



Comptroller General
of the United States
Washington, D.C. 20548

Pietrovento
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Decision

Matter of: Kerr-McGee Chemical Corporation
File: B-252979
Date: May 3, 1993

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Guy R. Pietrovento, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

A subcontractor's protest of subcontract awards by a government prime contractor are not "by" the government so as to justify the General Accounting Office taking jurisdiction over the protest, where the government's involvement is not so pervasive that the government in effect took over the procurement from the prime contractor.

DECISION

Kerr-McGee Chemical Corporation protests the award of a subcontract to Western Electrochemical Company (WEC) under request for proposals (RFP) No. X0538, issued by the Morton Thiokol, Inc. for ammonium perchlorate, to be supplied to the National Aeronautics and Space Administration (NASA) under Thiokol's prime contract with NASA. Kerr-McGee argues that NASA improperly directed a noncompetitive subcontract award under Thiokol's prime contract.

We dismiss the protest.

Thiokol is NASA's prime contractor for the space shuttle solid rocket motor. Ammonium perchlorate is an oxidizer¹ that is one of the principal ingredients of the solid fuel used in the space shuttle's boosters. Kerr-McGee and WEC are the only domestic producers of ammonium perchlorate.

Thiokol issued the RFP to Kerr-McGee and WEC, and sought proposals for five "flight sets" of ammonium perchlorate for the 1993 fiscal year and quotations for future year require-

¹An oxidizer is used to support the combustion of a rocket propellant.

ments.² Multiple awards could be made, and Thiokol stated, in response to Kerr-McGee's inquiry, that Thiokol's "primary intent [was] to award the [ammonium perchlorate subcontracts] on the [basis of the] lowest price per pound submitted . . . from the two qualified suppliers."

On March 11, 1993, Thiokol informed Kerr-McGee that Thiokol only intended to award three flight sets of ammonium perchlorate, and that it had decided to award a greater quantity of flight sets to WEC. Kerr-McGee states that its prices for ammonium perchlorate historically have been lower than WEC's, and that it believes that its proposed prices were lower than WEC's for this subcontract procurement. Kerr-McGee filed an agency-level protest with NASA, which NASA dismissed because Thiokol's subcontract awards were not made "by or for" NASA; that is, NASA took the position that the subcontract award selections were made solely by Thiokol and not by NASA. Kerr-McGee then filed this protest with our Office.

Under the Competition in Contracting Act of 1984 (CICA), our Office has jurisdiction to resolve bid protests concerning solicitations and contract awards that are issued "by a [f]ederal agency." 31 U.S.C. § 3551(1) (1988). In the context of subcontractor procurements, we interpret CICA as authorizing us to review protests only where, as a result of the government's involvement in the award process or the contractual relationship between the prime contractor and the government, the subcontract in effect is awarded on behalf of the government, that is, where the subcontract is awarded "by or for" the government. See Ocean Enters., Ltd., 65 Comp. Gen. 585 (1986), 86-1 CPD ¶ 479, aff'd, 65 Comp. Gen. 683 (1986), 86-2 CPD ¶ 10. For example, we have considered subcontractor selections to be "for" the government where they concern: (1) subcontracts awarded by prime contractors operating and managing certain Department of Energy, or other agency, facilities; (2) purchases of equipment for government-owned, contractor-operated plants; and (3) procurements by certain construction management prime contractors. Id. We have considered subcontractor selections to have been made "by" the government where the agency's involvement in the selection process was so pervasive as to amount to a procurement by the government. See St. Mary's Hosp. and Med. Center of San Francisco, Cal., 70 Comp. Gen. 579 (1991), 91-1 CPD ¶ 597; University of Mich.; Indus. Training Sys. Corp., 66 Comp. Gen. 538 (1987), 87-1 CPD ¶ 643.

²A "flight set" is approximately 800 tons of ammonium perchlorate, which represents the amount of ammonium perchlorate needed for two solid rocket shuttle boosters.

Kerr-McGee argues that "NASA's active direction and control of the [ammonium perchlorate] procurement process make[s] this Thiokol procurement 'by' the [f]ederal [g]overnment."³ Specifically, Kerr-McGee alleges that NASA, along with the Department of Defense, has been actively involved in the ammonium perchlorate market; that NASA, in order to continue the existence of two domestic sources for ammonium perchlorate, guaranteed purchases from WEC to allow WEC to obtain private financing to build the necessary production facilities; and that NASA directed Thiokol to award a larger number of flight sets to WEC rather than Kerr-McGee, regardless of the offerors' proposed prices.⁴

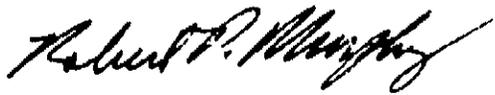
As stated above, we have assumed jurisdiction where the government's involvement in a subcontract award was so pervasive that it effectively took over the procurement, including the evaluation of proposals and source selection, such that the prime contractor was a mere conduit or instrumentality for the government. ToxCo, Inc., 68 Comp. Gen. 635 (1989), 89-2 CPD ¶ 170; Perkin-Elmer Corp., Metco Div., B-237076, Dec. 28, 1989, 89-2 CPD ¶ 604. For example, in St. Mary's Hosp. and University of Mich., where we concluded that prime contractor procurements were actually "by" the government, all meaningful aspects of the procurement, from the evaluation of proposals to the selection of the contractor, were controlled by government officials. On the other hand, we have not found subcontractor procurements to be "by" the government merely because the agency approved or disapproved a subcontractor selected by the prime contractor or because the agency effectively directed the subcontractor selection. See ToxCo, Inc., *supra*; Perkins-Elmer Corp., Metco Div., *supra*. Accepting the allegations made by Kerr-McGee, we do not find that NASA's involvement in this subcontractor procurement meets this jurisdictional standard.

³Kerr-McGee does not contend that this subcontract procurement is "for" the government by virtue of the contract between NASA and Thiokol.

⁴Until May 4, 1988, Pacific Engineering and Production Company of Nevada (PE) and Kerr-McGee were the only domestic producers of ammonium perchlorate. On May 4, PE's manufacturing facility was destroyed, eliminating approximately 50 percent of the domestic ammonium perchlorate production. WEC acquired PE's technology, trade secrets and proprietary information in order to enter this market, and NASA, to ensure the continued availability of two domestic sources, guaranteed purchases of ammonium perchlorate from WEC to allow WEC to acquire the necessary private financing to build production facilities.

There is no allegation that NASA officials did more than make known the agency's desire that both domestic producers of ammonium perchlorate be supported, and, to that end, that both firms receive subcontract awards. NASA officials were not involved in the evaluation of proposals, and did not sit on evaluation boards or formally act as the selection authority. Thiokol was responsible for negotiating and awarding subcontracts for ammonium perchlorate, and thus retained substantial responsibility for the conduct of the procurement. While Thiokol was clearly under some pressure to comply with NASA's desires, the firm, not NASA, was ultimately responsible for the subcontractor award selections.⁵ Even if NASA effectively directed the subcontractor selection, more than communication of agency desires is required to establish that Thiokol's involvement in the procurement was merely that of a conduit for an acquisition by the government, justifying bid protest jurisdiction. See ToxCo, Inc., supra.

The protest is dismissed.


for James F. Hinchman
General Counsel

⁵The Thiokol contract contained the standard NASA "Consent to Subcontracts" clause, requiring the consent of NASA to the award of the ammonium perchlorate subcontract. This approval provision does not establish that the purchase was "by" the agency for purposes of bid protest jurisdiction. Perkin-Elmer Corp., Metco Div., supra.