



**Comptroller General  
of the United States**

Washington, D.C. 20548

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## Decision

**Matter of:** Atlantic Marine, Inc.

**File:** B-236273

**Date:** November 21, 1989

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### DIGEST

Protest challenging propriety of a subcontract awarded by a government prime contractor is dismissed for lack of jurisdiction where the subcontract award was not made "by or for" the government; the prime contractor is not providing large-scale management services to the government or otherwise acting as a middleman or conduit for the government; and the government is not actively and directly involved in the procurement process or selection of the subcontractor.

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### DECISION

Atlantic Marine, Inc., protests the award of a subcontract to Houston Ship Repair, Inc., under a solicitation issued by Marine Transport Lines, Inc., a prime contractor performing services for the Military Sealift Command (MSC), Department of the Navy. The solicitation called for various alterations and repair work to Navy tanker vessels operated by Marine Transport for the agency. Atlantic Marine essentially argues that Marine Transport improperly evaluated offers by considering undisclosed evaluation factors on the alterations portion of the solicitation. MSC believes the evaluation was proper, but argues that we should dismiss the protest because it involves a subcontract award over which our Office does not take jurisdiction.

We dismiss the protest.

In March 1985, MSC awarded Military Transport the prime contract under which it was to provide operation and maintenance of nine sealift class tankers on a fixed-price, per diem basis, as well as related supplies and services on a cost-reimbursement basis. The prime contract further provided that additional maintenance, repair, alteration, and operating services could be added by issuance of change orders, with pricing to be negotiated. Under the terms of the prime contract, the contractor was to provide logistics

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support (such as furnish personnel, provisions, supplies, and spare parts), and operational and technical support, ashore and afloat (such as operate all shipboard machinery and systems and maintain and repair ships' equipment). The prime contract provided that the contractor would obtain MSC's written consent before placing any subcontract awarded on a fixed-price or cost-reimbursement basis exceeding either \$25,000 or 5 percent of the total estimated cost of the prime contract.

The procurement here reflects MSC's direction that Marine Transport solicit subcontract offers and submit them along with its own offer for vessel alterations on five ships, in accordance with the alterations provision of the prime contract. In its request for the work to Marine Transport, MSC provided the specifications for the alterations and requested that Marine Transport solicit quotes covering the work (e.g., install security alarm and lighting systems). The solicitation then issued by Marine Transport requested offerors to provide prices and total calendar days required for each of the alterations. Marine Transport received offers, conducted initial evaluations and discussions, and requested best and final offers. After Marine Transport conducted final evaluations and considered its own offer, it recommended that MSC approve award to Houston Ship Repair, the low evaluated offeror. MSC subsequently approved the subcontract award.

Our Office does not review subcontract awards by government prime contractors except where the award is "by or for" the government. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(10) (1989). This limitation on our review is derived from CICA, 31 U.S.C. § 3551 et seq. (Supp. IV 1986), which provides for our consideration of bid protests concerning solicitations issued by federal agencies. In the context of subcontractor selections, we interpret CICA to authorize our Office 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--by or for--the government.

For example, we will consider protests regarding subcontracts awarded by prime contractors operating and managing government-owned, contractor-operated plants; purchases of equipment for government-owned, contractor-operated plants; and procurements by construction management prime contractors. See Ocean Enters., Ltd., 65 Comp. Gen. 585 (1986), 86-1 CPD ¶ 479, aff'd, 65 Comp. Gen. 683 (1986), 86-2 CPD ¶ 10. In each of these situations, the prime contractor principally provides large-scale

management services to the government and, as a result, generally has an ongoing purchasing responsibility. In effect, the prime contractor acts as a middleman between the government and the subcontractor and, as a result, the subcontract is said to be awarded for the government. Id. On the other hand, we have specifically held that we will not consider a subcontract award protest when the subcontract is incidental to a support function under the prime contract and the subcontractor will be obligated contractually to the prime contractor, not to the agency. See Edison Chouest Offshore, Inc., et al., B-230121.2 et al., May 19, 1988, 88-1 CPD ¶ 477.

Atlantic Marine argues that Marine Transport functions as MSC's agent and that this subcontract procurement thus is for the government. The protester contends that the instant situation is analogous to our cases involving protests of subcontract awards made under Maritime Administration prime ship repair contracts, where we have taken jurisdiction based on our determination that the prime contractors were acting as general agents for the Maritime Administration. See Eastern Technical Enters., Inc., B-228035, Oct. 27, 1987, 87-2 CPD ¶ 400, and cases cited therein. Additionally, the protester argues that the agency's funding of the work further indicates that the procurement was for the government.

We find the circumstances here do not fall within the limited circumstances under which we review a subcontract protest. The prime contract lacks any indication that Marine Transport is providing large-scale management services or is merely acting as a conduit, or agent, between MSC and the subcontractor. The prime contract merely provides for operational support; it specifically provides that operational or management control is to be exercised by MSC through the provision of sailing orders and special reporting instructions, and further that the government will obtain clearances for the tankers to operate in foreign territorial waters and call at foreign ports. These provisions suggest an absence of large-scale, all-encompassing management activities such as those involved in the management and operation of a government-owned, contractor-operated facility. Additionally, because the procurement for alterations is for limited purposes, it does not entail ongoing purchasing responsibility. The fact that the subcontract will be awarded on a cost-reimbursement basis does not by itself, without indication of large-scale management services, establish that Marine Transport is conducting this procurement as a mere middleman for the

agency. Rhode & Schwarz-Polarad, Inc.--Recon., B-219108.2, July 8, 1985, 85-2 CPD ¶ 33; see also Optimum Sys., Inc., 54 Comp. Gen. 767, 774 (1975), 75-1 CPD ¶ 166.

Finally, it is significant that MSC's request for completion of the work was in accordance with the prime contract's specific provision that alterations could be added to the contract by the issuance of change orders. Thus, we view the subcontract for alterations as incidental to Marine Transport's support functions to maintain and repair the vessels. Regardless of whether Marine Transport made the alterations itself or subcontracted for them, the firm is responsible under its contract with MSC for providing the services, and the subcontractor will be obligated contractually only to Marine Transport, not to MSC. See Edison Chouest Offshore, Inc., et al., B-230121.2 et al., supra.

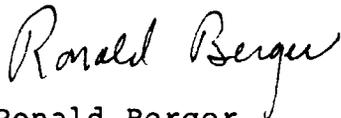
Our prior decisions (cited by Atlantic Marine) in which we have taken jurisdiction over subcontracts for vessel repair work under prime contracts with the Maritime Administration are distinguishable from the circumstances here. In those cases, the solicitations for the subcontracts were issued by contractors pursuant to service agreements with the Maritime Administration, under which the contractors were specifically designated as agents (and not independent contractors) responsible for managing and conducting the business of government-owned vessels. Here, in contrast, the prime contract does not similarly create such an agency relationship between MSC and Marine Transport.

The protester argues that since MSC considers its vessel operators agents for other purposes (e.g. tax and customs law) the operators should be viewed as agents in determining jurisdiction here. Whether the agency in fact treats Marine Transport as an agent in other contexts, however, is not determinative of our jurisdiction to review a subcontract protest. Rather, the specific relevant inquiry for purposes of determining our jurisdiction is whether the prime contractor has made a particular subcontract award in the capacity of an agent, or otherwise by or for the government, as previously explained. Again, here, Marine Transport was proceeding under the terms of a prime contract that made it responsible for alteration of the ships; it was not acting pursuant to a delegation of broad management authority from MSC so that it could be said to be acting as an agent. Similarly, we do not think MSC's limited participation in the procurement and selection process, i.e., providing the specifications and approval of the awardee, renders the intended subcontract one essentially awarded by the government. There is no indication that MSC will have taken an active part in the procurement or selection process here;

Marine Transport conducted the evaluation on its own terms, with no interference or involvement (other than final approval), by MSC, as provided for under the prime contract, which specifically provided that approval of any subcontract would not relieve the prime contractor of responsibility for performing under the prime contract. Although MSC did provide the specifications and had approval authority, neither of these factors constitutes the active and direct participation in the subcontractor selection process required before we will find that a subcontract has essentially been awarded by the government. Edison Chouest Offshore, Inc., et al., B-230121.2 et al., supra; see University of Michigan, et al., 66 Comp. Gen. 538 (1987), 87-1 CPD ¶ 643. It was Marine Transport's ultimate evaluation and rejection of Atlantic Marine's offer and selection of the awardee that forms the basis of the protest, not the government's involvement. See Barshfield, Inc., B-235575, July 11, 1989, 89-2 CPD ¶ 33.

We conclude that because Marine Transport is not acting as an agent or a mere conduit between the government and subcontractors, and MSC's involvement in the selection process was limited, the procurement was not by or for the government. Our review of the matter therefore is not warranted.

The protest is dismissed.



Ronald Berger  
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