

12/18/91



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: United Telephone Company of the Northwest

File: B-246333

Date: December 18, 1991

Thomas J. Madden, Esq., and William L. Walsh, Esq., Venable, Baetjer, Howard & Civiletti, for the protester.
Richard C. Duvall, Esq., and Richard L. Moorhouse, Esq., Dannels, Duvall & Porter, for Westinghouse Hanford Company, an interested party.
Thomas P. Humphrey, Esq., and Mark D. Colley, Esq., Davis, Graham & Stubbs, for US WEST Communications Services, Inc., an interested party.
Paul Lewis, Esq., Department of Energy, for the agency.
Christine F. Bednarz, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. The General Accounting Office (GAO) will not consider the protest of a subcontract award by a Department of Energy management and operations contractor that was not filed within 10 working days of the subcontract award decision, even though the award decision was the subject of an earlier decision by the General Services Administration Board of Contract Appeals (GSBCA) granting the protest and directing an award to the protester, which decision was vacated for want of jurisdiction by the U.S. Court of Appeals of the Federal Circuit; the GSBCA filing does not toll GAO's timeliness requirements. Also, contrary to the protester's argument, GAO generally measures the timeliness of a subcontract award protest from the time of the subcontract award decision, not the government approval of such decision.

2. Untimely protest of a subcontract award by a Department of Energy management and operations contractor that alleges conflict of interest violations and improper post best and final offer discussions does not warrant consideration under the significant issue exception to the General Accounting Office (GAO) Bid Protest Regulations timeliness rules, even where a vacated decision of the General Services Administration Board of Contract Appeals (GSBCA) found these violations and the government effectively conceded these violations in a brief filed on an appeal of the GSBCA decision, since these issues are not of widespread interest to the

procurement community and have been considered on the merits in previous GAO decisions.

DECISION

United Telephone Company of the Northwest protests the award of purchase order No. MOW-SVV-393260 to US WEST Communications Services, Inc., for the acquisition of an integrated voice/data telecommunications system for the Department of Energy (DOE) Hanford Nuclear Site. Westinghouse Hanford Company conducted the procurement by or for the Department of Energy in its capacity as a Hanford Site management and operations (M&O) contractor.

We dismiss the protest.

This requirement was originally solicited in 1986 by a predecessor M&O contractor. The procurement was ultimately assigned to Westinghouse in early 1988. Westinghouse conducted several rounds of discussions, which culminated in a request for best and final offers (BAFO) on December 29, 1988, to which four firms, including United and US WEST, responded by January 31, 1989. After a final evaluation, Westinghouse selected US WEST for award primarily owing to the firm's lower overall cost.

On March 1, 1989, United protested to Westinghouse that a conflict of interest tainted the proposed award to US WEST. This alleged conflict involved the former DOE Hanford telecommunications manager, who was employed by a US WEST subcontractor. Westinghouse denied the protest on April 21, 1989. Around that time DOE stated that it was prepared to approve Westinghouse's award selection of US WEST.

United filed a protest with the General Services Administration Board of Contract Appeals (GSBCA) on April 27, 1989, again asserting the alleged conflict of interest. DOE, Westinghouse, and US WEST moved GSBCA to dismiss United's protest for lack of jurisdiction, arguing that the Brooks Act, as amended by the Paperwork Reduction Reauthorization Act of 1986, Pub. L. Nos. 99-500; 99-591, limits GSBCA's protest jurisdiction to federal agency purchases, which does not include prime contractor purchases. The GSBCA expressly determined that it had protest jurisdiction over this purchase because the solicited telecommunications system was subject to Brooks Act coverage and because Westinghouse was DOE's "agent or conduit" for purposes of this acquisition. United Tel. Co. of the Nw., No. 10031-P, May 17, 1989, 89-3 BCA ¶ 21,916.

On July 25, 1989, following a trial on the merits, GSBCA granted United's protest of the award to US WEST, finding the award tainted both by the alleged conflict of interest,

from which US WEST may have obtained a competitive advantage, and by impermissible post-BAFO discussions between Westinghouse and US WEST. United Tel. Co. of the Nw., No. 10031-P, July 25, 1989, 89-3 BCA ¶ 22,108. GSBICA directed DOE and Westinghouse to award the contract to United as the only remaining acceptable offeror.¹

On August 15, 1989, US WEST, joined later by Westinghouse, appealed the GSBICA's decision to the Court of Appeals for the Federal Circuit, arguing that GSBICA's assertion of bid protest jurisdiction over awards by government prime contractors and the granting of United's substantive protest were improper. DOE, through the Department of Justice, filed a brief asserting that GSBICA had jurisdiction to entertain this subcontract award protest, though not upon the basis asserted by GSBICA, and that GSBICA properly disqualified US WEST from the procurement. In arguing that GSBICA properly disqualified US WEST from award, the government brief expressly states that the record supported the GSBICA findings that a conflict of interest tainted the procurement and that Westinghouse held improper post-BAFO discussions with US WEST.

On July 29, 1991, the Court of Appeals vacated GSBICA's decision on the jurisdictional grounds asserted by US WEST and thus declined to reach the merits of United's bid protest. US WEST Comms. Servs., Inc. v. United States, 940 F.2d 622 (Fed. Cir. 1991). On October 7, 1991, the court issued a mandate implementing the judgment, which had the effect of lifting GSBICA's stay on an award to US WEST under the procurement. On October 8, 1991, Westinghouse awarded the contract to US WEST with DOE's approval. United protested the award to our Office on October 18, 1991.

DOE, Westinghouse, and US WEST move for summary dismissal of United's protest. In particular, the movants argue that Competition in Contracting Act (CICA) contemplates a final forum election and precludes a protester, who first files with the GSBICA, from then protesting the same matter to the General Accounting Office (GAO). 31 U.S.C. § 3552 (1988); see also 4 C.F.R. §§ 21.1 (1991), 21.3(m)(6), as amended by 56 Fed. Reg. 3759 (1991). The movants additionally argue that our Bid Protest Regulations, which require that protests be filed not later than 10 working days after the basis of protest is known or should have been known, dictate dismissal of United's protest as untimely, since the protest concerns a 1989 award decision. 4 C.F.R. § 21.2(a)(2). As support for their dismissal request, the movants cite our

¹Westinghouse had eliminated the other two offerors from award consideration because of exceptions taken to the solicitation requirements.

decision in System Automation Corp., B-224166, Oct. 29, 1986, 86-2 CPD ¶ 493.

In System Automation, the protester initially contested a contract award to GSBCA. The procuring agency sought dismissal of the protest at GSBCA on grounds that the Brooks Act did not cover the procurement in question and that GSBCA thus lacked protest jurisdiction. GSBCA believed that it had jurisdiction and upheld the protest based upon the agency's failure to conduct meaningful discussions with the protester. Subsequently, the Court of Appeals for the Federal Circuit reversed GSBCA's decision for lack of jurisdiction. The protester then filed a protest with our Office within 10 working days of the Federal Circuit's reversal of the GSBCA decision. We dismissed the protest as untimely.

In System Automation, we discussed the provision of our Bid Protest Regulations requiring the protester to file with our Office within 10 days of learning of the contract award--the event forming the basis of its protest. We disagreed with the protester's argument that the reversal of the GSBCA decision established a new basis of protest, which could then be protested to our Office. We found that our timeliness requirements were not tolled by the protester's pursuit of its protest with GSBCA, reasoning that such a result was precluded by CICA's forum election provision. That provision states that an interested party who has filed a GSBCA protest "with respect to a procurement or proposed procurement may not file a protest with respect to that procurement" at GAO, 31 U.S.C. § 3552. As this provision contemplates an election between this Office and GSBCA, we held that we could not permit a protester to use an initial filing with GSBCA to preserve a "right to be heard here when it later protests in an untimely manner under our Bid Protest Regulations."

United argues that the rule in System Automation imposes an improper procedural preference for the GAO protest forum. Because the GSBCA's jurisdiction is now relatively settled, cases which are reversed on appeal for lack of jurisdiction should be increasingly rare, so we do not agree that System Automation creates any meaningful preference. The absence of any preference is confirmed by the fact that GSBCA has adopted the same rule for protests first filed at the GAO. See Micro Research, Inc., GSBCA No. 8405-P, Apr. 7, 1986, 86-2 BCA ¶ 18,899 (GSBCA dismissed protest initially filed with GAO as untimely, where GAO had dismissed the protest as a matter of contract administration and the GSBCA protest was filed more than a month after the basis of protest had arisen; the GAO filing did not toll the GSBCA's timeliness rules).

United argues alternatively that this case should not fall under the System Automation rule. As United observes, CICA's forum election provision does not bar a GAO protest filed after the dismissal of a GSBICA protest for want of jurisdiction, provided that the GAO protest independently satisfies our Office's timeliness requirements. See, e.g., Telos Field Eng'g, 68 Comp. Gen. 295 (1989), 89-1 CPD ¶ 238.² United claims that its protest satisfies our timeliness requirements because it protested within 10 working days of DOE's October 8, 1991, approval of the US WEST award. United explains that DOE's approval forms a fresh basis of protest because it flouts DOE's litigation position, as well as GSBICA's findings of fact, that US WEST should have been disqualified from the procurement.

The protestable event in a subcontractor award protest is generally the award decision itself, not the government's approval of that decision, and protest timeliness must be measured from that protestable event. CICA authorizes our Office to consider written objections by an interested party to a solicitation by a federal agency for bids or proposals for a proposed contract or "written objection(s) by an interested party to a proposed award or the award of such a contract." 31 U.S.C. § 3551(j). In the context of subcontractor procurements, we have interpreted this provision to authorize a review of protests where, as a result of the contractual relationship between the prime contractor and the government, the prime contractor effectively awards the contract "by or for," that is, on behalf of, the government. 4 C.F.R. § 21.3(m)(10); Rhode & Schwarz-Poland, Inc.--Recon., B-219108.2, July 8, 1985, 85-2 CPD ¶ 33. Government approval of a subcontract award is not ordinarily a factor in determining whether a subcontract award is "by or for" the government and thus subject to our bid protest jurisdiction. Toxco, Inc., 68 Comp. Gen. 635 (1989), 89-2 CPD ¶ 170; Rhode & Schwarz-Poland, Inc.--Recon., supra. Specifically, we will not consider a subcontract award effectively directed by the government unless the purchase is on behalf of the government as determined by the contractual relationship between the prime contractor and the government. Toxco, Inc., supra. Cf. St. Marys Hosp. and Med. Center of San Francisco, CA, B-243061, June 24, 1991, 70 Comp. Gen. ____, 91-1 CPD ¶ 597; University of Michigan; Indus. Training Sys. Corp., 66 Comp. Gen. 538 (1987), 87-1 CPD ¶ 687 (GAO assumed bid protest jurisdiction over subcontract procurements where the government involvement in the

²In Telos Field Eng'g we considered a protest first filed at GSBICA, where both GSBICA's dismissal of the protest for lack of jurisdiction and the filing at our Office were within 10 working days of when the protester originally knew of its protest basis.

procurements was so pervasive that it effectively took over the procurements, including the evaluation of proposals and the source selection). Since government approval of the subcontract award is not the significant event in determining our bid protest authority in these matters, we believe that protest timeliness should be measured from the subcontract award decision and not the subcontract's approval by the agency.³ See St. Marys Hosp. and Med. Center of San Francisco, CA, supra (timeliness measured from subcontract award decision and denial of protest to prime contractor).

It is apparent that the gravamen of United's protest concerns Westinghouse's award decision, not the recommendation and approval process following the Court of Appeals' vacating the GSBICA decision. United continues to assert that US WEST may not properly receive award of the subcontract in light of the alleged conflict of interest and post-BAFO discussions--matters that go to the propriety of the Westinghouse award decision, which United has previously protested to GSBICA. As indicated above, CICA requires a protester to make an election between GSBICA and GAO, and our timeliness rules are not tolled when a GSBICA protest is filed in order to assure GAO consideration in the event GSBICA does not finally resolve the matter. Electronic Sys. Assocs., Inc.--Recon., B-235323.2; B-235323.3, June 23, 1989, 89-1 CPD ¶ 596. This is as true in cases filed at our Office, in which the GSBICA itself previously dismissed the protest within a few weeks of filing, as it is when the final decision is reached years later in an appellate process. See e.g., Amertech Indus., Inc., B-229498, Nov. 9, 1987, 87-2 CPD ¶ 469. We view United's protest of the 1991 recommendation and approval process as a collateral attack on Westinghouse's 1989 award decision. See generally Systems Eng'g and Mgmt. Co.--Recon., B-234047.4, Aug. 20, 1990, 90-2 CPD ¶ 144. United's failure to protest that 1989 award decision to our Office within 10 working days renders its protest untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2).

³United suggests that it would have been premature to protest to our Office until Westinghouse actually awarded the contract with DOE's approval, i.e., October 8, 1991. We disagree because, as indicated above, our protest jurisdiction is based upon the subcontract award decision, not the government approval process. Moreover, United did not await the actual award to file its agency-level and GSBICA protests. Our Office has not dismissed as premature protests against unapproved subcontractor award decisions.

United also suggests that the 1991 award to US WEST forms a new basis of protest because it contradicts Westinghouse's intention to award the contract to United, as reflected by a Westinghouse letter to United dated August 4, 1989. The apparent motivation for this letter is the July 25, 1989, GSBICA decision directing Westinghouse to award the contract to United; there is no indication that this reflected a new source selection decision.

Finally, United suggests that it lacked sufficient information to protest prior to the October 8, 1991, award, in that the protective order issued by GSBICA withheld from United the details of its own evaluation and led United to believe that its proposal remained under active consideration. United has not protested the reasonableness of its evaluation, but rather the presence of a conflict of interest and improper post-BAFO discussions influencing the award to US WEST. United possessed this information when it protested these matters to Westinghouse and GSBICA in 1989.

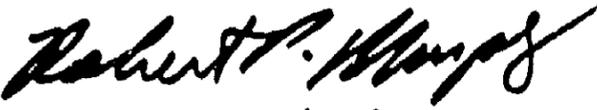
Assuming that its protest is untimely, United suggests that we should nonetheless consider it under the "significant issue" exception to the timeliness rules because the facts of the case indicate improper action on the part of the agency. Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. While we may invoke the significant issue exception when, in our judgment, the circumstances of a given case are such that our consideration of the protest would be in the interest of the procurement system, we strictly construe this exception in order to assure that the timeliness rules are meaningful. The exception reaches protests that raise issues of widespread interest to the procurement community and which have not been considered on the merits in a previous decision. DynCorp, 70 Comp. Gen. 38 (1990), 90-2 CPD ¶ 310.

The resolution of issues that relate only to the requirements and evaluation procedures of a single solicitation do not generally fall within the significant issue exception, even where the record indicates there is a material error by the agency in the conduct of a procurement. Id. United's protest, which challenges Westinghouse's source selection on grounds that our Office has considered previously, i.e., the effect of post-employment restrictions and post-BAFO discussions on procurements, see, e.g., Nadduf Intl. Trading Co., B-238768; B-238768.2, Oct. 19, 1990, 90-2 CPD ¶ 316; The Earth Tech. Corp., B-230980, Aug. 4, 1988, 88-2 CPD ¶ 113 (post-employment restrictions); Microlog Corp., B-237486, Feb. 26, 1990, 90-1 CPD ¶ 227 (post-BAFO

discussions), does not fall under the significant issue exception, Dyncorp, supra; Correa Enter., Inc.--Recon., B-241912.2, July 9, 1991, 91-2 CPD ¶ 35 (alleged conflict of interest is not a significant issue).

While United suggests that our dismissal of this protest will leave it without a remedy, we find this result is consistent with the CICA admonition that protests be expeditiously resolved. Further, it appears that United is not without a remedy since it could likely pursue this matter in a United States District Court. See 31 U.S.C. § 3556; 40 U.S.C. § 759(f)(6)(C) (1988); Bayou States Sec. Servs., Inc., v. Dravo Util. Constr., Inc., 674 F.2d 325 (5th Cir. 1982).

The protest is dismissed.


for James F. Hinchman
General Counsel