



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: American Nuclear Corporation
File: B-228028
Date: November 23, 1987

DIGEST

Protest of a subcontract awarded by a government prime contractor is dismissed where the subcontract was not "by or for" the government.

DECISION

American Nuclear Corporation (ANC) protests the award by M-K Ferguson Company of a contract to Umetco Minerals Corporation under request for proposals (RFP) No. RIV-87-02. Because the contract was not awarded by a federal agency, we dismiss the protest.

Under Title I of the Uranium Mill Tailings Radiation Control Act of 1978, 42 U.S.C. § 7901 et seq. (1982), the Department of Energy (DOE) is required to take remedial action to stabilize and control mill tailings at a number of inactive uranium mills. Tailings are the residue from processed uranium ore and are sources of low-level radiation. In 1983, DOE awarded a contract to Morrison-Knudsen Company, Inc., the parent company of M-K Ferguson, for engineering, design, construction, and inspection services necessary to accomplish remedial action at several sites, including one near Riverton, Wyoming. Following a prequalification process, M-K Ferguson issued the RFP in June of 1987, soliciting fixed-price proposals for construction work involving the removal and disposal of the mill tailings at Riverton. Both Umetco and ANC submitted proposals. Umetco's price was \$21,900,144; ANC's price was \$24,272,055. M-K Ferguson awarded a contract to Umetco on July 31.

ANC protests the award on several grounds. First, ANC contends that the type of remedial action contemplated here--that is, relocating tailings from an inactive Title I site to an existing disposal site licensed under Title II of the Act to receive "active" material--is a confidential and proprietary concept that was the subject of an unsolicited proposal ANC submitted to DOE in 1986. The protester

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contends that DOE, which previously had considered requiring the Title I tailings to be stabilized in place, violated the Federal Acquisition Regulation (FAR), 48 C.F.R. subpart 15.5 (1986), by allowing an improper disclosure of this concept. In addition, ANC complains, Umetco had access to ANC's unsolicited proposal, including pricing information, in the state of Wyoming offices. ANC contends further that Umetco failed to comply with a prequalification licensing requirement and with solicitation requirements concerning the use of local and minority labor; that M-K Ferguson arbitrarily increased the estimated quantity of excavation material from 1,500,000 to 1,700,000 cubic yards, thereby forcing ANC to seek a modification to its reclamation plan previously approved by the Nuclear Regulatory Commission (NRC); and that DOE violated the FAR, 48 C.F.R. § 33.103(a), by failing to have the award to Umetco withheld pending resolution of an agency-level protest filed with DOE on July 28.

The agency's position is that we should not consider this protest because it involves the award of a subcontract by a government prime contractor and that the circumstances under which we consider such protests do not exist here. We agree.

Under the Competition of Contracting Act of 1984 (CICA), 31 U.S.C. § 3551(1) (Supp. III 1985), this Office has jurisdiction to decide protests involving contract solicitations and awards by federal agencies. We have interpreted this provision as authorizing us to decide protests of subcontract solicitations and awards only when the subcontract is "by or for the government." Bid Protest Regulations, 4 C.F.R. § 21.3(f)(10) (1987). Basically, a subcontract is considered to be by or for the government where the circumstances are such that the prime contractor essentially is acting as a middleman or conduit between the government and the subcontractor. Such circumstances may exist where the prime contractor operates and manages a government facility, Westinghouse Electric Corp., B-227091, Aug. 10, 1987, 87-2 C.P.D. ¶ 145, otherwise provides large-scale management services, Union Natural Gas Co., B-224607, Jan. 9, 1987, 87-1 C.P.D. ¶ 44, serves as an agency's construction manager, C-E Air Preheater Co., Inc., B-194119, Sept. 14, 1979, 79-2 C.P.D. ¶ 197, or functions primarily to handle the administrative procedures of subcontracting with vendors effectively selected by the agency. University of Michigan, et al., B-225756, et al., June 30, 1987, 66 Comp. Gen. ____, 87-1 C.P.D. ¶ 643. Except in these limited circumstances, a subcontract awarded by a government

contractor in the course of performing a prime contract generally is not considered to be by or for the government. See, e.g., Rohde & Schwartz-Polarad, Inc.--Reconsideration, B-219108.2, July 8, 1985, 85-2 C.P.D. ¶ 33.

ANC contends that M-K Ferguson's subcontract with Umetco for the remedial action construction work was by or for the government because the Riverton site is a DOE-owned facility managed by M-K Ferguson. In this regard, ANC stresses that M-K Ferguson exercises broad management authority under its prime contract. ANC further argues that the subcontract is by or for the government because final selection of the subcontractor was made by DOE and because the government, acting through not only DOE but also the NRC, the Department of Transportation, and the Environmental Protection Agency, has such pervasive control over the entire project that M-K Ferguson is a mere conduit between the government and Umetco.

The record in this case does not support ANC's contention that the subcontract with Umetco was by or for the government. Contrary to ANC's assertion, DOE does not own the Riverton site. Rather, reports DOE, the state of Wyoming owns most of the site, having acquired it from a private party in late July of 1987. While ANC contends that DOE is the owner of the site pursuant to the Uranium Mill Tailings Radiation Control Act of 1978, supra, we find nothing in that Act that so provides. Since DOE does not own the site, it cannot be said that M-K Ferguson is operating and managing a government facility. Ocean Enterprises, Ltd., 65 Comp. Gen. 585 (1986), 86-1 C.P.D. ¶ 479, aff'd on reconsideration, 65 Comp. Gen. 683 (1986), 86-2 C.P.D. ¶ 10. In any event, while M-K Ferguson does have management responsibilities, the agency estimates that this constitutes only 10 percent of the total effort required under the prime contract. Thus, the contract is not primarily for management services. Id.

We recognize that a number of government agencies have been involved in reviewing and approving various aspects of the remedial action plan for Riverton. It does not follow, however, that because there has been extensive government involvement M-K Ferguson is acting as a mere conduit between the government and Umetco. It is not unusual that a complex and potentially hazardous project such as this would fall within the purview of several different agencies, and we are not persuaded that such a circumstance creates a "by or for" situation. The same is true with respect to DOE's mere approval of the selection of Umetco as the construction subcontractor. See Rohde & Schwartz-Polarad, Inc.--Reconsideration, B-219108.2, supra.

DOE's contract with M-K Ferguson provides that the firm is responsible for performance of remedial action with respect to several mill sites, disposal sites, and vicinity properties. The contract does not require or prohibit the subcontracting of any of the work, but leaves that determination to the prime contractor. While M-K Ferguson chose to subcontract some of work required under the prime contract, there is no indication that in so doing it was acting as a mere conduit for the government. Because the subcontract with Umetco is not by or for the government, ANC's protest of that award is dismissed.^{1/}



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^{1/} While we conclude that ANC's protest is not within the jurisdiction of this Office, we find nothing in the record that would require disturbing the award to Umetco, the low offeror. In particular, we find no indication that DOE was responsible for any improper use or disclosure of information in ANC's unsolicited proposal. In this connection, the FAR, 48 C.F.R. § 15.508(a), prohibits government use of concepts contained in unsolicited proposals, but only if such concepts are not otherwise available to the government. We are not convinced that the concept of relocating and commingling uranium mill tailings was proprietary to ANC or was unavailable to the government except through ANC's unsolicited proposal.