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**DECISION**



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

**FILE:** B-186672

**DATE:** December 15, 1976

**MATTER OF:** Control Data Corporation

**DIGEST:**

Protest against award of subcontract by prime contractor of National Science Foundation (NSF) is not for consideration by GAO under standards established in Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), because prime contractor was not acting as purchasing agent of NSF, award was not made "for" NSF, nor is fraud or bad faith in NSF's approval of subcontract award shown.

Control Data Corporation (CDC) has protested against the award of a subcontract to Cray Research, Inc. (Cray), for a fifth generation computer system under request for proposals (RFP) No. 1-76, issued by the University Corporation for Atmospheric Research (UCAR), a prime contractor of the National Science Foundation (NSF).

CDC contends that the subcontract should be ruled invalid because UCAR abused its discretion in relaxing mandatory RFP terms and conditions for the benefit of Cray without advising CDC. CDC alleges waiver of several technical specifications, "watering down" of the subcontract default provisions, relaxation of the liquidated damages clause, and a change in the method of acquisition from lease to purchase or lease. UCAR and NSF deny that CDC was treated unfairly and assert that the procedure followed by UCAR—discussions with the offerors, submission of best and final offers and final negotiations with the selected offeror, Cray—was proper and in fact parallels closely negotiated procurement procedures used at the Federal level by the National Aeronautics and Space Administration (NASA). See Sperry Rand Corporation (Univac Division), et al., 54 Comp. Gen. 408 (1974), 74-2 CPD 276. CDC disagrees, citing among other authorities Union Carbide Corporation, 55 Comp. Gen. 802 (1976), 76-1 CPD 134, where our Office found that NASA did not follow the basic "ground rules" laid down in a negotiated procurement.

The threshold question is whether our Office should exercise jurisdiction in this matter. In Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD 166, we stated (quoting from the third digest):

"As matter of policy, GAO generally will not consider protests against awards of subcontracts by prime contractors, even where prime contract is of cost-reimbursement type, whether or not subcontract has been awarded. However, GAO will consider subcontract protests where prime contractor is acting as Government's purchasing agent; Government's active or direct participation in subcontractor selection has net effect of causing or controlling potential subcontractors' rejection or selection, or of significantly limiting subcontractor sources; fraud or bad faith in Government's approval of subcontract award is shown; subcontract award is for Government; or agency requests advance decision. \* \* \*" (Emphasis supplied.)

The issues in this case involve the three criteria underscored above.

CDC first alleges that UCAR acted as the Government's agent in this procurement, citing an April 17, 1974, NSF letter authorizing UCAR to procure ADPE. However, both the letter itself and supporting documentation provided by NSF indicate that the purpose of furnishing the letter was to enable UCAR to purchase certain items under a General Services Administration (GSA) ADP Schedule contract. NSF points out that the present procurement does not involve a GSA ADP Schedule contract.

CDC additionally contends that a principal-agent relationship is established because the NSF-UCAR prime contract requires UCAR to provide in each consultant agreement, subcontract, or other commitment that it is assignable to the Government, and the Cray subcontract contains this language. However, we do not view this provision as binding the Government to make payment directly to Cray for supplies ordered for the account of the Government. See 21 Comp. Gen. 682 (1942). Any such inference is contradicted by the immediately preceding contractual language that "The contractor shall make all consultant agreements, subcontracts, or other commitments in its own name and shall not bind or purport to bind the Government or the Foundation." The Cray subcontract specifically states that it does not bind or purport to bind the Government or the Foundation.

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CDC next contends that the award to Cray was made by UCAR "for" NSF. We have traditionally considered protests of awards made "for" the Atomic Energy Commission (now the Energy Research and Development Administration (ERDA)) by prime management contractors which operated and managed ERDA facilities, and also protests against purchases of equipment for Government-owned contractor-operated (GOCO) plants by Government prime contractors. See the decisions cited in Optimum Systems, 54 Comp. Gen., supra, at 774, and also Midwest Tele Communications Corporation, B-184323, February 9, 1976, 76-1 CPD 81. CDC contends essentially that the present procurement is similar to that involved in Midwest Tele Communications, supra. In that case, a contractor-operator of a Government-owned (U.S. Army) ammunition plant--designated as an "independent contractor"--awarded a subcontract and title to the purchased equipment vested in the Government upon delivery. We held that the subcontract was made "for" the Government.

However, the facts in the present case as set forth in NSF's reports of July 22 and September 22, 1976, do not establish that the subcontract award was made for the Government as in Midwest Tele Communications, supra, the ERDA plant management cases or other GOCO cases. In particular, we note that the "plant" in this case is not a Government-owned plant producing nuclear materials or ammunition; rather, it is a research center operated by a consortium of universities (UCAR). As indicated in Article II of the prime contract, the center consists partly of Government-owned facilities and partly of contractor-owned facilities. Moreover, the Cray subcontract (Schedule A, Articles II.C and XXVI) indicates that UCAR may decide to install the computer system either in the Government's facilities or in its own. NSF also points out that it has no employees on-site at the center, nor does the computer system meet any specific NSF in-house needs.

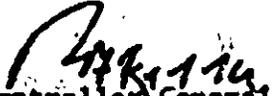
Further, the RFP does not indicate that UCAR intended to purchase a computer system "for" the Government, nor does the subcontract establish that title to the system will vest in the Government. The subcontract (Schedule A, Articles I, III, IV, X) indicates that after the system is installed and operating successfully, approximately 7 months after award, UCAR has the election to lease it with the option to purchase, or to purchase it outright. It appears that unless and until a purchase is made, the subcontractor retains title to the equipment. In view of the foregoing, we conclude that exercising jurisdiction on the basis of an award made "for" the Government is not appropriate in this case.

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CDC also states that our Office should not dismiss the possible application of the third Optimum Systems criterion, i.e., where fraud or bad faith in the Federal agency's approval of the subcontract award is shown. CDC believes that our Office should look to the substance of the procurement and the agency's approval in the context thereof. Even assuming, for the purposes of argument, that CDC's position on the substantive issues has merit, we do not think the criterion has been met since it relates to a showing that the Federal agency acted dishonestly rather than merely erroneously in approving the subcontract award.

In view of the foregoing, consideration of CDC's protest is inappropriate and it is dismissed.

Deputy

  
Comptroller General  
of the United States