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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

**FILE:** B-209358

**DATE:** April 22, 1983

**MATTER OF:** Ecological Research Services, Inc.

**DIGEST:**

Potential subcontractor's protest against subcontract awards is dismissed because it does not meet any of the circumstances under which GAO considers subcontractor protests.

Ecological Research Services, Inc. (ERS), protests the award of subcontracts to Michigan State University pursuant to request for proposals (RFP) No. E06515-82-R-00015 issued by Illinois Institute of Technology Research Institute (Institute). The RFP was issued under the Institute's prime contract with the Naval Electronic Systems Command (NAVELEX) for the provision of technical support services for the Extremely Low Frequency (ELF) Environmental Compatibility Assurance Program.

ERS protests the award of those subcontracts alleging that its proposal did not receive a fair and complete review by the Institute due to the undue influence exercised by one of the evaluators. The protest is dismissed.

To facilitate public understanding and acceptance of the ELF Communications Program and to provide advice to the contractor on environmental issues, NAVELEX established an Environmental Review Committee (Committee) whose members included representatives from several naval commands, including NAVELEX. The Institute routinely holds public meetings to brief the Committee on the status of its work under the contract.

The contract required the Institute to implement a program to study the long-term, low-level electromagnetic effects of the ELF Communications Systems on various ecological species in Wisconsin and Michigan. The Institute decided to subcontract for the studies and prepared a statement of work in anticipation of issuing an RFP. The statement of work was submitted

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to the Committee for its review and comments; no changes were made as a result of that review.

Following submission of proposals, a technical review was conducted and proposals were ranked. The Institute provided the Committee with a one-page description and oral presentation summarizing each proposal. No change in relative ranking occurred as a result of this presentation. Best and final offers were requested from all offerors receiving a minimum technical score in the rankings. Subcontract negotiations were completed on July 29, 1982. Navy personnel were not involved in either the evaluation or the negotiation processes.

After the Institute selected potential subcontractors, it asked NAVELEX to provide for audits of those subcontractors. NAVELEX arranged for the Office of Audit of the Department of Health and Human Services to provide the necessary assistance and to report the audit results directly to the Institute. In early September, after audit results were received, the Institute awarded the subcontracts with the Navy's concurrence.

As a general rule, the statutes and regulations governing direct Federal procurement do not apply to the contracting practices and procedures of prime contractors, who normally are acting as independent contractors. See Singer Company, Inc., Kearfott Division, 58 Comp. Gen. 218 (1979), 79-1 CPD 26. Therefore, our Office will consider subcontractor protests only in limited circumstances: (1) where the prime contractor is acting as the purchasing agent of the Government; (2) where the Government's active or direct participation in the selection of the subcontractor has the net effect of rejecting or selecting a potential subcontractor, or significantly limiting subcontract sources; (3) where fraud or bad faith is shown in the Government's approval of the subcontract award or proposed award; (4) where the subcontract is "for" an agency of the Government; or (5) where the

questions concerning the award of subcontracts are submitted by Federal officials who are entitled to advance decisions by this Office. Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD 166. While ERS contends that its protest falls within the Optimum Systems criteria, we disagree.

ERS's contention that the Institute was acting as the purchasing agent of the Government in the subcontract awards is not supported by the facts. We have held that a prime contractor is acting as an agent of the Government where the legal effect of the contractor's actions is binding on the Government. See Universal Aircraft Parts, Inc., B-187806, January 11, 1979, 79-1 CPD 14. The Navy's contract with the Institute did not authorize it to act as the Government's agent and the legal effect of the subcontracts was to bind the Institute, not the Government. Therefore, this contention is without merit.

The protester's allegation that the Navy's direct participation in proposal review and selection caused its proposals to be rejected likewise is without merit. While we would consider such a protest if the facts supported the protester's allegation, Beall Pipe, Inc., B-204203, April 28, 1982, 82-1 CPD 396, the record here does not support ERS's position. The only Navy personnel involved in proposal review and selection were those individuals serving on the Committee, who were briefed periodically on the subcontract award. The record does not support, nor does the protester supply any evidence suggesting, a finding that the Committee directly participated in proposal review and selection or caused ERS's rejection as a potential contractor.

ERS also contends that the Navy's approval of the subcontract award gives GAO jurisdiction over this protest since bad faith, if not fraud, was involved in the alteration of research topics and evaluation criteria. While we have held that GAO will assume jurisdiction over the protest if, where the Government has approved the subcontract award, bad faith or fraud

on the part of the Government is shown, see 51 Comp. Gen. 803 (1972), the protester has not demonstrated any Government action which supports this contention. To support a finding of bad faith, the record must show irrefutable proof that the agency had a malicious and specific intent to injure the party alleging bad faith. Arlandria Construction Company, Inc., B-195044, B-195510, April 21, 1980, 80-1 CPD 276. At best, ERS has addressed action taken by the prime contractor independent of Government involvement and, thus, provides no basis for GAO jurisdiction over this protest under this exception.

Since the protester offers no reasons under the other Optimum Systems exceptions for our Office to assume jurisdiction over this protest, the protest must be dismissed.

*Harry R. Van Cleve*

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