $.17 per minute[3] x 5 years	=	14,025,000
Savings/Avoidance		11,805,000

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[1] Projected average direct distance dialing rate for intrastate calls.

[2] R is $.21 per minute, the present effective cost per minute for MARCOM through December 31, 1984. As of January 1, 1985, R is $.32 per minute, the projected average direct dialing rate for intrastate calls. ATT COM projects a minimum of a 100% increase in rates for the intrastate lines associated with MARCOM. With the minimum increase, the effective cost per minute on MARCOM would be $.32.

[3] Estimated average cost per minute with network rearrangement.