



5/11/89
Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: ToxCo, Inc.

File: B-235562

Date: August 23, 1989

DIGEST

The General Accounting Office will not consider a bid protest of a subcontractor selection by an Environmental Protection Agency (EPA) emergency response clean-up contractor, even assuming EPA effectively directed the subcontractor selection, since the EPA involvement was not so pervasive that the contractor would be considered a mere conduit for an EPA acquisition.

DECISION

ToxCo, Inc., protests the award of a subcontract under request for proposals (RFP) No. RES-89-9783A by Riedel Environmental Services, Inc., to Qualtec, Inc., for cement fixation of lead contaminated soils at the Norco Battery Superfund site under Riedel's contract No. 68-01-7334 with the Environmental Protection Agency (EPA) for emergency response cleanup service.

We dismiss the protest, since this subcontractor protest is not for consideration under our Bid Protest Regulations, 4 C.F.R. § 21.3(m)(10) (1988).

Riedel has a combined fixed-price/cost-reimbursement contract with EPA, under which Riedel responds to delivery orders to conduct removals of oil and hazardous substances under the Superfund program. Riedel can either provide these services itself or by subcontract. However, these services are required to be in accordance with the directions of the federal On-Scene Coordinator (OSC) or other designated federal official. The subcontractor RFP in question here was issued pursuant to a delivery order issued by the EPA's Norco OSC, which required Riedel to issue an RFP for a cement fixation subcontractor and to provide certain other services related to the cleanup of on-site contaminated soils and battery debris at the Norco site. The RFP requested technical and price proposals.

046329/139420

Three offerors responded to Riedel's RFP, but only ToxCo and Qualtec were included in the competitive range. After several rounds of discussions, Riedel awarded Qualtec a technical score of 85 points on a 100 point scale and ToxCo 65 points. ToxCo's \$695,344 price was lower than Qualtec's \$1,054,978 price. After consulting with EPA, Riedel selected Qualtec for award as the highest technically ranked offeror.

ToxCo claims that its offer should have been selected since it submitted the best and lowest priced proposal and because Qualtec does not possess the necessary state licenses or local experience. ToxCo also claims that the selection was actually made by the EPA OSC, who overruled the Riedel evaluation that ToxCo was technically superior, which resulted in a noncompetitive award to Qualtec.

EPA asserts that the selection was reasonable and denies that the OSC controlled the selection. EPA also claims that ToxCo's protest should be dismissed since it is a subcontract protest over which our Office has no jurisdiction. ToxCo responds that its protest is appropriate for consideration under our Bid Protest Regulations, 4 C.F.R. Part 21 (1988), and advances a number of alternative theories to support this contention.

We agree with EPA that this subcontract protest is not for consideration under our Bid Protest Regulations. Under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. 3551(1) (Supp. IV 1986), our 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." 4 C.F.R. § 21.3(m)(10).^{1/} Basically, a subcontract is considered to be "by or for the government" where the prime contractor principally provides large-scale management services to the government and, as a result, generally has on-going purchasing responsibility. In effect, the prime contractor acts as a middleman or a conduit between the government and the subcontractor. American Nuclear Corp., B-228028, Nov. 23, 1987, 87-2 CPD ¶ 503. Such circumstances may exist where the prime contractor operates and manages a government facility,

^{1/} Since our jurisdiction over subcontract protests is defined by CICA, we cannot, as is suggested by ToxCo, assume jurisdiction over this protest on the basis of the significant dollar value and congressional interest in Superfund subcontracting activities in general.

Westinghouse Elec. Corp., B-227091, Aug. 10, 1987, 87-2 CPD ¶ 145, otherwise provides large-scale management services, Union Natural Gas Co., B-224607, Jan. 9, 1987, 87-1 CPD ¶ 44, serves as an agency's construction manager, C-E Air Preheater Co., Inc., B-194119, Sept. 14, 1979, 79-2 CPD ¶ 197, or functions primarily to handle the administrative procedures of subcontracting with vendors effectively selected by the agency. University of Mich., et al., 66 Comp. Gen. 538 (1987), 87-1 CPD ¶ 643. Except in these limited circumstances in which the prime contractor is basically acting as the government's agent, a subcontract awarded by a government contractor in the course of performing a prime contract generally is not considered "by or for the government." Barshfield Inc., B-233575, July 11, 1989, 89-2 CPD ¶ ____.

ToxCo alternatively characterizes Riedel's contract with EPA as one to provide large-scale management services or construction management services and, thus, subject to our bid protest jurisdiction. However, our review of the contract between EPA and Riedel indicates that Riedel is to provide much of the clean-up services with its own forces.^{2/} The management, including construction management, responsibilities included in Riedel's contract are incidental to Riedel's primary function to cleanup Superfund sites. See American Nuclear Corp., B-228028, supra; Edison Chouest Offshore, Inc., et al., B-230121.2 et al., May 19, 1988, 88-1 CPD ¶ 477. In any case, since this Superfund site is not on government property, it cannot be said that Riedel is operating and maintaining a government facility. Id. Therefore, we do not find that the nature of the contract between EPA and Riedel indicates that this subcontract procurement is "by or for the government."

ToxCo also argues that the degree of control exercised by EPA and the OSC in this case made Riedel a "mere conduit" for EPA to acquire these services on a sole-source basis. In this regard, as provided in the Riedel contract, the OSC issued a delivery order to accomplish the cleanup of the Norco Battery site, which specifically required Riedel to subcontract for the cement fixation portion of the project, because the OSC and Riedel recognized that Riedel was not sufficiently experienced or qualified to perform the cement fixation.

The OSC is stated to be an expert in the "new and innovative emerging technology" of cement fixation. In his affidavit,

^{2/} Indeed, fixed rates for various labor categories are specified in the contract.

the OSC states that he drafted technical documents used by Riedel in the RFP and identified potentially acceptable sources to be solicited by Riedel. The OSC also states that he reviewed the proposals, and discussed their merits, as well as the administrative aspects of the procurement, with Riedel personnel on a daily basis. He states that he had input into the evaluation of the proposals and conduct of discussions and when Riedel "indicated an inclination to select ToxCo" for award because of its "low price and technical acceptability," he expressed his opinion that ToxCo "was not technically acceptable" and he "recommended award of the subcontract to Qualtec." When Riedel then selected Qualtec for award, the OSC consented to the award pursuant to the subcontract clause in Riedel's contract.

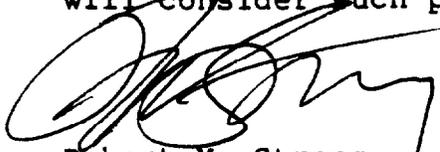
On the other hand, the EPA and OSC assert that Riedel--not EPA--was contractually responsible for selecting the subcontractor. In this regard, the OSC indicates that Riedel "independently" weighed the technical merits of the proposals and "independently assigned the proposals technical scores," and that he "was not involved in the scoring process."^{3/}

We do not find that EPA's involvement in this subcontractor procurement indicates this case is appropriate for consideration under our Bid Protest Regulations. Even assuming the OSC's conduct here amounted to effectively directing the subcontractor selection, this alone does not indicate the prime contractor is acting "by or for the government," that is, as the government's agent for this procurement, which the only basis upon which we will review the subcontract award. Barshfield Inc., B-235575, supra, at 2; Rohde & Schwarz-Polarad, Inc.--Recon., B-219108.2, July 8, 1985, 85-2 CPD ¶ 33. We will only assume jurisdiction where the government's involvement in the subcontractor selection is so pervasive that the contractor is a mere conduit for the government. See, for example, University of Mich., et al., 66 Comp. Gen. 538, supra, where the award selection was made by a government employee evaluation team. While the OSC obviously was actively involved in the procurement process and may even have effectively controlled the selection, we do not regard Riedel's involvement as that of a "mere conduit" for an acquisition by the government. Specifically, the record indicates that Riedel--not EPA--was

^{3/} ToxCo alleges that Riedel actually rated it technically superior to Qualtec and the OSC "directed" the evaluation be changed and award made to Qualtec. However, not only has ToxCo provided no evidence to support this speculation, the record contradicts ToxCo's allegation.

responsible for the solicitation of offers as well as the evaluation and award selection process, and that the OSC consented to this selection.4/

In view of the foregoing, we do not regard this subcontract protest as falling within the limited circumstances where we will consider such protest.



Robert M. Strong
Associate General Counsel

4/ While ToxCo complains that the evaluation criteria and specifications contained in the RFP were manipulated by the OSC with the view of effecting a sole-source award to Qualtec, this contention is an untimely protest against an apparent solicitation defect, not for consideration under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1), even assuming the OSC did exercise the control alleged by ToxCo over this RFP.