

DECISION

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

*Center**118633*

FILE: B-207112

DATE: May 28, 1982

MATTER OF: Electronic Space Systems Corporation

DIGEST:

A complaint that the Department of Energy's use of a cooperative agreement, rather than a procurement, was improper is dismissed because the complainant has failed to establish that the project in question should have been the subject of a procurement.

On April 14, 1982, Electronic Space Systems Corporation (ESSCO) complained to our Office about the Department of Energy's (DOE) intent to enter into a cooperative agreement with another company, Advanco Corporation (Advanco), for a research project. We dismiss ESSCO's complaint.

As ESSCO describes it, this effort originated with the issuance by DOE of program opportunity notice (PON) No. DE-PN04-81-AL16333(PON) for the design, fabrication, test and performance evaluation of a prototype solar parabolic dish/Stirling engine system module described in detail in the PON. (Oversimplified, a Stirling engine produces power in much the same manner as gasoline or diesel engines, except that in a Stirling engine heat is applied to the cylinders externally rather than by burning a fuel, such as gasoline, inside the cylinders. A parabolic dish or "concentrator" can focus the sun's rays into a small area to produce the heat needed to operate the Stirling engine. The two devices may be combined, for instance, as a stand-alone system to run an electric generator.) ESSCO also states that in reviewing the PON, it noted that the P-40 Stirling engine, manufactured by United Stirling, Inc. (United), was "frequently mentioned" in section "G" of the PON. We have examined the PON and find that section "G," to which ESSCO refers, provides background technical information on at least five different Stirling engines.

ESSCO indicates that its efforts to link up with United in the proposal effort were unsuccessful because United had an exclusive commitment to another proposer, which we presume to be Advanco. ESSCO, therefore, provided information in its proposal on other Stirling engines and proposed to make an extensive evaluation of all Stirling engines after the agreement was completed. We have been informally advised that the solicitation closed in August 1981 and that DOE received five proposals. At a debriefing in April 1982, ESSCO was advised that it was not selected because of the inadequacy of the Stirling engine portion of its proposal.

ESSCO asserts, in effect, that the United Stirling-Advanco exclusive arrangement and an alleged DOE preference for the United Stirling engine resulted in a de facto sole source which would not have been justifiable under the procurement regulations. ESSCO contends that DOE conducted this effort as a cooperative agreement rather than a procurement in an improper effort to avoid the statutory and regulatory requirements for competition which govern Federal procurements.

We have stated that we will consider an objection to an agency's use of a cooperative agreement only if there appears to be a conflict of interest, not alleged here, or when there is a showing that the agency is using the cooperative agreement to avoid the statutory and regulatory requirements for competition which would apply to a procurement. Renewable Energy, Inc., B-203149, June 5, 1981, 81-1 CPD 451; Del Manufacturing Company, B-200048, May 20, 1981, 81-1 CPD 390. At a minimum, however, this latter showing requires a clear demonstration that the particular project or undertaking which is the subject of the cooperative agreement should properly have been the subject of a procurement. Based on our reading of ESSCO's initial filings with our Office, we conclude that ESSCO has failed to satisfy this threshold requirement.

ESSCO relies for its conclusion that this should have been a procurement on the assertion that a stand-alone electrical generating system would be very useful at remote military and weather stations and that this

direct benefit falls within the definition of "procurement under the Federal Grant and Cooperative Agreement Act of 1977, Pub. L. 95-224, 41 U.S.C. §§ 501, et seq., (1976 Ed., Supp. III), as the acquisition of property and services for the direct benefit of the Government. (See 41 U.S.C. § 503(a).) ESSCO also points to the similarity between the language and format used in this PON and in DOE solicitations for negotiated procurements, such as references to "proposals," the establishment of one person as the point of contact, and the use of point scoring in the evaluation of proposals, as reflecting the intent to conduct a procurement.

Initially, we do not agree with ESSCO's apparent position that "benefit" is dispositive of the question of whether a contract, grant or cooperative agreement should be used in any particular instance. In this regard, we note parenthetically that even if we agree with ESSCO that stand-alone electrical generating equipment might be useful to the Government in many applications, there are as many instances in which such devices might be of benefit to private and commercial interests, particularly in remote areas for such commonly identifiable activities as oil exploration or logging. Rather than rely on "benefit," our Office has expressed the position that whether any specific project or undertaking should be accomplished through a procurement, grant or cooperative agreement should be determined by the purpose of the proposed activity-- that is, whether it is the Government's principal purpose to acquire the services or goods in question, or whether it is the Government's purpose to stimulate or support their production. (This assumes, of course, that the agency has the statutory authority to enter into the type of relationship in question.) See "Agencies Need Better Guidance for Choosing Among Contracts, Grants, and Cooperative Agreements," Report of the Comptroller General, GGD-81-88, September 4, 1981. The Federal Grant and Cooperative Agreement Act of 1977, supra, gives the agency considerable discretion in determining which mechanism to use to carry out the project or activity in question. This Office will not question the exercise of that discretion unless it appears that

the agency disregarded the statutory and regulatory guidance provided to assist in making these determinations or if we find that the agency lacked authority to enter into a particular assistance relationship. None of these factors are applicable here.

Under the Solar Energy Research, Development and Demonstration Act of 1974, Pub. L. 93-473, 88 Stat. 1431, 42 U.S.C. § 5551, et seq. (1976), as modified by the Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565, August 4, 1977, DOE has the responsibility to conduct, support, and stimulate scientific, economic, social, and environmental research and studies on the beneficial uses of solar energy, 42 U.S.C. §§ 5555(b)(1), (2) and (3) (1976). We think it a fair summary to state that the purpose of these efforts is to promote the broad national interest rather than to satisfy a specific governmental need for a supply or service. 5 U.S.C. § 5551 (1976). The requisite statutory authority to enter into an assistance relationship is clearly present.

In our view, this PON reflects the broader support and stimulation purposes of the Solar Energy Research, Development and Demonstration Act of 1974, supra, rather than an intent to acquire services or technology, and, therefore, was correctly denominated a cooperative agreement. We note, for instance, that as described in the PON, the primary purpose of the project is:

"* * * to encourage firms who, in cooperation with the Government, will identify the market, design, assemble, and perform sufficient tests to establish the technical feasibility of a prototype dish-Stirling module for their early sales promotion. The ultimate goal of this project is the availability of a dish-Stirling module as a commercially available product in the 1984-1985 time frame. * * *"

The specifications, sample statement of work, and other materials included with the PON, are consistent with this expressed purpose. In sum, it is our reading of the PON that its principal purpose is to encourage

the development and early market entry of a dish/Stirling module rather than to support the conduct of a procurement. A cooperative agreement is an appropriate vehicle to accomplish this objective. We therefore have no reason to question the method that DOE selected to pursue this project.

Since ESSCO's initial filings with our Office, read in the light most favorable to ESSCO and without answer or rebuttal, fail to demonstrate that this project should have been conducted as a procurement, we conclude that the conditions under which we might consider ESSCO's complaint are absent. We therefore dismiss ESSCO's complaint.

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